DRN-5066385

The complaint

Mrs L complains that Legal and General Assurance Society Limited (L&G) has turned down an incapacity claim she 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 key events.

Mrs L is insured under her employer's group income protection policy. The policy provides cover in the event that Mrs L is unable to work in her own occupation, as a result of illness or injury. The deferred period is 26 weeks.

In February 2022, Mrs L was signed-off of work, suffering from a 'stress reaction'. She remained unfit for work and so, in April 2022, her employer made an incapacity claim on her behalf.

L&G didn't think there was evidence to show that Mrs L was incapacitated in line with the policy terms. Instead, it felt she was experiencing a stress reaction to a close family member's illness and the need to provide care. So it turned down her claim.

Subsequently, on 20 March 2023, Mrs L saw a consultant psychiatrist who diagnosed her with moderate depressive disorder and concluded that she wasn't fit to work. As L&G maintained its decision to turn down the claim, Mrs L asked us to look into her complaint.

Our investigator concluded that it hadn't been unfair for L&G to conclude that Mrs L hadn't met the policy definition of incapacity between February and August 2022. However, he thought the psychiatrist's letter was persuasive medical evidence that Mrs L had met the policy definition of incapacity on 20 March 2023, He recommended that L&G should start a new deferred period from that date onwards and assess whether Mrs L met the definition throughout the new deferred period and beyond.

L&G accepted the investigator's view but Mrs L didn't. So I issued a final decision in November 2023 which explained the reasons why I thought it had been fair for L&G to conclude that Mrs L hadn't shown she met the policy definition of incapacity between February and August 2022. But I agreed with the investigator that it would be fair and reasonable for L&G to begin a new deferred period from 20 March 2023. So I directed L&G to assess a new claim from 20 March 2023 onwards and to consider whether Mrs L met the incapacity definition for the full, following 26 week deferred period.

Having obtained new medical evidence from Mrs L's GP and having sought the clinical opinion of its Chief Medical Officer (CMO), L&G concluded that the evidence didn't show Mrs L had met the definition of incapacity for the full deferred period. In brief, it noted that she hadn't had any follow-ups with secondary care and that Mrs L's symptoms had appeared to improve during the deferred period. And so it didn't agree to accept and pay her claim.

Mrs L asked us to consider a new complaint about L&G's decision.

Our investigator recommended that Mrs L's complaint should be upheld. He considered new evidence from Mrs L's GP, dated July 2024, which stated that in September 2023, there'd been a significant deterioration in Mrs L's mental health. The evidence also showed that after October 2023, Mrs L had been prescribed increased dosages of anti-depressant medication. And in February 2024, there'd been found to be no significant improvement in Mrs L's condition. The investigator felt that this evidence showed that Mrs L had met the policy definition from March 2023 onwards and that she'd continued to do so. So he recommended that L&G should accept and pay Mrs L's claim, together with interest. And he also recommended that L&G should pay Mrs L £250 compensation to represent the trouble and upset it had caused her.

L&G disagreed and so the complaint was passed to me to decide.

I issued a provisional decision on 13 September 2024 which explained the reasons why I didn't think it had been unfair for L&G to turn down her claim. I said:

'First, I must make the parameters of this decision clear. As I set out above, I issued a decision in November 2023 which explained why I didn't think L&G had been acting unfairly when it concluded that Mrs L hadn't met the policy definition of incapacity between February and August 2023. And, based on the consultant psychiatrist's letter of 20 March 2023, and the CMO's comments from the time, which appeared to accept incapacity at that date, I directed L&G to begin a new deferred period from 20 March 2023 onwards. Mrs L accepted that decision and so my findings became legally binding on both parties. This decision cannot and will not, therefore, consider any of the issues I considered in my original decision and nor will I take into account any medical evidence I took into account in November 2023.

Instead, I will simply be deciding whether I think L&G acted reasonably when it concluded that Mrs L hadn't shown she met the policy definition of incapacity between March and September 2023.

The relevant regulator's rules say that insurers must handle claims promptly and fairly. And that they mustn't turn down claims unreasonably. I've taken those rules into account, along with other considerations, such as industry rules and guidance, the medical evidence, and the policy terms, to decide whether I think L&G treated Mrs L fairly.

