DRN-4257697

The complaint

Mr W complains that Unum Ltd has turned down 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've set out a summary of what I think are the key events.

Mr W is insured under his employer's group income protection insurance policy. The policy provides cover for Mr W's own occupation should he become incapacitated due to sickness or accident.

In February 2020, Mr W was signed-off from work, suffering from severe fatigue and other symptoms which could indicate myalgic encephalomyelitis/ chronic fatigue syndrome (ME/CFS). His employer made an incapacity claim on the insurance policy.

Mr W's deferred period ended in August 2020. Unum assessed the available medical evidence and turned down Mr W's claim. It didn't think there was enough evidence to show that Mr W had met the contractual definition of incapacity throughout the deferred period and afterwards.

In January 2021, Mr W was formally diagnosed with ME/CFS and was ultimately referred to an ME/CFS service. He made a complaint to us about Unum's decision to turn down his claim.

Our investigator recommended that Mr W's complaint should be upheld. While he acknowledged Mr W hadn't received a formal diagnosis of ME/CFS before the end of the deferred period; he felt that the diagnosis letter in January 2021 contextualised Mr W's condition throughout the deferred period. So he was satisfied that Mr W had shown he met the definition of incapacity throughout the deferred period and beyond.

Unum accepted the investigator's recommendations. It agreed to pay Mr W incapacity benefit for a period he had been signed-off work. However, it noted that Mr W had returned to full-time hours a short time later and hadn't been signed-off again until February 2021. So it said it would consider a linked incapacity claim starting in from that point. This was accepted by Mr W and the complaint was closed.

As it had agreed, Unum considered a linked claim beginning in February 2021. Having considered the available medical evidence, it didn't think there was enough to show that Mr

W had met the policy definition of incapacity. That's because it didn't think the medical records indicated that Mr W had been incapacitated during that period and also because it didn't think his reported social and exercise activities matched his inability to work full-time hours.

Mr W was unhappy with Unum's decision on his linked claim and so he made a new

complaint to us.

The investigator recommended that Unum should accept and pay Mr W's linked claim on a proportionate basis, in line with the reduced hours he'd worked. He acknowledged that some of the medical evidence was thin. But he noted that Unum had accepted that Mr W had been incapacitated in line with the policy during the deferred period which had applied to the first claim. And he thought the medical evidence which was available did again contextualise Mr W's earlier reported symptoms. Unum had accepted it was likely that Mr W had suffered flare-ups of his condition during this period.

And the investigator also felt that had Unum accepted the earlier claim, Mr W and his employer would have continued to seek occupational health assessments to provide supporting evidence of his continued incapacity. But Unum had told Mr W's employer – after it declined the first claim - that its decision was final. This meant that Mr W had self-managed his symptoms and work to his capability. The investigator thought though that an occupational health specialist would've considered Mr W was unable to work full-time hours.

Finally, the investigator accepted that Mr W did undertake regular exercise and social activities. But he didn't think there was anything in the medical evidence that suggested his ability to carry out those activities meant that he was fit for full-time work.

I issued a provisional decision on 9 June 2023 which explained the reasons why I thought Unum should only accept and pay Mr W's claim for a short period between March and May 2021. I said:

'It's important I explain the parameters of this decision. I will only be considering whether it was fair for Unum to turn down Mr W's linked claim – his complaint about its decision to turn down the first claim has been closed and settled.

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 I think Unum treated Mr W fairly.

I've first considered the policy terms and conditions, as these form the basis of Mr W's employer's contract with Unum. Mr W has made a linked claim for incapacity. Unum has defined what it means by incapacity in the policy terms, which state:

'A member is incapacitated if they are unable to perform the material and substantial duties of their insured occupation because of illness or injury.'

This means that in order for Unum to pay Mr W benefit, it needs to be satisfied that Mr W was prevented from carrying out the duties of his insured role due to his illness. If Mr W was incapacitated from working full-time, Unum could consider paying Mr W proportionate benefit for any hours he did work.

In this case, it's common ground that Unum ultimately accepted that Mr W had been incapacitated in 2020 and it paid benefit for a short period of time. However, it's also agreed that Mr W appeared to return to work on a full-time basis following the end of that period, which meant that the claim ended. When Mr W became unwell again, in early 2021, Unum agreed to consider a 'linked' claim – which meant that there would be no need for Mr W to wait for the expiry of the deferred period before benefit may be due. But Unum was still entitled to be satisfied that Mr W was incapacitated, in line with the policy terms, from working full-time in his insured occupation. And based on the evidence Unum reviewed, it wasn't persuaded that Mr W had been incapacitated from working on a full-time basis. So

I've looked closely at all of the available evidence. I can see that on Mr W's claim form, he stated that from 1 February 2021, his condition had begun to decline again, which led to a severe relapse in March 2021. He'd been unable to work for two months. Since then, he said his condition had gradually improved and he'd been able to return to work on a part-time basis.

Next, I've looked closely at the medical evidence, which spans the relevant time. This includes Mr W's GP records and notes from his treating practitioners. I'm not a medical expert, so when making my decision, I must necessarily base my decision on the evidence provided by medical experts who are specialists in their field.

