DRN-4423853

The complaint

Mr F complains that Legal & General Assurance Society Limited (L&G) 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 F is insured under his employer's group income protection insurance policy. In June 2019, Mr F was signed-off from work with an initial diagnosis of Meniere's Disease. His employer made an incapacity claim on the policy, which L&G accepted. It began to pay Mr F monthly benefit from December 2019.

L&G kept the claim under periodic review and based on the available evidence, it remained in-payment. Mr F was subsequently diagnosed with myalgic encephalomyelitis/chronic fatigue syndrome (ME/CFS).

In 2022, L&G referred Mr F to a third-party provider for a Chronic Pain Abilities Determination (CPAD) assessment. This took place over two days in May 2022 and Mr F underwent a series of cognitive and physical tests. Ultimately, the CPAD assessor concluded that the functional abilities Mr F had demonstrated during the assessment were the minimum he could safely perform over a normal working day. They felt Mr F had exaggerated some symptoms. The CPAD assessor was satisfied that Mr F was fit to return to his usual occupation on a full-time basis.

L&G's vocational clinical specialist (VCS) team reviewed the CPAD report. VCS designed an eight-week phased return to full-time work plan for Mr F's employer. L&G paid proportionate benefit for the duration of the eight-week plan but terminated Mr F's benefit from 21 August 2022 onwards.

Mr F was unhappy with L&G's decision and he appealed. He strongly disagreed with the conclusions reached by the CPAD assessor and felt they'd made clear errors. He also provided L&G with a copy of an occupational health (OH) report, dated July 2022, which stated that Mr F would be fit to return to work on a very gradual basis from September 2022 onwards. And he provided evidence that he'd been diagnosed with viruses and infections, which could have caused ME/CFS.

But L&G maintained its stance and it issued its final response to Mr F's complaint in November 2022. So Mr F asked us to look into his complaint. He told us that he had returned to work on a phased basis, but in a different role.

Our investigator thought Mr F's complaint should be upheld. She considered the CPAD report and the OH report of July 2022. She noted that the CPAD assessor had recommended that Mr F should be referred for a neurological assessment to determine his cognitive abilities, but this hadn't happened. She considered Mr F had experienced ongoing symptoms and was unable to return to his own occupation, which had been demonstrated by

the fact that he now worked in a different role. So she didn't think it had been fair for L&G to terminate the claim and she recommended that L&G should pay Mr F backdated benefit, together with interest. She also felt that L&G should pay Mr F £300 compensation.

L&G disagreed and I've summarised its response. It felt that medical professionals had certified that Mr F was fit to work and that the CPAD had found that Mr F had no cognitive impairment. It noted the investigator's comments that Mr F had changed roles, but it said it had no objective medical evidence to support this. It maintained that the decision it had made at the time it issued its final response to Mr F's complaint was fair and reasonable. But it said it could explore any new evidence separately.

I issued a provisional decision on 12 October 2023, which explained the reasons why I didn't think it had been fair for L&G to terminate Mr F's claim in August 2022. I said:

'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. Within this decision though, I haven't commented on each point that's been made and nor do our rules require me to. Instead, I've focused on what I think are the key issues.

It's also important that I make the parameters of this decision clear. I will only be considering the evidence which was available to L&G in November 2022 – at the point it issued its final response to Mr F's complaint, endorsing its decision to terminate benefit in August 2022. If Mr F now has new, objective medical evidence and evidence from his employer which shows that he has changed roles and that such a change was medically supported, he'll need to send this evidence to L&G for its review. That's because it wouldn't be appropriate for me to make any finding on evidence or comments which L&G hasn't had an opportunity to consider or assess. If Mr F is unhappy with any new, further assessment of his claim, he may be able to bring a new complaint to us about that issue alone.

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 L&G has handled Mr F'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 F's responsibility to provide L&G with enough medical and other evidence to demonstrate that he met the policy definition of incapacity. It's common ground that L&G was satisfied that Mr F was incapacitated in line with the policy terms and it accepted his claim in 2019. 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 F's claim fairly and reasonably, L&G needs to provide enough evidence to show that Mr F no longer meets the definition of incapacity.