L&G has assessed whether it believes Mrs L has shown she met the policy definition of incapacity. So I've set out this definition below:

'Incapacity - 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 policy terms also say that benefit will become payable following the end of the deferred period.

It's a general principle of insurance that it's for a policyholder to demonstrate that they have a valid claim on their policy. This means it was Mrs L's responsibility to provide L&G with enough medical evidence to demonstrate that an illness had led to her being unable to carry out the essential duties of her own occupation for the full 26 week deferred period between 20 March and 18 September 2023 – and afterwards.

Even though L&G appeared to accept that Mrs L had provided enough evidence to show she was incapacitated on 20 March 2023, that doesn't mean it had accepted the claim. Nor does it mean that it was bound to accept it. Mrs L still needed to provide L&G with enough medical evidence to show that she was incapacitated for the entire deferred period (and beyond)

before I think it was required to accept the claim and pay benefit.

L&G considered the available medical evidence for the full deferred period, including with clinical members of its staff. And it still wasn't persuaded that Mrs L was suffering from an injury or illness of a sufficient severity to result in her being incapacitated from carrying out the essential duties of her own occupation. So I've gone on to consider the available medical evidence to decide whether I'm satisfied that this was a fair conclusion for L&G to draw.

I've first considered an occupational health report, dated April 2023. I've set out what I think are the key findings:

'She has been attending her GP and doing some online self-help modules and also saw a consultant psychiatrist on 20 March 2023 who diagnosed a depressive disorder. They recommended antidepressant medication which she started last week and her GP will review this with her again in four weeks time…

The relevant medical conditions are anxiety and depression.

I would consider she is medically unfit for work due to anxiety, emotional fragility and reduced memory, focus and concentration the latter being particularly pertinent when considering the nature of her role.

She is very keen to return to work once her symptoms improve and is hopeful of a positive response to her treatment and is also hopeful her anxiety will reduce as there are some encouraging signs with regards to her (close relative's) health.'

L&G wrote to ask Mrs L's GP for further medical information. I've carefully considered Mrs L's medical records from 20 March 2023 onwards and again; I've referred to what I think are key entries:

In April 2023, Mrs L was issued with a fit note citing stress at home and depression of moderate intensity as the reason for her absence.

The next month, in May 2023, Mrs L was issued a further fit note which also stated that she was unfit for work due to stress at home and depression of moderate intensity. Mrs L had a GP consultation for a review of the anti-depressant medication she appears to have begun to take a few weeks before. The GP said: 'Reports this has helped to a degree with low mood and anxiety and now able to drive and go to the shops again…is keen to aim to return to work when able but realistically still a few months away from this.'

In June and July 2023, Mrs L was issued with a fit note signing her off due to stress at home and depression of moderate intensity. In late July 2023, Mrs L was reviewed by the GP who noted:

'Mood has improved since commenced (anti-depressant) but still overwhelming tiredness…(Close relative) was showing signs of improvement but still having difficult days. Not at stage of fit to return to work, so issue further line for 4 weeks with view to working towards date for return.'

A fit note citing stress at home and depression of moderate intensity was issued in August 2023. And on 5 September 2023, the GP noted: 'Reports improvement over last two months but still good days and bad days. Can be quite tired some days…'

The GP also sent L&G a letter dated 25 August 2023, providing further information. Again, I'll set out what I think are the key points:

'Her current symptoms include acute anxiety, low mood/depression, poor concentration, being increasingly forgetful and struggling with difficulty getting to sleep, disturbed sleep and early morning wakening. She has these symptoms on a daily basis and they are in direct response to her (close relative's) significant illness and the difficulties associated with this.

She is unable to work due to her acute anxiety and poor concentration with associated forgetfulness. Due to her (close relative's) significant illness, she has struggled to leave home and is constantly on edge and fearful about what might happen. This is having an effect on her ability to attend the workplace and her ability to safely perform her duties…

Since commencing (anti-depressant) in March 2023, there has been a slow steady improvement in symptoms but this also reflects an improvement in her (close relative's) health issues…..'

