

## **The complaint**

Mr and Mrs L are unhappy with the way in which Vitality Life Limited has handled a claim made by Mrs L on their life and serious illness insurance policy, including having a claim for the serious illness benefit declined.

Although Mrs L is being represented in this complaint, for ease, I've referred to her throughout.

## **What happened**

I issued my provisional decision in June 2024 explaining why I was intending to partially uphold this complaint. I said:

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Vitality has an obligation to handle insurance claims promptly and fairly. And it mustn't unreasonably decline a claim.

I intend to partially uphold this complaint. I'll explain why.

The policy provides cover for serious illness. It says:

Serious Illness Cover pays a lump sum if you are diagnosed with an illness or condition that we cover and that meets our definition of that condition. Your claim also needs to meet other criteria. We set these out in this provision.

The lump sum we pay you will be a percentage of your Serious Illness Cover between 5% and 100%. That percentage will depend on how severe your illness is – based on a scale from levels A to G...

It goes on to say when the benefit will be paid by Vitality:

Your claim must meet the following criteria before we will pay it:

- You must be diagnosed with a condition that we cover. The serious illnesses we cover are specified in Appendix 1. They are grouped into body system categories to help us assess claims.
- Your condition must meet any of the definitions set out in Appendix 1 that apply to it.
- We must have agreed to cover you for the condition you claim for. Your plan schedule shows whether we have excluded any conditions from your cover. If we have, we will not pay a claim for that condition.

Appendix 1.n provides cover for total permanent disability. And if established, a level A benefit will be paid.

Based on the cover detailed in the schedule of insurance, the definition relevant to this complaint includes:

Total permanent disability – own occupation

- i) Total permanent disability – unable before age 70 to do your own occupation ever again

It goes on to detail what needs to be met for this to be established:

Loss of the physical or mental ability through an illness or injury before age 70 to the extent that you are unable to do the material and substantial duties of your own occupation ever again.

The material and substantial duties are those that are normally required for, and/ or form a significant and integral part of, the performance of your own occupation that cannot reasonably be omitted or modified.

Own occupation means your trade, profession or type of work you do for profit or pay. It is not a specific job with any particular employer and is irrespective of location and availability.

The relevant specialists must reasonably expect that the disability will last throughout life with no prospect of improvement, irrespective of when the cover ends or you expect to retire.

This last paragraph is also in line with the policy definition of 'permanent'.

One of the reasons put forward by Vitality to decline the claim is that there's no evidence to confirm organic neurological disease or other pathology giving rise to Mrs L's symptoms and so, it says, permanence cannot be established.

To consider whether Vitality has fairly and reasonably relied on this reason, I've considered the policy terms and the available medical evidence. Although I may not refer to all medical evidence and all relevant policy terms, I want to assure the parties that I have considered them all.

In a letter dated March 2020, Mrs L's consultant neurologist writes:

I do feel that there is an element of dissociation here as well as a problem with chronic pain syndrome and I discussed with her (Mrs L)... that she will require to re-programme her brain in interpreting these altered sensations...to maintain normal function in the long term...I cannot give a timeline when this will recover altogether but the fact that we cannot identify an underlying abnormality I think the prognosis is likely to be very good even though two years down the line she still complains of symptoms.

Another consultant neurologist writes in December 2021 that:

- Examination was somewhat limited because of pain in her left leg although she clearly was quite hyperaesthetic in her left leg.
- Throughout the consultation as well as the examination she'd had bouts of pain where she would shout out because of the severity of her symptoms.

- Mrs L's primary problem remains that of pain and that perhaps the responses to the pain that she has is out of proportion to what one would expect.
- A pain management programme is probably the best way forward.

That same consultant provided a letter dated April 2023 which reflects:

- In the consultant's opinion, Mrs L had chronic pain syndrome and the referral to the pain management clinic was primarily for her to gain some control over her symptoms but in their opinion, they couldn't say whether this would allow her to return to her occupation.
- Based on a consultation in December 2021, they didn't believe Mrs L would be able to return to her previous role.

In a letter dated March 2022, Mrs L's consultant neurologist writes:

As it stands at present, she (Mrs L) would be unable to fulfil her duties in her previous job due to neuropathic pain in the left leg and left foot...with ongoing limitation with pain, difficulty ambulation and frequent falls...We do not anticipate that she would now recover from this and it is likely to be a permanent disability. I think the prospect of improvement in the future is minimal. In time she might be able to better manage her symptoms perhaps with conventional pain relief or other interventions which she has tried in the past but unfortunately were not deemed of significant benefit...she appears to have developed a permanent disability and is unable to carry out her duties in her previous occupation...

In December 2022, Mrs L's consultant neurologist writes (in relation to chronic pain):

The recommended evidence base [sic] treatment...is pain management which teaches sufferers a set of skills to cope with the impact of chronic pain. It doesn't take away the pain and it doesn't mean that function in terms of walking distance etc will necessarily improve.

