DRN-4386617

The complaint

Mrs S complains that Legal and General Assurance Society Limited (L&G) has turned down an incapacity claim she made on a personal income protection insurance policy. She also complains that L&G has cancelled the policy from its inception.

Mrs S is represented by Mr S.

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 key events.

In October 2019, Mrs S applied for a personal income protection insurance policy through a broker. L&G assessed Mrs S' application and agreed to offer her cover.

Unfortunately, in May 2022, Mrs S was diagnosed with a brain tumour and therefore, she made an incapacity claim on the policy.

L&G investigated Mrs S' claim and it obtained her medical records. L&G learned that Mrs S had been found to have an abnormality in her brain in 1997, which had been under surveillance by a multi-disciplinary team for a number of years. So L&G considered that Mrs S hadn't answered questions about her health correctly at the time of application. It said that if Mrs S had disclosed her condition, it would never have offered her any cover at all. L&G concluded that Mrs S had deliberately or recklessly misrepresented her health to it. And so, it turned down Mrs S' claim and cancelled her policy from its inception.

Mrs S was unhappy with L&G's decision and so Mr S asked us to look into this complaint. She felt she'd answered L&G's questions correctly. She acknowledged that she'd been under review for a number of years. But in 2016, Mrs S had been told that the abnormality was likely to be an area of dysplasia, rather than a neoplasia. And she'd been discharged from the multi-disciplinary team's care. She said she didn't think an area of dysplasia fell with the scope of the questions she'd been asked during the policy application.

Our investigator thought it had been fair for L&G to turn down Mrs S' claim and cancel her policy. She considered that L&G had asked Mrs S clear questions about her health, which she didn't think Mrs S had taken reasonable care to answer. She was satisfied that if Mrs S had told L&G about the dysplasia, it wouldn't have offered her an income protection insurance policy.

However, the investigator didn't think it was fair for L&G to conclude that Mrs S had deliberately or recklessly misrepresented her health. Instead, she thought Mrs S had made a careless misrepresentation. And so she recommended that L&G should refund the premiums Mrs S had paid for the policy together with interest.

L&G said that while it still felt Mrs S had made a deliberate or reckless misrepresentation, it would refund her premiums, together with interest.

Mrs S didn't accept the investigator's conclusions and I've summarised Mr S' response. Mr S said that for more than 17 years, Mrs S had been monitored by MRI scans, which showed that the abnormality was stable. He said that the abnormality had been a patch of cells – without a measurable dimension. So he felt that there'd clearly been no cyst, growth or tumour. He maintained that Mrs S had answered L&G's questions accurately and she'd been told that the abnormality in her brain had no clinical significance. Mr S stated that there'd been no measurable mass in Mrs S' brain in 2016, when she'd been discharged from care and she'd been entitled to believe that the abnormality was a normal variant. He felt L&G was trying to penalise Mrs S with the benefit of hindsight.

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, whilst I'm very sorry to disappoint Mrs S, I don't think it was unfair for L&G to turn down her claim and cancel her income protection insurance policy and I'll explain why.

First, I'd like to reassure Mrs S that while I've summarised the background to her complaint and Mr S' submissions to us, I've carefully considered all that's been said and sent. I was very sorry to hear about Mrs S' diagnosis and I appreciate that this has been a very worrying and upsetting time for Mrs S and her family.

I must also make it clear that this decision will only consider L&G's handling of Mrs S' income protection insurance claim and policy cancellation. A complaint about Mrs S' Life and Critical Illness policy will be considered separately by this service.

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 law; the terms of the insurance contract; and the available medical evidence, to decide whether I think L&G handled Mrs S' claim fairly.

The relevant law in this case is The Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA). CIDRA requires consumers to take reasonable care not to make a misrepresentation when taking out a consumer insurance contract. The standard of care is that of a reasonable consumer.