The GP stated that Mrs L had seen the consultant psychiatrist once and that they'd suggested Mrs L seek NHS psychiatry review. But the GP said Mrs L 'was reluctant for this as she has no faith in the available service.'

Continuing, the GP stated that Mrs L's medication had 'certainly lessened her symptoms of both anxiety and depression and she is starting to function more normally. Her (close relative's) health and their response to treatment has been one of the major reasons for her own symptoms.'

Ultimately, the GP felt Mrs L would be able to return to work in the future on a graded basis, although it was likely she would need some weeks to get to that stage.

L&G's CMO reviewed the GP's evidence and so I've also set out what I believe to be their key conclusions:

'My review of the available evidence, noting there is no ongoing specialist input or re-referral, is that the member has responded well to therapy and there has been a steady improvement in her reported symptoms and her son's health.

The member appears to have prioritised her (close relative's) care needs…

On balance, there is insufficient objective evidence of an illness or injury of sufficient severity to result in total incapacity for the member relative to the demands of her own occupation throughout the 20/03/2023 to 18/09/2023 period and beyond, in my opinion.'

Mrs L's GP has provided us with a further letter, dated 4 July 2024. In brief, the letter reiterated Mrs L's previous symptoms and treatment. It also noted that in August 2023, Mrs L had been discussing a phased return to work over the next few months. But the GP said that she'd deteriorated significantly by September 2023 and that in October 2023, her antidepressant dosage had increased. The GP referred to further deterioration in Mrs L's condition in January 2024 and afterwards.

I've thought very carefully about all of the evidence that's been provided. It's important I make it clear that I'm not a medical expert. So I can't substitute medical opinion with my own to reach a clinical judgement and nor would it be appropriate for me to do so. Therefore, in reaching a decision, I've considered the evidence provided by medical professionals and other experts to decide which I find most persuasive.

It's clear that on 20 March 2023, L&G agreed that Mrs L had shown she met the policy definition of incapacity. I can see that she was under regular GP review; she remained signed-off from work, in part, due to depression of moderate severity, and that she began to take medication in April 2023. I've borne in mind too that Mrs L's GP continued to sign her off work and explained her symptoms in some detail.

On the other hand, though, it's also clear that each of the fit notes the GP issued following 20 March 2023 referred to part of the cause of Mrs L's absence being 'stress at home'. The GP has clearly linked Mrs L's symptoms to her close relative's illness and symptoms and indicated that Mrs L's fearfulness about her relative's illness had led to her being unable to leave the house or attend work. And the GP's notes indicate that following Mrs L starting to take medication, her symptoms did steadily improve up until August 2023, with a return to work being planned. Nor was Mrs L referred for further secondary psychiatric care and indeed, the GP suggests that Mrs L opted not seek NHS psychiatric care.

As such, on the balance of probabilities, I don't think it was unfair or unreasonable for L&G to place more weight on the evidence of its CMO that Mrs L's absence continued to be mainly due to her relative's care needs. And the evidence indicates too that Mrs L's illness between March and September 2023 appeared to be largely down to stress at home, and, in particular, her relative's illness. So I don't think it unfairly relied on its CMO's evidence to conclude that Mrs L hadn't shown she met the policy definition of incapacity for the full deferred period.

I was sorry to hear that Mrs L's condition appears to have deteriorated after September 2023. But much of the GP's July 2024 letter refers to events outside of that date and outside of the deferred period. So I don't think I could fairly treat any decline in Mrs L's health after the end of the deferred period as evidence that she met the definition of incapacity between March and September 2023.

On this basis then, I don't think it was unfair for L&G to conclude that Mrs L's absence wasn't due to an incapacity in line with the policy definition. Instead, I think it fairly concluded that Mrs L's absence was more likely due to a reaction to her circumstances.

I understand Mrs L was medically signed-off. And it's clear that she's been through a very difficult time. But I need to decide whether I think she's shown she met the policy definition of incapacity for the whole of the 26-week deferred period dating from 20 March until 18 September 2023. As I've explained, I don't think she has.

Overall then, despite my natural sympathy with Mrs L's position, I don't currently find it was unfair or unreasonable for L&G to turn down this claim. And as I don't think L&G has treated Mrs L unfairly, I don't think there are any reasonable grounds upon which I could direct it to pay her any compensation.'

