DRN-4583111

The complaint

Mr S has complained that, when he made a claim on the serious illness policy he held with Vitality Life Limited, Vitality declined the claim and cancelled his policy.

What happened

In late August 2022, Mr S applied for a serious illness policy from Vitality. He answered a number of health and lifestyle questions. His application was accepted and the policy commenced a few days later.

About four weeks later, Mr S consulted his doctor about a lump in his neck. He was referred to a specialist who, sadly, diagnosed him with tonsil cancer.

Mr S submitted a claim to Vitality. As part of their assessment of the claim, Vitality reviewed Mr S's GP notes. These recorded that Mr S had noticed a lump about six weeks before the consultation. So Vitality said he should have disclosed this in his application. Vitality said Mr S's failure to disclose was a misrepresentation which permitted them to decline the claim and cancel his policy.

Mr S complained to Vitality. He said he hadn't had a lump when he applied for the policy. He said he'd told his GP that he'd had the lump for "a few weeks", not six weeks, as the GP had recorded. He'd had dental treatment in early August and provided a statement from his dentist that they'd had no concerns at that time. And he provided a letter from his consultant, which set out the consultant's opinion that it was unlikely he'd had a significant symptom at the end of August.

In their response to the complaint, Vitality acknowledged that they had taken longer than they should have done to address Mr S's concerns. They offered him £120 compensation for this. But they maintained he should have answered "yes" to the question:

"Apart from if you have already told us in this application, have you had any of the following in the last 3 months?

-A lump, growth, cyst or lesion that has grown or changed in appearance, blood in your urine, bleeding from the bowel or a change in bowel habit or unexplained weight loss?"

Vitality said declining the claim and cancelling the policy was in line with the Consumer Insurance (Disclosure and Representations) Act 2012 ("CIDRA"), although they said they had decided on review to refund the premiums Mr S had paid.

Mr S wasn't satisfied with Vitality's response and brought his complaint to our service. Our investigator reviewed all the information and concluded Vitality didn't need to do any more to resolve the complaint. She was satisfied the evidence supported Vitality's position that Mr S had made a qualifying misrepresentation when he applied for the policy. And that Vitality had dealt with this in line with CIDRA.

Mr S didn't agree with our investigator's view. He repeated he'd told his GP during their phone consultation that he'd had the lump a few weeks, not six weeks. And he felt she'd not

taken into account the evidence of his dentist and his consultant. So I've been asked to make a final decision.

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 that, I'm upholding Mr S's complaint. But I'm not asking Vitality to do any more than they said they would in their final response letter. I know Mr S will find that distressing and I'm sorry about that. I hope it will help if I explain why I've reached that decision.

It's not my role to decide whether a claim should be paid. Rather, it's to decide whether the decision an insurer has reached is fair and reasonable in light of the available evidence and the relevant law.

The relevant law in this case is CIDRA. This requires consumers to take reasonable care not to make a misrepresentation when taking out a consumer insurance contract (a policy). 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.

I've set out above the question Vitality says Mr S should have answered differently. Their position is that he had the lump in his neck when he bought the policy – so he should have answered it "yes". Mr S says he didn't have the lump at that point – so his answer of "no" was accurate.

I've considered the evidence carefully. Mr S initially had a phone consultation with his GP, which was followed up by a face to face consultation the same day. The GP's notes record both consultations. The notes of the telephone consultation record the symptoms, but not how long Mr S had had them for. And they say a face to face consultation was booked:

"…to be sure full and accurate history has been obtained…."

The notes of the face to face consultation say:

"Seen F2F to examine lump on neck and thi jat [sic]

About 6 weeks history of a lump on th eleft [sic] *side of his neck and also on the left side of throat…"*

I've weighed this against the statements from Mr S's dentist and his consultant. I can see he saw his dentist 7½ weeks before his GP. So his dentist's statement doesn't make his GP's record inaccurate.

The consultant's letter is dated June 2023 – nine months after Mr S first saw his GP. It records the consultant's view that:

"…it is unlikely that you had a significant "symptom" a month earlier at the end of August."

But it also notes there are no record or scan from that time. Mr S's position is this evidence demonstrates the recording of a six week history by his GP is an error. While I know Mr S will be disappointed by my conclusion, I don't agree.

I accept Mr S mentioned "a few weeks" over the telephone. But I've seen that the telephone consultation was followed by a face to face meeting because the GP wanted to make sure he captured the full history accurately. I'm not persuaded in these circumstances that the GP recorded a specific time period for the history in error. I think he most likely made the notes after going over details with Mr S to pin down the length of time he'd been aware of a problem. That means I think it's fair for Vitality to rely on the GP's record as evidence that Mr S had a lump at the time he made his application. And it's fair for them to say that, by answering the question set out above as he did, he failed to take reasonable care and made a misrepresentation.

And I'm satisfied the misrepresentation is a qualifying one, because Vitality have shown that, had they known about the lump in his neck, they wouldn't have offered Mr S cover until investigations as to the cause of the lump had been completed. Unfortunately, those investigations identified the cancer.

Finally, CIDRA sets out what remedy can be applied where there's a qualifying misrepresentation, depending on whether it's categorised as deliberate or reckless, or careless. In either circumstance, because they would never have offered the policy, CIDRA entitles Vitality to avoid it – that is, to treat it as if it never existed - and refuse all claims. However, if the misrepresentation is deliberate or reckless, CIDRA allows them to keep the premiums paid whereas, if it is careless, the premiums should be refunded.

When Vitality wrote to Mr S in February 2023 and declined his claim, they told him they'd categorised his misrepresentation as deliberate, based on the medical information. I don't think that categorisation was unfair. But Vitality stated in their final response in December 2023 that they would refund Mr S's premiums. CIDRA requires when a careless misrepresentation is made. But Vitality are free to do more than CIDRA requires.

I understand Vitality hasn't yet made that refund. They made a clear statement in their final response letter that they would do this, notwithstanding their categorisation of the misrepresentation – so I think they should do that. But I don't think they need to do any more to resolve Mr S's complaint

My final decision

For the reasons I've explained, I'm upholding Mr S's complaint about Vitality Life Limited. Vitality should now refund the premiums in line with the offer they made in their final response letter.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 21 March 2024.

Helen Stacey
Ombudsman