I've first considered the policy terms and conditions, as these form the basis of Mr F's employer's contract with L&G. L&G concluded that Mr F no longer met the policy definition of incapacity and so I've looked closely at the definition of incapacity. This is defined as:

'Own occupation:

Means the insured member is incapacitated by illness or injury that prevents him from performing the essential duties of his occupation immediately before the start of the deferred period. The insured member's capacity to perform the essential duties of his own occupation will be determined whether or not that occupation remains available to him.'

I've gone on to consider then whether I think L&G has provided enough evidence to show that Mr F no longer met the policy definition of incapacity. I've looked closely at the available medical evidence – including clinic letters; VCS records, the CPAD report and the OH report of July 2022. It's clear that Mr F reported (and underwent some treatment for) a number of debilitating symptoms since 2019, including fatigue, nausea, tinnitus and memory loss. Ultimately, it seems that Mr F's symptoms were found to be caused by ME/CFS.

There is little objective medical evidence from doctors between November 2019 and the OH report of July 2022. Neither have I seen copies of Mr F's GP notes. The evidence we do have indicates that Mr F tried a number of treatments to aid his recovery, including grommet surgery; cognitive behavioural therapy and hyperbaric ozone treatment, in addition to changing his diet. L&G's continued acceptance of the claim between November 2019 and May 2022 appears to have been largely based on periodic reviews between Mr F and VCS – which necessarily seem to have relied on Mr F's self-reporting. So it appears to me that L&G was happy to broadly accept Mr F's own symptom self-reporting for over a two-year period.

Based on the time that had passed, I don't think it was unfair for L&G to appoint an external company to undertake a CPAD assessment with Mr F. I've looked carefully at the report and I've summarised below what I consider to be the assessor's key conclusions:

'A review of the CPAD results indicate that the functional abilities demonstrated by Mr F… are the minimum he can safely perform over a normal working day…

Whilst it is noted that there were a number of consistencies provided by Mr F over both days of testing, there were also some areas of concern which are highlighted in detail as follows:

• Mr F reported he has much more than usual problems with tiredness, needing to rest more, feeling sleepy or drowsy, lacking energy, feeling weak, having less strength in his muscles, and memory. This does not correlate with his ability to converse normally throughout history taking, maintain eye contact, his self-reported ability to travel to London for treatment between days 1 and 2 of CPAD, or his report of feeling more energised on day 2…

Notwithstanding the areas of concern noted above, according to the physical results on day 2 of CPAD, Mr F demonstrated the following (minimum) safe workday tolerances:

• He is able to constantly (over 67% of the working day) sit with regular breaks.

• Mr F is able to frequently (34-66% of the working day) reach out bilaterally, perform bi-manual handling tasks, and walk, all with regular breaks.

• He is able to occasionally (up to 33% of the working day) perform bi-manual fine dexterity tasks, and stand, both with frequent breaks.

• Normal power (5/5) was demonstrated in both upper limbs.

• Mr F's reduced ability to pinch and grip should not impede his ability to return to his normal occupation.

• He demonstrated a normal range of movement in his cervical inclinometry.

Therefore, taking into account the above inconsistencies, his reported abilities to undertake numerous activities of daily living, as well as the very minimum results on day 2 of CPAD when compared to his self-reported role demands, it is clear that they confirm that Mr F is fit to resume his normal occupation… on a full-time basis.

With regards to the battery of cognitive tests undertaken during the CPAD assessment… it is concluded that he did not demonstrate any level of cognitive impairment during this test on either day of CPAD.

A review of (one) cognitive test results indicate that Mr F performed with significant symptom exaggeration on day 1 of testing.

These scores are lower than patients suffering from severe traumatic brain injuries, stroke, and dementia. Individuals within this score range would typically require significant support to perform everyday self-care and routine functions and cognitive function challenges are often clearly evident within general communication and interaction with such individuals. This is not however, the case with Mr F.