In letter dated August 2023, Mrs L's consultant neurologist also writes:

- In relation to chronic pain syndrome, there has been no suggestion of improvement over time (by that stage over four years) and that it's unlikely that Mrs L's symptoms will improve over time.
- Initially they thought the prognosis was good but symptoms still persist which means the outlook is looking "very unsatisfactory".
- Even light touch over the affected area results in Mrs L experiencing significant pain.

So, although the initial prognosis was positive, the medical opinion from those involved in her medical care has become less so over time. To the extent that more recently in April 2024, Mrs L's consultant neurologist writes:

I expect Mrs L's condition to last throughout her life. She may experience some fluctuations in symptoms but certainly I would expect her to remain symptomatic throughout her life.

I don't expect Mrs L to ever return to her previous occupation during her life.

This is dated from after the final response letter but our investigator sent a copy to Vitality and it provided comment, so I think it's fair and reasonable for me to take this medical evidence into account when determining this complaint.

Although this evidence is supportive of Mrs L's claim, Mrs L's consultant neurologist hasn't provided much commentary to support her medical opinion in the April 2024 letter.

Whilst there is medical evidence from the consultant neurologists that Mrs L's condition will last throughout life with no prospect of improvement, it looks like their medical opinion is largely based on Mrs L's self-reported symptoms and there have been little objective functionality tests carried out. There are many references in the letters I've seen – including the ones I've referenced above – to Mrs L 'telling' them about or 'reporting' certain symptoms. And for example, in the consultant's letter dated December 2021, they say they haven't reviewed Mrs L's NHS records to see what investigations have been carried out.

However, I'm also not satisfied that Vitality's continued stance that as the diagnosis remains chronic pain syndrome with no pathology having been identified, it's fair for it to decline the claim. I understand the point Vitality makes; that in the absence of conclusive pathology giving rise to Mrs L's symptoms, permanence cannot be established. In effect its saying that if the cause of the chronic pain cannot be established then it can't be predicted how long the symptoms will last.

But there isn't a requirement under the section of the policy relating to total permanent disability – own occupation for there to be a clear diagnosis explaining why she's experiencing chronic pain. The definition only requires there to be an illness and as this isn't defined by the policy terms, I'm persuaded that a reasonable person would reasonably consider chronic pain syndrome to amount to an illness.

Although it's for Mrs L to establish her claim, I think she has done all that she reasonably could to obtain the necessary evidence from her consultant neurologists.

So, I think it would be fair and reasonable in the circumstances of this particular case for the parties to jointly appoint an independent medical expert (IME) to meet with Mrs L and report on the impact of her chronic pain, based on established functionality tests relevant to her condition. I think it would be fair and reasonable for Vitality to pay for this in the circumstances of this case.

When making this provisional finding, I've taken into account that Vitality has put forward other reasons to decline the claim. I've listed these below and explained why I don't think it's fair and reasonable for it to rely on those reasons to do so.

- The specific exclusions under appendix 1.n do list “any diagnosis, disease, disorder, condition procedure or disability not listed in the definitions section of this illness category, or not meeting the stated minimum required severity or any exclusion within the definition of any named condition” as an exclusion.
- Chronic pain syndrome isn't listed as a separate serious illness in appendix 1.
- I note that 'permanent neurological deficit with persisting clinical symptoms' is defined by the policy and sets out a list of symptoms which are covered. The definition says “symptoms of psychological or psychiatric origin” aren't covered. However, although the term permanent neurological deficit with clinical symptoms is defined under the definitions section of the policy, I can't see that this term appears

anywhere else in the policy terms including in appendix 1 (where the serious conditions are listed and separately defined). So, I don't think it would be fair and reasonable to rely on the exclusion contained within this definition to decline the claim in the circumstances of this complaint.

- Further and in the alternative, I'm not persuaded that Mrs L's symptoms are of psychological or psychiatric origin in the circumstances of this case. Vitality has referred to a medical journal which supports that chronic pain is a somatic symptom disorder. But in this case, I'm more persuaded by what Mrs L's consultant neurologist says in her letter dated August 2023 that "an individual's specific response to a symptom or a stimulus is often determined by their psychological attitude though this is not the same as referring to one's condition as being psychological". She has been in regular contact with Mrs L over the years and her opinion is more directed at the circumstances of Mrs L's case.
- In its final response letter dated June 2023, Vitality also says that under "total permanent disability - permanent failure or functional activity" it expressly says that "disabilities for which the relevant specialist cannot give a clear prognosis isn't covered". The policy schedule says total permanent disability will be based on your own occupation or permanent failure of functional activity. As the claim is being assessed under "total permanent disability – own occupation" and that term isn't contained under this definition, I don't think that's relevant to this case.
- Further and in the alternative, I think the relevant specialists in this case (the consultant neurologists) have given a clear prognosis – which I know Vitality disagrees with. As stated above, this prognosis is largely based on self-reported symptoms and I've explained why I think it would now be fair and reasonable for an IME to be instructed.