And if a consumer fails to do this, the insurer has certain remedies provided the misrepresentation is - what CIDRA describes as - a qualifying misrepresentation. For it to be a qualifying misrepresentation, the insurer has to show it would have offered the policy on different terms - or not at all - if the consumer hadn't made the misrepresentation.

CIDRA sets out a number of considerations for deciding whether the consumer failed to take reasonable care. And the remedy available to the insurer under CIDRA depends on whether the qualifying misrepresentation was deliberate or reckless, or careless.

When Mrs S applied for the policy, she was asked information about herself and a number of questions about her health. L&G used this information to decide whether or not to insure Mrs S and if so, on what terms. L&G says that Mrs S didn't correctly answer the questions she was asked on the application form. This means the principles set out in CIDRA are relevant. So I think it's fair and reasonable to apply these principles to the circumstances of Mrs S' claim.

L&G thinks Mrs S failed to take reasonable care not to make a misrepresentation when she applied for the policy. So I've considered whether I think this was a fair conclusion for L&G to reach.

First, when considering whether a consumer has taken reasonable care, I need to consider how clear and specific the questions asked by the insurer were. Therefore, I've looked carefully at the application form Mrs S completed, which sets out the questions she was asked and the answers she gave.

The application form includes a section called 'Health – Ever'. This sets out the following:

'*When answering the following questions, if you're unsure whether to tell us about a medical condition, please tell us anyway.*

Have you ever:

- *Had a cyst, growth or tumour in either your brain or spine?'*

Mrs S answered 'no'.

The next section of the application form sets out 'Health – Last 5 years' and asks:

'*Apart from anything you've already told us about in this application, during the last five years have you seen a doctor, nurse or other health professional for:*

- *A growth, lump, polyp or tumour of any kind?'*

Mrs S answered 'no'.

In my view, these questions were asked in a clear and understandable way and included clear timeframes. So I think these questions ought to have prompted a reasonable consumer to understand what information L&G wanted to know. L&G says that Mrs S ought to have disclosed the brain abnormality during the application process. So I've closely considered Mrs S' medical records and her testimony to decide whether I think she took reasonable care to answer L&G's questions.

Mrs S accepts that in 1997, an MRI scan found a left parahippocampal lesion in Mrs S' brain. Mrs S was placed under regular surveillance and observation under a multi-disciplinary team. In 2003, Mrs S' GP wrote to neurology. Their letter included the following:

'(A scan in the 1990s) *showed a lesion within her brain which caused quite a lot of concern however finally it was reported that she had a low grade glioma in the left hippocampal and parahippocampal gyrus.'*

In 2005, a consultant neurosurgeon stated:

'(Mrs S) has what we think is a low grade tumour, probably a glial series tumour.'

So it appears that as early as 1997, Mrs S had been diagnosed with a glioma – a form of tumour which originates from the glial cells. Mrs S remained under surveillance and the abnormality remained stable for many years. As such then, I'm satisfied that the answer to L&G's question asking whether Mrs S had *ever* been diagnosed with growth or tumour in her brain or spine should have been yes.

It's clear that Mrs S feels strongly that she did answer L&G's questions accurately, given the findings of further scans in 2015 and 2016, in particular. I've thought about this evidence

very carefully.

In March 2015, the consultant stated: *'(Mrs S') parahippocampal abnormality has been static now for 15 years. I will review images with the neuroradiologist to see whether they are sufficiently happy that this is cortical dysplasia rather than low grade glioma.'*

And in August 2016, Mrs S' multi-disciplinary team said:

'*The most recent MRI scan shows very stable appearances…We have reviewed these and we feel that this is probably an area of dysplasia rather than neoplasia, although we can never be 100% certain that this is what is going to be the most likely diagnosis…I do not think she needs any further MRI scans for surveillance of this lesion and she should just consider this a normal variant.'*

Mrs S says she didn't think she needed to tell L&G about her diagnosis, because she didn't think dysplasia was a growth, cyst or a tumour. And she says she'd understood that the area of dysplasia was a normal variant. I can entirely understand why, following Mrs S' discharge from neurology, she'd believed that the dysplasia wasn't a significant clinical concern.