Additionally, these very low and low percentile level scores are not consistent with Mr F's demonstrated normal cognitive function in (other) tests, his observed abilities to follow and recall test instructions, his ability to converse normally at all times, or his reported abilities to undertake a number of activities of daily living…

Whilst the majority of scores are classified in the average and above average percentiles, it is noted that he scored in the low percentile level for both the visual and verbal memory domain, and in the very low percentile level for the composite memory domain. It is therefore recommended that further assessment of his cognitive capabilities be undertaken through an in-depth Neuro-psychological Assessment.'

It's clear that Mr F has substantive concerns about the accuracy and veracity of the report and the conclusions reached by the CPAD assessor. However, L&G's records show that it notified the assessor of Mr F's comments and asked for their response. In the circumstances, I think this was an appropriate and reasonable position for it to take. And I don't think it was unfair for L&G to place some weight on the findings of a qualified, external assessor.

L&G didn't go on to organise a neuro-psychological assessment for Mr F, as the CPAD assessor had recommended. Instead, it seems to have relied on the finding that Mr F hadn't demonstrated any level of cognitive impairment in one particular test during the CPAD. I'm not currently persuaded that this was a fair and reasonable response from L&G. That's because given Mr F's long-reported symptoms of fatigue, I think it would have been reasonable for L&G to appoint an independent neurological consultant to assess Mr F's cognitive capacity for work – whether full or part-time at that particular point in time.

Given the CPAD report's conclusions, L&G instead referred Mr F's case to its VCS team to draw up a phased return to work plan. This was based on an eight-week programme, which was intended to conclude with Mr F returning to full-time hours. L&G decided to terminate benefit from the point Mr F's employer could have actioned the plan and Mr F could have returned to work.

Following L&G's decision, Mr F provided more medical evidence in support of his claim. This included blood test results and an OH report dated July 2022. I've carefully considered the new evidence Mr F provided and in particular, the OH report, which was carried out by an

OH consultant physician – an expert in occupational medicine. I've set out their key findings below:

'Mr F has noticed a gradual improvement in his health, especially in 2022. As mentioned above, his energy, general malaise and other symptoms do fluctuate both within the day and between days but overall, he estimates his energy level is around 65% of normal. He feels

he copes well with the tinnitus and his partial hearing loss does not cause him any difficulties in his daily life…

It is harder for (Mr F) to gauge the extent of his cognitive fatigue because other than reading, he has not really challenged himself in this area but it is likely to parallel his physical fatigue. Certainly he feels there has been little impact on his memory, speed of thought or his ability to undertake calculations.

Fitness for work

I think Mr F has reached a point in his recovery where he could return to work provided it was possible from a business point of view to implement some workplace adjustments. At this stage it is hard to predict whether he will, in due course, reach full time hours; around 50% of those with CFS who do return to work are able to do so. However, (Mr F) is now making good progress and so I think there are grounds to be optimistic.

As he has been off sick for three years and he has both cognitive and physical fatigue which are exacerbated by taking on too much, in my view it would be important for him to have a very gradual phased return. In addition, during the first six weeks back, it would be helpful if he were to avoid work with tight time pressures or where there is a need to undertake much multitasking. He should also not be expected to travel for long periods and therefore I recommend for now, he works from home…

My suggestions for the first 6 weeks of the phased return are set out in the table below. It is likely the whole phased return will last at least 3 months but it is too early to set out the complete programme at this stage…

As (Mr F) has many appointments in August at clinics which are not close to his home, I also think it would be sensible for him to delay his return until September.'

The consultant physician recommended that Mr F should work one hour per day for three days in the first week, four days in the second week and five days in the third week, followed by one and half hours per day for five days in the fourth week, two hours per day for five days in the fifth week and two and a half hours per day for five days in the sixth week.