### **Other issues**

Vitality accepts that it has, at times, caused unreasonable delays and it could've provided better customer service when handling Mrs L's claim and subsequent appeal against decision. In total its offered Mrs L £350 compensation for distress and inconvenience. I think that fairly reflects the impact those delays had on her, which I accept would've been upsetting and frustrating at an already difficult time for her.

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I invited both parties to provide any further information in response to my provisional decision. Mrs L replied agreeing to my provisional findings but asking me to add the following to any final decision:

- Any evidence submitted to the chosen IME by Vitality should be made available to Mrs L and her representative.
- Mrs L and her representative can submit relevant information to the IME.
- To comply with Access to Health Records Acts, Mrs L should be able to view any medical report before this is submitted to Vitality and the Financial Ombudsman Service.
- If the IME reaches a conclusion that conflicts with Mrs L's own medical professionals, they be allowed to review this information and make comments as required.

Vitality also replied. In summary it said:

- Instructing an IME will not be useful in this case, particularly in the absence of any clinical findings.
- As an insurance company, it needs to be able to assess claims objectively. Without this it will lose fairness in the process. It's reasonable for it to rely on the policy terms and exclusions, which are there to ensure it doesn't pay claims in circumstances that have not been priced for.
- The claim has been declined as it cannot conclude that the permanency element of the criteria is met. Without any underlying diagnosis for pain and in the absence of pathology there is a realistic chance of Mrs L's symptoms improving.
- The medical evidence reflects that Mrs L may experience some fluctuations in symptoms so there's a possibility of improvement.
- The policy hasn't been designed or priced to cover chronic pain syndrome.
- The roots of chronic pain syndrome are both physical and mental. In Mrs L's case, it has been shown that there's no physical cause. Given the lack of underlying identifiable cause, emotional and psychological overlay, one cannot say that her disability would last throughout her life.
- Mrs L's treating specialists have initially stated that the outlook for Mrs L can look positive. The only reason they have now changed the outlook is that she has not shown an improvement over the last four years. Therefore, the outlook is more unsatisfactory in their own minds. This may be their opinion, but it is not the same as the contractual definition of permanency.
- Appendix 1, section 1n sets out specific exclusions which includes "any exclusion within the definition of any named condition". The definition of permanent neurological deficit with persisting clinical symptoms excludes "neurological signs occurring without symptomatic abnormality" and "symptoms of psychological or psychiatric origin".

### **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 carefully considered the points Vitality has made in response to my provisional decision, some of which have been raised previously. Those points haven't changed my provisional findings.

Before I explain why, I acknowledge that I haven't responded to every point Vitality has made. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here. The rules that govern the Financial Ombudsman Service allow me to do this as we are an informal dispute resolution service. If there's something I've not mentioned, it isn't because I've overlooked it. I haven't. I've considered everything provided by the parties, but I'm satisfied I don't need to comment on every individual point to be able to fulfil my statutory remit.

For the following reasons – and for reasons set out in my provisional decision (an extract of which is set out above and forms part of this final decision) – I partially uphold this complaint.

- Appendix 1n of the policy (permanent disability) does include specific exclusions at section 4. And that includes “any exclusion within the definition of any named condition”.
- The exclusion Vitality seeks to rely on isn’t set out as a specific exclusion in any of the named conditions in Appendix 1 (the conditions which amount to serious illnesses under the policy). The exclusion is set out in the definition of ‘permanent neurological deficit with persisting symptoms’ (page 68 of the policy terms and conditions). It defines this phrase as:

Symptoms of dysfunction in the nervous system that are present on clinical examination and expected to last throughout your life. Symptoms that are covered include:

- Numbness
- Hyperaesthesia (increased sensitivity)
- Paralysis
- Localised weakness
- Dysarthria (difficulty with speech)
- Aphasia (inability to speak)
- Dysphagia (difficulty in swallowing)
- Visual impairment
- Difficulty in walking
- Lack of coordination
- Tremor
- Seizures
- Lethargy
- Dementia
- Delirium
- Coma

The following are not covered:

- An abnormality seen on brain or other scans without definite related clinical symptoms
  - Neurological signs occurring without symptomatic abnormality, e.g. brisk reflexes without other symptoms
  - Symptoms of psychological or psychiatric origin.
- I don’t think it’s fair and reasonable to rely on the exclusions contained in that definition to conclude that Mrs L’s chronic fatigue syndrome is excluded from being covered under appendix 1n of the policy and it can’t be covered as a permanent disability.
  - I’m not persuaded that the definition ‘permanent neurological deficit with persisting symptoms’ is a condition within itself. It’s a list of symptoms. And although, in response to my provisional decision, Vitality has helpfully pointed out where this phrase is used in appendix 1, it’s restricted to describing symptoms.
  - Further, there are specific exclusions listed under each category of conditions. For example, under section 1c (stroke and nervous system category), there’s a specific exclusion whereby the following conditions aren’t covered “Chronic Fatigue

Syndrome, or any synonym including, but not limited to, Epidemic Neuromyasthenia, Myalgic Encephalomyelitis, Post Viral Fatigue Syndrome or Royal Free Disease”.