I asked both parties to send me any further evidence or comments they wanted me to consider. L&G didn't respond by the deadline I gave.

Mrs L didn't accept my provisional findings and I've summarised her detailed response below, although I'd like to reassure her that I have carefully read her submission in detail:

- Mrs L said she was shocked and upset by my preliminary findings and that my provisional decision had contained a number of inaccuracies;
- She felt that evidence should be based on a policyholder's medical adviser and that additional evidence should only be sought if there were substantial reasons to doubt a treating medical adviser's evidence. She felt it would be impossible to know how

many and what type of reports would be needed to satisfy L&G's evidential requirements. And she felt that in reality, L&G had an unachievable standard of proof of illness, given its dismissal of the psychiatrist's March 2023 letter;
- She considered it ought to have been clear to everyone that L&G was never going to accept that she had been incapacitated from working throughout the deferred period, despite the GP's evidence, as we'd allowed it to turn down the claim previously. So she felt we should have been aware of the likelihood that L&G would not act in good faith or a fair and objective manner. I had to decide what evidence I found most convincing – evidence from her GP which followed detailed assessment and discussion with Mrs L or dismissal of that evidence by a commercial insurance company;
- The GP's records did note improvement in Mrs L's condition but she wasn't certified as fit to work because she'd remained incapacitated. Her relative's condition was a major contributory cause of her own illness – but she felt the cause of the incapacity should be immaterial;
- Mrs L didn't understand how the CMO could have concluded that she was fit to work in her own occupation. She didn't think a limited response to therapy should exclude incapacity. And she said a lack of specialist input couldn't be used to assume Mrs L's fitness to work but instead reflected the availability of NHS mental health services. Mrs L said she would have been prepared to access secondary care, but there were around two-year waiting lists for treatment;
- It was clear from the OH report that Mrs L had been motivated to access support and she'd accessed the available online help. She'd also referred to her employer's assistance programme and had had counselling sessions provided by L&G's provider;
- The CMO's conclusion that Mrs L had prioritised her close relative's care needs was untrue. This was an unsubstantiated assumption and I shouldn't give weight to L&G's conjecture, although she felt I was giving precedence to the commercial CMO's opinion;
- She maintained that precedence should be given to the GP's reports and letter of July 2024, which clearly explained Mrs L's symptoms and incapacity. She said it was imperative that this service should be led by evidence and not align with L&G's selective presentation of the facts;
- And Mrs L referred to the investigator's findings, given he had relied on the evidence to conclude that her complaint should be upheld and given his history of dealing with her complaint. She added that her GP may be in a position to provide further evidence in support of her claim.

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 sorry to cause Mrs L further upset and disappointment, my final decision is the same as my provisional decision and for the same reasons. I'll now go on to address what I consider to be the key further points Mrs L has raised.

I appreciate that our investigator reached a different conclusion to my own and I do understand how upsetting this must have been for Mrs L. But I'm not bound to agree with an investigator's opinion. My role is to reach an independent and impartial conclusion, taking into account all of the available evidence. I'd like to reassure Mrs L that I have reviewed the same information which was available to the investigator.

It's also important I make it clear that while Mrs L suggested obtaining further medical

evidence to support her position, it wouldn't be appropriate for me to take into account any new medical evidence as part of my assessment of this complaint. That's because L&G wouldn't have had the chance to review and consider that evidence. I've instead relied on the evidence which was available to me and to both parties when I issued my provisional findings.

As I explained in my provisional decision, following the consultant psychiatrist's letter of March 2023, which concluded that Mrs L was unfit to work at that particular point, L&G agreed to begin a new deferred period. The consultant psychiatrist's letter did support that Mrs L was incapacitated at that time. But it remains the case that Mrs L needed to provide enough evidence to show she *remained* incapacitated - in line with the contract terms - throughout the full, following 26-week deferred period before L&G was obliged to accept the claim and pay benefit.

