

The complaint

Mr R complains about Vitality Life Limited's decision to turn down his income protection claim and avoid the policy.

What happened

In April 2022, Mr R applied for income protection cover with Vitality. This was accepted and the cover started in July 2022.

In October 2022, Mr R said he couldn't continue working as a builder because of difficulty with his hands. He therefore made a claim under the policy.

Vitality assessed the claim and concluded that Mr R had misrepresented information about his health, occupation, employment status and earnings when taking out the policy. Vitality also said that Mr R hadn't provided sufficient evidence of his pre-incapacity earnings, and thought Mr R had continued working (in another capacity) after making the claim which he hadn't told it about.

Vitality categorised the alleged misrepresentation as deliberate. It therefore refused the claim and avoided the policy from the start. Unhappy with this, Mr R brought a complaint to this Service.

Our investigator didn't recommend the complaint be upheld. She thought it had been reasonable for Vitality to conclude that Mr R hadn't given it accurate information and avoid the policy.

I issued a provisional decision on 11 January 2024. Here's what I said:

'The relevant law I need to consider here is The Consumer Insurance (Disclosure and Misrepresentation) Act 2012 ('CIDRA'). This requires consumers to take reasonable care not to make a misrepresentation when taking out a consumer insurance contract.

Mr R took out the policy through a broker, who submitted the application to Vitality online. Vitality then sent Mr R a confirmation schedule, which confirmed the questions and answers that had been provided. It asked him to check the document for accuracy and completeness, and that he should advise it of any changes.

First of all, I'll consider Vitality's view that Mr R misrepresented information about his health.

Vitality thinks Mr R answered the following questions incorrectly:

'Apart from any condition you have already told us about, have you had any of the following in the last 5 years:

Any pain or other problems relating to your back, neck, joints, bones or muscles including arthritis, ankylosing spondylitis, rheumatism or gout? (ignore simple muscle sprains, sprains or limb fractures if you have fully recovered)'

and

'Apart from anything you have already told us about in this form, do you have any impairment or medical complaints that you intend seeking medical advice for, or are you currently awaiting the results of any investigations?'

Mr R answered 'no' to both of the above questions.

I've considered the medical evidence to see if Mr R took reasonable care not to make a misrepresentation when answering the questions.

On 18 October 2022, Mr R's GP referred him to a specialist. The GP said Mr R had a bilateral hand condition, and worked as a joiner. They said more recently he had been getting pain across his knuckles too, with swelling. And his hands felt stiffer throughout the day. The GP confirmed to Vitality that Mr R first consulted with them about the matter on 14 October 2022.

Mr R was reviewed by a consultant orthopaedic surgeon (Mr W) in November 2022. He noted that Mr R had very painful and stiff joints of all the fingers in both hands. He said Mr R struggled with his job as a joiner. Mr W arranged some blood tests and said he would do some steroid injections in Mr R's right hand.

Mr W saw Mr R again later that month. The blood test results that had come back were normal. Mr W said it looked very much like it was just osteoarthritis, and they would continue with their original plan to inject the joints of Mr R's right hand. Mr W didn't think Mr R was a suitable candidate for surgery, and noted that Mr R wasn't able to carry out his day-to-day job of lifting heavy machinery and climbing up and down scaffolding. Mr W said he had also had another look at Mr R's hand condition, and that it didn't warrant treatment at that time, but he suspected it would do in the near future.

I note that Mr R was sent for a medical examination by Vitality after he applied for the cover earlier that same year. The examining doctor was asked if there were any deformities or swelling of Mr R's joints, and answered no to this.

Vitality's chief medical officer (CMO) has said that joint inflammation may start suddenly and progress over the course of weeks, but it appears Mr R's doctor didn't think this was the case and thought it was osteoarthritis, which the CMO says develops over years.

Whilst I appreciate osteoarthritis can develop over years, I haven't seen any medical evidence which shows that Mr R was aware he had this or was experiencing symptoms before the policy was taken out.

Vitality's CMO also says that Mr R's hand condition develops very slowly and over many years (first as thickening in the palm and then deformity in the fingers). They said this was definitely present at application stage, especially if deformity of the fingers was present.

I've looked at what the NHS says about the condition. It says the condition tends to get slowly worse over many months or years. So I accept that Mr R likely had this condition when the policy was taken out, though I don't know if the deformity in his fingers had started by this point. If there had been deformity to his fingers, I would have thought the doctor carrying out the medical examination would have noticed this, but they didn't. If there had just been thickening to Mr R's palms, I wouldn't have expected him to have answered yes to either of the above medical questions.

I therefore don't find that Mr R misrepresented information about his health when taking out the policy.

I'll now consider Vitality's view that Mr R misrepresented information about his occupation, employment status and earnings.

When Mr R applied for the policy, he said he was employed as a builder, and that his income was £100,000 a year.

Mr R has explained that he was previously a builder and director of his own company (that I'll call Company O). He then agreed to join another company as a builder and director (that I'll call Company A). So he decided to wind down Company O, though he says there was a transitional period as he had to finish some building jobs he'd started working on. He says he started working for Company A shortly after the policy started.

As I understand it, Mr R was appointed director of Company A in March 2021. He was named as one of the directors for that company in their financial statement for the year ending November 2021. I also understand that Company O was placed into liquidation in August 2021, but Mr R remained a director of that company until it was wound up in 2022.

I've looked at the information Mr R provided to his broker, and I see he described himself as a director. Though he also said he was a builder, and his earnings were taken from a combination of income sources – his building company, rental properties, and some other sources. It was noted that his day-to-day work involved a large amount of manual labour.

