

The complaint

Mr L complains that Unum Ltd has terminated benefit for 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 simply set out a summary of what I think are the main events.

Mr L was insured under his employer's group income protection insurance policy. In 2015, Mr L was signed-off work, suffering from eosinophilic oesophagitis (EO), which caused him to vomit 15 to 20 times per day. Mr L's employer made an incapacity claim on his behalf, which Unum accepted in April 2015.

Unum undertook regular medical reviews of the claim. While Mr L briefly returned to work, he became incapacitated again and so Unum reinstated the claim in 2017. It noted that Mr L was under the care of different medical specialists. While Mr L had a diagnosis of EO, medical specialists concluded that Mr L's intractable vomiting was likely psychogenic on a background of anxiety. Mr L's employment ended and so Unum switched to paying the claim on a 'pay direct' basis.

In 2020, Unum terminated Mr L's claim. It didn't think there was enough evidence to show that he continued to meet the policy definition of incapacity. However, following a claim review by Unum's complaints team, Mr L's claim was reinstated. That's because the complaint handler didn't think there was enough evidence to show that Mr L's symptoms had improved.

Unum continued to undertake regular reviews of the claim. It noted that Mr L had also begun to suffer episodes of fainting and carpal tunnel syndrome. These symptoms had been investigated by neurology and no sinister pathology had been found. Mr L's GP had continued to issue Mr L with fit notes which showed that he remained unfit to work due to intractable vomiting. So in October 2022, Unum therefore decided to ask Mr L to complete a two-week activities of daily living diary and appointed investigators to carry out a surveillance on him. The surveillance took place in early November 2022.

Mr L told Unum that he hadn't been able to complete the diary because he'd been too ill. But Unum didn't think this was borne out by the surveillance evidence, which showed Mr L had, amongst other things, been observed walking his dog and going to the shops during that period. And Mr L hadn't been seen to vomit during the period of surveillance. On that basis, Unum wasn't satisfied that Mr L had experienced the symptoms he'd reported and it concluded that he no longer met the policy definition of incapacity. So it terminated Mr L's claim.

Mr L was unhappy with Unum's decision and he asked us to look into his complaint.

Our investigator didn't think it had been fair for Unum to terminate Mr L's claim. He felt Mr L had been clear throughout the claim that he had good days and bad days. And he didn't

think the surveillance evidence was inconsistent with what Mr L had told Unum he could do. While he accepted that Mr L had potentially exaggerated his symptoms at the point he'd been asked to complete the diary, he was persuaded that Mr L had been consistent in his symptom reporting since 2015. And he'd seen a number of specialists. He noted too that Unum hadn't sought a medical opinion on the surveillance evidence and what it meant for Mr L's claim. Nor did he think that a lack of a diagnosis of Mr L's fainting or hand symptoms meant he wasn't experiencing them. Overall, he didn't think that Unum had provided enough medical evidence to show that Mr L no longer met the policy definition of incapacity. So he recommended that Unum should reinstate and pay the claim, together with interest. And he considered that Unum should also pay Mr L £350 compensation.

Unum disagreed. It stated that prior to the decision to cease the claim, Mr L had been seen by a gastroenterologist who'd found no problems with dysphagia or active EO. It said that Mr L had also been seen by a cardiologist, a neurologist and an immunologist, who'd also reported no concerns. It maintained that during the period of surveillance, Mr L had been observed being active, during a period he'd reported that he'd been vomiting 10 to 15 times per day. So Unum still felt that this called into question the validity of Mr L's self-reported symptoms, taken together with the clinical medical evidence. Overall, it felt that given the contrast between Mr L's reported symptoms and the clinical and surveillance evidence, it was fair for it to have concluded that he no longer met the definition of incapacity.

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 it was fair for Unum to terminate Mr L's claim and I'll explain why.

First, I'd like to reassure both parties that while I've summarised the background to this complaint and the parties' detailed submissions, I've carefully considered all that's been said and sent to us. This is a complex claim, of many years' duration and there is a great deal of medical and other evidence on file. So this decision has necessarily focused on what I think are the key issues and the key medical evidence.

The relevant regulator's rules say that insurers must handle claims promptly and fairly. So I've carefully considered, amongst other things, the policy terms and conditions and the available evidence, to decide whether I think Unum has handled Mr L's claim fairly.

It's a general principle of insurance that it's for a policyholder to provide enough evidence to show that they have a valid claim on their policy. This means that at the outset, it was Mr L's responsibility to provide Unum with enough medical and other evidence to demonstrate that he met the policy definition of incapacity. It's common ground that Unum was satisfied that Mr L was incapacitated in line with the policy terms and it accepted his claim in 2015. Once an insurer accepts an income protection insurance claim, the burden of proof switches. I generally take the view that in order for it to terminate Mr L's claim fairly and reasonably, Unum needs to provide enough evidence to show that Mr L no longer meets the definition of incapacity.

I've first considered the policy terms and conditions, as these form the basis of the income protection contract. Unum concluded that Mr L no longer met the policy definition of incapacity and so I've looked closely at the definition of incapacity. This says:

'If...Unum is satisfied that the member is unable, by reason of his illness or injury, to perform the material and substantial duties of his insured occupation; and

The member is not following any occupation...

then the member is incapacitated.'

I've gone on then to consider whether I think Unum has provided enough evidence to show, on balance, that Mr L no longer meets the policy definition of incapacity.