Following an entry in January 2021 (which has no details alongside the date), the next GP entry is dated 23 March 2021 and says that Mr W had a flare-up of ME, that he'd been in bed for four-five days, that he was 'not able to work, thinks overdid it at work, therapist suggests he needs to work reduced hours.' A fit note was issued following this appointment, stating that Mr W wasn't fit for work, which was backdated to 18 March 2021.

I can see that fit notes stating that Mr W was not fit for work were emailed to him in April and May 2021. On 14 May 2021, Mr W was issued with a fit note stating that he was fit to work on a phased basis.

Mr W saw a psychiatrist in May 2021. While the psychiatrist referred to Mr W's reported CFS symptoms, they did not diagnose him with a psychiatric condition and nor did they find that Mr W was unfit for work – either full or part-time. In June 2021, Mr W spoke with a member of the CFS service. Their notes say that Mr W 'said he had a very difficult time during February through to May with his ME symptoms and that he had to take time off work. He would be very grateful for a short letter addressed to him, that he could show his employer's insurers confirming that his ME had flared up.'

The notes do not suggest that the clinician Mr W spoke with recommended that he wasn't fit to work on a full or part-time basis.

In July 2021, Mr W spoke with the CFS service again. The notes reflect that Mr W was working 10 hours per week from home. The notes say that 'he was cycling most days.' Again, there appears to be no indication that the CFS service felt that Mr W should only work part-time – although they did refer to the fact that Mr W aimed to return to work 25 hours per week by the end of the year.

Subsequently, in August 2021, the CFS service noted that Mr W had attended two social occasions and had coped well from an energy point of view. The notes say that 'he denied experiencing post-exertional malaise.' They noted that Mr W had experienced a general levelling-out of symptoms and that he continued to try and increase cycling. The notes state that Mr W found his workplace canteen the most difficult part of his day, due to the noise and stimulus. Mr W was 'planning to try a longer cycle ride, considering around 40 miles per day, each day, over a weekend.'

In November 2021, the CFS service noted that Mr W described ups and downs in his symptoms. He 'continued to work 15 hours per week, but is fearful of increasing any further than this, as he feels this is currently a sustainable level.'

And in February 2022, Mr W was discharged from the CFS service, In their notes, the clinician stated that Mr W had a ski trip planned for the end of that month and had been walking over the weekend – for 14km and 5km respectively, without experiencing post exertional malaise. Mr W reported that he 'was feeling very much better.'

Unum's clinician's reviewed the available evidence, including the available medical evidence. I've set out one of the clinicians' findings as follows:

'Prior to the index Med3 issued on 23/3/21 backdated from 18/3/21, there is no clearly & contemporaneously documented medical basis for his absence. Whereas the reporting of a flare-up of his CFS in March 2021 was potentially credible, his clinical and functional situation in April and May 2021 was not entirely clear…There was further void in the medical evidence and functional situation until mid-August 2021. The reported level of function in August 2021 together with the contemporaneously documented evidence of a significant clinical and functional improvement in February 2022 are not in keeping with evidence of a sustained and functional loss that would have resulted into ongoing limited engagement in relation to a sedentary function.'

I've weighed-up the available evidence very carefully. I appreciate that patients suffering from ME/CFS can and do suffer from flare-ups. I appreciate too that Unum did accept that Mr W had previously been incapacitated by his illness.

However, based on the totality of the evidence before me, I don't think it was unfair for Unum to conclude that there simply isn't enough contemporaneous medical evidence to demonstrate that Mr W was incapacitated from carrying out his role on a full-time basis for the duration of his claim. In my view though, there is sufficient medical evidence to indicate that Mr W had suffered a serious flare-up of his condition between 18 March and 14 May 2021 (the date a medical certificate was issued stating that Mr W may be fit for work). So I don't think it was fair for Unum to turn down Mr W's claim for this period.

But the medical evidence does have large gaps. I don't think the short period Mr W was signed-off between March and May 2021 is enough to show that Mr W was suffering from incapacity in line with the policy terms for a sustained period. There's no medical evidence to indicate why Mr W wasn't working full-time in February 2021 and Mr W sought medical advice quite late in the month of March 2021. I appreciate that Mr W was under the care of the CFS service – but its notes of sessions with Mr W don't indicate that its clinicians recommended that Mr W should work part-time hours only. This appears to have been self-management on Mr W's part. And by Mr W's account, he had significantly improved by the time he was discharged from the CFS service.

So on that basis, while I think Unum must pay Mr W's claim between 18 March and 14 May 2021, together with interest, I currently find it was reasonably entitled to conclude that Mr W hasn't shown he was incapacitated for the full duration of his claim. So overall, despite my natural sympathy with Mr W's position, I currently only plan to direct Unum to pay Mr W incapacity benefit for a short period of time.'

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

Unum accepted my provisional findings.

Mr W confirmed he'd received my provisional decision, but he didn't provide any additional evidence.

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, as neither party has provided me with any substantive additional evidence

or comments, I see no reason to change my provisional findings.

So my final decision is the same as my provisional decision and for the same reasons.

My final decision

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

I direct Unum Ltd to pay Mr W's incapacity claim, in line with the policy terms and conditions, for the period 18 March until 14 May 2021 only. It must also add interest to the settlement at an annual rate of 8% simple from the date each benefit payment was due until the date of settlement.

If Unum considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr W how much it's taken off. It should also give Mr W a tax deduction certificate 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 W to accept or reject my decision before 18 August 2023.

Lisa Barham
Ombudsman