The application asked for Mr R's main occupation, and he answered builder. However, he hadn't yet started working as a builder for Company A, and was solely a company director at that time. That being the case, I think Mr R ought to have disclosed that his main occupation was a company director, even though his occupational duties would involve being a builder in the future. So I think there was misrepresentation here.

Vitality also says that Mr R ought to have disclosed that he was self-employed. My understanding is that a company director of a limited company can be considered employed, according to HMRC. We put this to Vitality, and it said a director doesn't have to be an employee if they're paid purely in dividends. It says Mr R completed the application as if he was on PAYE as an employee, which it says wasn't correct.

Vitality hasn't provided sufficient information here to persuade me that Mr R ought to have answered that he was self-employed. As I understand it, Mr R wasn't receiving any income from Company A when he completed the application form. It therefore seems to me he could have answered the question about employment status either way. So I don't think Vitality has shown that Mr R misrepresented his employment status.

Finally, Vitality says that Mr R misrepresented his earnings. On the application, Mr R said he earned £100,000. As I've said, my understanding is that Mr R wasn't receiving any income from his role as a director for Company A at this time, and presumably wasn't earning anything from Company O as it was in liquidation. So I agree that he misrepresented his earnings.

I therefore find that Mr R misrepresented his occupation and his earnings when taking out the policy.

Vitality has shown this Service that if Mr R had given it the correct information, it would have referred his application for manual underwriting. It has provided a statement from its underwriter which says that if this had happened, it would have requested further information

about Mr R's previous employment and earnings, and then wouldn't have offered him any income protection cover. I'm therefore satisfied the misrepresentation was 'qualifying', for the purposes of CIDRA.

Vitality has categorised Mr R's misrepresentation as deliberate or reckless, but I don't agree. I'll explain why.

Mr R stated on the application that he was a builder because this would be the main day-to-day role that he would be carrying out for Company A in the future. I think this was careless rather than deliberate or reckless.

Although Mr R said he earned £100,000, I think he would have known this would need to be evidenced in the event of a claim. Whilst he wasn't earning this amount at the time of taking out the policy, he thought he would do so once he started working for Company A. So, again, it seems to me that the misrepresentation here was careless rather than deliberate or reckless.

As I've found that Mr R's qualifying misrepresentation was careless, the remedy available to Vitality under CIDRA is based on what it would have done if Mr R hadn't misrepresented the information. As Vitality has shown that it wouldn't have offered Mr R any cover, I'm satisfied that it was entitled to turn down his claim and avoid his policy from the start. However, I intend to require it to return his premiums paid, plus interest.

As I've concluded that it was reasonable for Vitality to avoid the policy and turn down the claim, I don't need to consider whether Mr R meets the financial requirements for a claim to be paid, or whether he continued working after making the claim.'

I asked both parties if they wanted to provide any more comments or evidence before I made a final decision.

Mr R responded with the following main points:

- He applied for income protection cover with Vitality in 2019, but didn't revisit it until 2022 due to the Covid-19 pandemic. Also, Vitality arranged two medicals before he was accepted for cover. He says Vitality are therefore wrong to say he made a misrepresentation about his health.
- In 2021, he was working as a builder and director for Company O. He then decided to close Company O and work for Company A. Though it took around six months to transition over due to existing contracts.
- Between July 2022 and when he was signed off work in October 2022, he earned income from Company A. Based on this he thinks his annual earnings would have been around £100,000.
- He maintains that he was employed.
- He had to try and work after the claim was refused, in order to bring in an income for his family.

Vitality responded with the following main points:

- It disagrees that Mr R's misrepresentation should be categorised as careless.
- It says there is no doubt that Mr R was aware he wasn't earning £100,000 when he took out the policy.
- It noted I had mentioned in my provisional decision that Mr R's broker totalled his income inclusive of rental income and other sources. However, it only takes into account earned income, and the application form asked for earnings. If I am alleging

that Mr R's broker made a mistake, then the broker would be responsible for this rather than Vitality.

- It remains of the view that Mr R deliberately misrepresented his income and employment status.
- It still thinks Mr R ought to have disclosed that he was a director rather than a builder.

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.

I've noted Mr R's point about previously applying for income protection cover in 2019. Though I've already concluded that he didn't misrepresent any information about his health when applying for the policy in 2022. In reaching that conclusion, I took into account that Vitality had sent him for a medical examination before accepting him for cover.

Mr R says that if he had worked for Company A for a year, he would have earned around £100,000. However, he didn't work for Company A for a year, so we don't know what his annual earnings would have been. Though in any event, he wasn't earning that level of income when he completed the application form. Therefore, whilst he may have hoped to earn this income in his new role in Company A, I remain of the view that there was misrepresentation here. However, I still think this was careless, given that Mr R and his broker would have been aware he would need to evidence his income in the event of a claim. I don't agree with Vitality's view that it was deliberate.

I'm aware that Mr R's broker was working on his behalf and not Vitality's. I mentioned the information that Mr R gave his broker about his occupation to demonstrate that Mr R saw himself as both a director and a builder.

I've agreed with Vitality that Mr R ought to have disclosed that he was a director when completing the application and so there was misrepresentation, but I remain of the view that this was careless. Mr R's main day-to-day role would be that of a builder for Company A, so I can understand why he mistakenly answered this on the application instead of director.

As I remain of the view the misrepresentation in respect of Mr R's occupation and earnings was careless, Vitality should refund the premiums paid, plus interest.

My final decision

My final decision is that I partly uphold this complaint. I require Vitality Life Limited to return the premiums Mr R paid. Interest should be added at the rate of 8% simple per annum from the date Vitality turned down the claim to the date of settlement*.

* If Vitality considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Mr R how much it's taken off. It should also give Mr R 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 R to accept or reject my decision before 1 March 2024.

Chantelle Hurn-Ryan
Ombudsman