As I've set out above, there is a great deal of medical evidence available. During the course of his illness, Mr L has seen a number of medical professionals – including gastroenterologists; psychiatry; cardiology; immunology and neurology, along with regular reviews by his GP practice. I can see that Mr L has undergone a number of diagnostic tests to understand the causes, not just of his symptoms of intractable vomiting, but also of fainting and carpal tunnel syndrome. It's common ground that Mr L was diagnosed with EO, which has at points during the claim, been active, even if it wasn't active at the point of termination. He was also previously diagnosed with dysphagia – again, even if this condition wasn't active at the time benefit was stopped.

But from 2017 onwards, Mr L's specialists had specifically stated that they hadn't found a cause for his symptoms of vomiting. Specific reference was made to the possibility that the vomiting was separate to Mr L's diagnosis of EO. No explanation was found for the cause of Mr L's vomiting - no psychical cause appears to have been discovered. And the medical specialists seemed broadly in agreement that Mr L's intractable vomiting was psychogenic in nature – potentially on background of anxiety and depression. The GP notes for the duration of the claim show that Mr L's vomiting remained unchanged. So it seems to me that for some years, Unum was prepared to accept that Mr L's vomiting symptoms did meet the definition of incapacity, even if no underlying pathology had been found. It also seems to me that Unum has been largely prepared to accept Mr L's self-reported symptoms. And I note too that in 2020, Unum's Chief Medical Officer suggested that Unum should write to one of Mr L's treating specialists to understand more about what barriers to work his symptoms posed. It doesn't appear that this happened.

I do accept Unum's point that none of the medical specialists have concluded that a sinister pathology was causing Mr L's symptoms and I've thought about this carefully. But as I've said, it seems that medical specialists had concluded some years earlier that Mr L's vomiting was likely psychogenic with no physical explanation. Despite that, Mr L has been referred to a number of specialists over the years to try and obtain a diagnosis for his overall symptoms, or effective treatment. This would indicate that Mr L did - at the very least - experience symptoms which warranted investigation. And I've seen no persuasive medical evidence which would suggest that Mr L was no longer suffering from the intractable, unexplained vomiting symptoms he'd suffered from over many years, even if no sinister pathology was found. Indeed, in July 2022, Mr L's GP's records showed that his symptoms remained unchanged and fit notes stating that he remained unfit for work have continued to be issued. So in my view, the available medical evidence indicates that Mr L continues to suffer from vomiting up to several times per day.

Based on the lack of clinical evidence to show a cause for Mr L's symptoms, Unum decided to ask Mr L to complete a diary showing his daily activities and arranged for a period of surveillance. I don't think it was unreasonable for Unum to request this evidence as part of its overall claim review. It's common ground that Mr L didn't complete the diary and that Unum didn't think the surveillance evidence was consistent with his reported symptoms. I've thought about this very carefully.

The surveillance footage noted that Mr L left the house with his child and with his dog. He was recorded shopping and driving. There was no evidence of Mr L vomiting while he was out of the house. Given Mr L told Unum he'd been too ill to write in the activity diary during this time, I can entirely understand why it had concerns about whether his reported symptoms were consistent with his daily activities.

With that said, on balance, I don't think the nature of the surveillance footage is enough to demonstrate that Mr L no longer meets the policy definition of incapacity. The extensive claim evidence shows that throughout the life of the claim, Mr L has consistently reported that he has good and bad days. There is reference to Mr L being able to walk his dog and being able to go for short walks. I don't find that the surveillance evidence indicates inconsistencies with what Mr L has long told his treating doctors and Unum what he was capable of doing. And as the investigator said, there are long periods of time during the surveillance when Mr L remained in the house – where his activities necessarily couldn't be recorded. I don't think the surveillance evidence is enough to demonstrate that Mr L wasn't suffering from repeated vomiting during the periods he was inside his home – or during the night, nor that some activity left him fatigued and needing to rest.

It was also open to Unum to ask a medical specialist or an independent medical examiner to comment on the surveillance evidence and to seek an occupational health opinion on whether the footage showed Mr L was no longer incapacitated in line with the policy terms. Alternatively, it was open to Unum to appoint a specialist to examine Mr L and provide an occupational health specialist opinion on whether his symptoms meant he remained incapacitated by his illness. I've seen no compelling evidence which shows it chose to do so. As I've mentioned, the available medical evidence we do have indicates that Mr L's vomiting symptoms are broadly the same. And so I don't think Unum's shown, on the balance of probabilities, that Mr L's symptoms have changed to such a degree that he is now able to carry out the material and substantial duties of his role.

Overall then, based on the available evidence at the time Unum decided to terminate benefit, I'm not persuaded it's shown that Mr L no longer medically met the policy definition of incapacity nor that his symptom-reporting was invalid. So I agree with our investigator that it wasn't fair or reasonable for Unum to terminate the claim. This means that I'm satisfied that Unum should reinstate the claim and pay backdated benefit, together with interest. However, that doesn't mean I find that Unum is bound to pay the claim indefinitely. In line with the policy terms, it's entitled to regularly review the claim and to seek further medical evidence and clinical opinion to assess whether Mr L remains incapacitated in line with the policy terms.

I do think that Unum's decision to terminate benefit was unreasonable based on the evidence it had and it's clear this has caused Mr L unnecessary trouble and upset. He's told us he was caused anxiety and distress in trying to meet his bills and that he's needed to borrow money. So I agree that compensation of £350 is a reasonable and proportionate award to reflect the impact of Unum's decision on him.

My final decision

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

I direct Unum Ltd to reinstate Mr L's claim from the date it was terminated and to pay backdated benefit. It must add interest at an annual rate of 8% simple to each benefit payment from the date each payment was due until the date of settlement.*

I also direct Unum Ltd to pay Mr L £350 compensation.

*If Unum considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell how much Mr L it's taken off. It should also give Mr L 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 L to accept or reject my decision before 23 November 2023.

Lisa Barham
Ombudsman