I've borne in mind the CPAD report's findings and the VCS' return to work plan. I'm also aware that Mr F has had diagnoses of conditions which may have caused the ME/CFS – although there's no objective evidence that these underlying diagnoses would cause incapacity in and of themselves. But I'm more persuaded by the findings of the OH consultant physician – an expert in their field. It's clear that the OH consultant physician didn't think Mr F would remain totally incapacitated and unfit to carry out his insured role in any capacity. Neither did they think Mr F had any cognitive concerns. Instead, they concluded that Mr F was fit to return to work on a graduated plan, beginning in September 2022. The OH consultant physician's phased return plan was considerably more gradual than the plan recommended by VCS and the OH consultant specifically stated that it was too early to set out a full plan.

I don't think the CPAD findings are enough to negate the OH consultant physician's evidence. Instead, I think the OH report is persuasive enough to show that Mr F remained fully incapacitated in line with the policy terms until August 2022 and that he became fit to work part-time from September 2022 onwards. So I think this is persuasive evidence to show that L&G ought to have continued to pay benefit, in line with the phased return to work plan detailed in the July 2022 report and subject to further reviews, either by external experts or by the OH consultant physician.

Overall then, I currently find that L&G hasn't provided enough evidence to show, on balance, that Mr F no longer met the policy definition of incapacity at the point it issued its final complaint response in November 2022. So it follows that I'm not satisfied that L&G has shown it was fair and reasonable to terminate Mr F's claim in August 2022.

Accordingly, I currently find that the fair outcome to this complaint is for L&G to reinstate and pay Mr F's claim, backdated to the date of termination, in line with the policy terms and conditions and in line with the July 2022 return to work plan. It is entitled to pay proportionate benefit in line with the contract terms from the point the OH consultant physician concluded Mr F would have been fit to return to work. And I intend to find that L&G must add interest of 8% simple to each monthly benefit payment from the date it received the July 2022 report until the date of settlement.

I must make clear that L&G remains entitled to periodically review the claim, in line with the policy terms and conditions to assess whether the claim remains payable. This may include asking Mr F to provide further evidence or undergo further medical assessment. As I've explained, it's open to Mr F to provide L&G with new medical evidence to support his change in role.

As I've set out above, I think that from the point of Mr F's appeal and the date it received the OH report, L&G was in a position to reinstate the claim and pay backdated benefit. I think it's decision not to do so caused Mr F unnecessary trouble and upset, at an already difficult time for him. This has led to the claim being unnecessarily prolonged for around a further 11 months. For that reason, I currently think that L&G should also pay Mr F £300 compensation to reflect the trouble and upset I think its caused him.'

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

Mr F didn't provide any substantive new evidence.

L&G said it had no further evidence or commentary to provide. It said it understood the decision and would action a detailed instruction from this service.

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 any substantive new 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.

For completeness, I'm directing L&G to reinstate and pay Mr F's claim, backdated to the date of termination, in line with the policy terms and the July 2022 return to work plan. It's entitled to pay proportionate benefit from the point the OH consultant physician concluded that Mr F would have been fit to return to work. It must also add interest at an annual rate of 8% simple to each monthly benefit, from the date it received the July 2022 OH report until the date of settlement.

L&G remains entitled to review the claim, in line with the policy terms, to assess whether it remains payable. This may include further medical assessment or OH review. It's also open to Mr F to provide L&G with new evidence in support of his claim should he wish to do so. If Mr F is unhappy with the outcome of any further assessment 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 in part.

I direct Legal & General Assurance Society Limited to:

- Reinstate and pay Mr F's claim, backdated to the date it was terminated, in line with the policy conditions and the return to work plan set out in the OH report of July 2022;

- Add interest at an annual rate of 8% simple to each backdated monthly benefit from the date it received the July 2022 OH report until the date of settlement*;

- Pay Mr F £300 compensation.

*If L&G considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr F how much it's taken off. It should also give Mr F 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 F to accept or reject my decision before 27 November 2023.

Lisa Barham
Ombudsman