- If Vitality intended to exclude all conditions with symptoms of psychological or psychiatric origin or with neurological signs occurring without symptomatic abnormality, I think it would've been fair and reasonable to have included them as a specific exclusion in appendix 1, rather than include it within a separate definition about symptoms as opposed to conditions amounting to serious illnesses under the policy.
- I've taken into account Vitality's points about there being a lack of pathology and underlying diagnosis in this case. As I've explained in my provisional decision there isn't a requirement under the section of the policy relating to total permanent disability – own occupation for there to be a clear diagnosis explaining why Mrs L is experiencing chronic pain. The definition only requires there to be an illness and as this isn't defined by the policy terms, I'm persuaded that a reasonable person would reasonably consider chronic pain syndrome to amount to an illness.
- Although there's medical evidence to support that Mrs L's symptoms may fluctuate during her lifetime, I don't think that should (within itself) reasonably be taken to mean that there's a prospect of improvement in light of what else is said. The same medical evidence supports that Mrs L will remain symptomatic throughout her life and won't ever return to her previous occupation during her life.
- I'm satisfied that in the circumstances of this case, and for reasons fully set out in my provisional decision, that the fair and reasonable way forward is for the parties to jointly instruct an IME.

In terms of the points Mrs L has made about the parties jointly instructing an IME (at Vitality's cost), I'm satisfied that:

- When agreeing the contents of the joint letter of instruction to be sent to the IME, the parties should agree the evidence which should be submitted with the joint letter of instruction and a list of documents should be included so that there's no ambiguity.
- It would be fair and reasonable for it to be a condition of the parties jointly instructing an IME in this case is for Mrs L to waive any right for her to receive the IME report first. Vitality has received lots of medical information about Mrs L's condition and that will be included in the joint letter of instruction. However, once the report is received by both parties, Mrs L is free to make any further representations to Vitality and/or the IME.
- If the IME reaches a conclusion that conflicts with Mrs L's own medical professions, Mrs L is free to ask her medical professionals to review the IME report and make comments after both parties have received the IME's report. She's then free to forward these on to Vitality. However, I think it's fair and reasonable in those circumstances for the cost of obtaining any further medical evidence from her medical professionals to be met by Mrs L.

### **Putting things right**

Within 28 days from the date on which the Financial Ombudsman Service tells Vitality that Mrs L accepts this final decision, I direct Vitality to identify three suitably experienced and

available IMEs to meet with Mrs L to prepare a report on issues relevant to the claim including:

- Mrs L's chronic pain syndrome (based on the relevant objective functionality tests);
- whether, in their medical opinion, this condition meets the definition of permanency under the terms of the policy (and, if their opinion is that it doesn't, to explain why their opinion differs to Mrs L's own consultant neurologists' opinions); and
- whether Mrs L unable to carry out the material and substantial duties of her own occupation (as defined by the policy terms) ever again (and, if they consider she is, to explain why their opinion differs to Mrs L's own consultant neurologists' opinions).

And within that timeframe, the names of the IMEs and their respective medico-legal CVs should then be sent to Mrs L together with a draft letter of joint instruction (and a draft list of documents to be included for the IME's attention) for her agreement.

Within 28 days, the parties should then promptly seek to agree on the identity of the IME, the contents of the joint letter of instruction and documents to be included with this letter.

Within seven (7) days of the identity of the IME being agreed and the contents of the joint instruction letter being agreed by the parties, Vitality should provide the IME with the letter of instruction together with an agreed list of documents, including medical records and letters from Mrs L's consultant neurologists and the relevant policy terms and definitions.

The cost of the IME appointment and subsequent report should be met by Vitality.

Within 21 days of receiving the IME's report (unless an extension of time is jointly agreed between the parties), I direct Vitality reassess the claim for total permanent disability – own occupation under the serious illness section of the policy terms and provide Mrs L with its outcome.

### **My final decision**

I uphold this complaint to the extent set out above and direct Vitality Life Limited to put things right as set out above. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs L to accept or reject my decision before 5 September 2024.

David Curtis-Johnson  
**Ombudsman**