However, I asked L&G's Chief Medical Officer (CMO) to provide a definition of dysplasia and explain how it could be considered as a growth, tumour or cyst. The CMO provided the following definition:

'Dysplasia is any of various types of abnormal growth or development of cells (microscopic scale) or organs (macroscopic scale), and the abnormal histology or anatomical structure(s) resulting from such growth.'

The CMO also said: '*In other words, dysplasia represents an abnormal growth or development of cells. The term signifies a departure from the norm and can indicate a predisposition towards neoplasia (uncontrolled cell growth).'*

Based on the CMO's evidence and the medical definition of dysplasia, it seems that it does refer to an abnormal growth of cells. Mrs S did know that she had an area of dysplasia in her brain at the time of policy application – a growth of cells. And I've borne in mind too that for around 15 years, Mrs S had been given a likely diagnosis of a low grade glioma - a tumour. So it still seems to me that even if a diagnosis of glioma had been replaced with a diagnosis of dysplasia, Mrs S is most likely to have been aware of a growth of abnormal cells in her brain. And it remains the case that she had been given a diagnosis of a glioma previously.

As such, I think, on balance, Mrs S ought reasonably to have been prompted to answer 'yes' to L&G's question, as she had been diagnosed with a form of tumour in the late 1990s and had been under the care of a specialist team for many years. And the 2016 letter didn't state that Mrs S had a definite diagnosis of dysplasia – the consultant made it clear that this was a likely diagnosis, but that the diagnosis couldn't be certain.

I must make it clear that I don't think Mrs S deliberately or recklessly sought to mislead L&G about her health. But I don't think she took enough care to ensure she answered its questions correctly. And I'm mindful that the application form did indicate that if a consumer was unsure whether or not they should disclose something, they should tell L&G about it. Given Mrs S' long history of neurological issues, I think she ought to have been aware that this was something L&G would want to know about.

In my view then, the available evidence suggests that Mrs S did make a qualifying misrepresentation under CIDRA. So I think L&G is reasonably entitled to apply the relevant remedy available to it under the Act. While L&G originally concluded that Mrs S had made a

deliberate or reckless misrepresentation, it accepted our investigator's view that Mrs S had made a careless misrepresentation. On the evidence before me, I agree that the misrepresentation was careless.

CIDRA says, in cases of careless misrepresentation, that an insurer is entitled to rewrite the policy as if it had all of the information it wanted to know at the outset. If it wouldn't have offered the policy, it may cancel the contract from the outset and refund the premium. In this case, L&G has provided confidential underwriting information which shows that if it had been aware of Mrs S' dysplasia, it would never have offered her an income protection insurance policy. So I don't think it was unfair for L&G to have turned down the claim and cancelled Mrs S' policy from the start. It's now agreed to refund all of the premiums she's paid since the policy began, together with interest. I find this to be a fair and reasonable outcome to Mrs S' complaint in all the circumstances.

For completeness, L&G also concluded that Mrs S hadn't disclosed existing anxiety either when she applied for the policy. However, as I've found that it wouldn't have offered her a policy regardless of any misrepresentation of this particular condition, I don't think I need to consider this point any further.

Overall, despite my natural sympathy with Mrs S' position, I think L&G has now agreed to settle her complaint in a fair and reasonable way.

My final decision

For the reasons I've given above, my final decision is that L&G has now offered to settle Mrs S' complaint in a fair and reasonable way. I'm not directing L&G to reinstate Mrs S' policy or pay her claim.

I direct Legal and General Assurance Society Limited to refund all of the premiums Mrs S paid for the income protection insurance policy from inception. It must add interest at an annual rate of 8% simple to the settlement, from the date each premium was paid until the date of settlement.

If L&G considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs S how much it's taken off. It should also give Mrs S a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 15 December 2023.

Lisa Barham
Ombudsman