It's clear how strongly Mrs L feels that her GP's evidence is sufficient to show that she met the policy definition of incapacity between March and September 2023 and beyond. She's questioned why further evidence is necessary and what types of evidence L&G is reasonably entitled to require. It isn't my role to tell insurers what types of evidence they should ask for when considering a claim. But in my experience, it would be very unusual for an income protection insurer to simply accept completed GP fit notes alone as clear evidence of incapacity – or even GP records. So I don't find L&G acted unfairly by not simply accepting the GP's evidence as proof of Mrs L's incapacity in line with the policy terms.

And it's clear Mrs L has concerns about the way L&G handled her claim. However, I've seen nothing to suggest that L&G didn't fully consider the medical evidence it was provided with or that it didn't act in line with its regulatory obligations when it assessed this claim. I'm satisfied it sought the opinion of clinical members of its staff and that it was also entitled to rely on the opinion of its CMO when considering the claim. That's because its CMO is a qualified doctor and a specialist in occupational medicine.

I set out in my provisional decision that I'm not a medical expert and that my decision must necessarily be based on an assessment as to which medical evidence I find most persuasive. As I explained, the GP's evidence makes it clear that Mrs L remained under regular GP review; she remained signed-off from work, in part, due to depression of moderate severity, and that she began to take medication in April 2023. And I'm mindful that Mrs L's GP continued to sign her off work and explained her symptoms in some detail.

But it's still the case that each of the fit notes the GP issued following 20 March 2023 referred to part of the cause of Mrs L's absence being 'stress at home'. While I've taken into account Mrs L's testimony that while her close relative's illness was a *contributory* factor to her incapacity, I need to bear in mind the contemporaneous medical evidence from the time. And as I set out, the GP clearly linked Mrs L's symptoms to her close relative's illness and symptoms and indicated that Mrs L's fearfulness about her relative's illness had led to her being unable to leave the house or attend work.

Additionally, the GP's notes indicate after Mrs L began to take medication, her symptoms did steadily improve up until August 2023, with a return to work being planned. So while I appreciate the GP continued to certify Mrs L as unfit to work, I don't think this is sufficiently persuasive evidence that Mrs L remained incapacitated in line with the contract terms. And I understand what Mrs L has told us about the reasons why she didn't seek secondary care during the deferred period. But the evidence still indicates that Mrs L opted not to pursue a referral – even though she's explained this was down to NHS waiting lists.

I appreciate Mrs L feels that the CMO's opinion is based on assumption and effectively conjecture. Based on what I've seen though, the CMO, who, as I've mentioned, is a doctor

and specialist in occupational medicine, did review the available medical evidence before reaching their opinion. This isn't unusual and as I've said, I don't think it was unreasonable for L&G to take this evidence into account. It's still the case that the CMO felt there was insufficient objective evidence of an illness or injury of sufficient severity to result in Mrs L's total incapacity from carrying out her own occupation between 20 March and 18 September 2023 and beyond.

Having considered the evidence again, on the balance of probabilities, I still don't think it was unfair or unreasonable for L&G to place more weight on the evidence of its CMO to conclude that Mrs L's absence continued to be mainly due to her relative's care needs. And I still don't think it acted unfairly when it also concluded that the evidence indicates that Mrs L's illness between March and September 2023 appeared to be largely down to stress at home, and, in particular, her relative's illness.

Therefore, I don't find L&G unfairly relied on its CMO's evidence to conclude that Mrs L hadn't shown she met the policy definition of incapacity for the full deferred period. And it follows that I don't think L&G acted unreasonably when it concluded that Mrs L's absence wasn't due to an incapacity in line with the policy definition but was more likely due to a reaction to her circumstances.

I do sympathise with Mrs L's position, as I appreciate she is medically unfit for work and that she's been through a very difficult time. But having considered all of the evidence impartially and independently, I simply don't find that L&G has acted unfairly or unreasonably. So overall, I don't think it was unfair for L&G to turn down her claim.

As I mentioned, Mrs L has referred to the possibility of obtaining more medical evidence in support of her claim. It's open to her to do so, at her own cost, and to provide this to L&G for its further consideration. If she's unhappy with the outcome of any new assessment of her claim, she'd need to make a new complaint to L&G 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 don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs L to accept or reject my decision before 6 November 2024.

Lisa Barham
Ombudsman