DRN-5601489

The complaint

Mr N complains Legal and General Assurance Society Limited (L&G) has turned down 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 N is insured under his employer's group income protection insurance policy. The policy provides cover if a policyholder is incapacitated from carrying out their own occupation. The deferred period is 26 weeks.

In March 2023, Mr N was signed off from work suffering from a frozen shoulder, headaches and migraines. As Mr N remained signed off work, an incapacity claim was made on the policy. In June 2023, he was seen by a consultant neurologist, who I'll call Mr T. Mr N underwent an MRI and was placed on preventative medication.

L&G asked for medical evidence to assess Mr N's claim. It also asked a Vocational Clinical Specialist (VCS) to assess Mr N's fitness for work. The VCS concluded Mr N wasn't fit for work. Subsequently, in January 2024, L&G arranged for Mr N to undergo a Functional Capacity Evaluation (FCE). The assessment considered whether Mr N's shoulder injury would prevent him from carrying out his sedentary role. And it concluded that Mr N had demonstrated capabilities which were compatible with his job. The FCE report also referred to non-medical factors, such as work-stress, impacting on Mr N's symptoms and absence.

Based on the available evidence, L&G didn't think Mr N had provided enough evidence to show he was incapacitated in line with the relevant policy definition. So it turned down his claim.

Mr N was very unhappy with L&G's decision and he appealed. L&G asked its Chief Medical Officer (CMO) to comment on the medical evidence. The CMO noted that Mr N hadn't had treatment escalation and nor had he been referred for additional treatment. They also didn't think that Mr N's subjective reporting of ongoing headaches would be the basis to totally exclude an individual from working for 18 months. The CMO referred to adjustments they believed Mr N's employer could make. And overall, the CMO wasn't persuaded there was sufficient evidence to show Mr N was incapacitated from carrying out his insured role.

On that basis, L&G maintained its decision to turn down Mr N's claim. And so Mr N asked us to look into his complaint.

Ultimately, our investigator thought Mr N's complaint should be partly upheld. She didn't think there was enough medical evidence to fairly conclude that L&G should accept and pay Mr N's claim. But she didn't think it had been reasonable for L&G to turn down the claim, given Mr T and Mr N's GP had both stated Mr N wasn't fit for work. She thought a fair outcome to the complaint would be for L&G to appoint an independent medical examiner (IME) to assess how Mr N's migraines affected his ability to carry out his insured role and to

accordingly reassess the claim.

Neither Mr N nor L&G agreed with the investigator's recommendation and so the complaint's been passed to me to decide.

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, I agree with our investigator that the fair outcome to this complaint is for L&G to appoint an IME to assess how Mr N's migraines affect his ability to carry out his insured role and to reassess his claim based on the IME's findings. I'll explain why.

First, I was sorry to hear about Mr N's symptoms over a prolonged period of time and I was also sorry to hear about the impact his ill-health has had on him. It's clear that this has been a very difficult time for him and for his family.

I'd also like to reassure both parties that while I've summarised the background to this complaint and their detailed submissions to us, I've carefully considered all that's been said and sent. In this decision though, I haven't commented on each point that's been raised and nor do our rules require me to. Instead, I've focused on what I think are the key issues.

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, together with other relevant considerations, such as regulatory principles, the policy terms and the available medical evidence, to decide whether I think L&G handled Mr N's claim fairly.

I've first considered the policy terms and conditions, as these form the basis of Mr N's employer's contract with L&G. Mr N made a claim for incapacity, so I think it was reasonable and appropriate for L&G to consider whether Mr N's claim met the 'own occupation' policy definition of incapacity. This says 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 insured member's capacity to perform the essential duties of his own occupation will be determined whether or not that occupation remains open to him.'

This means that in order for L&G to pay Mr N incapacity benefit, it needs to be satisfied that he had an illness or injury which prevented him from carrying out his own occupation for the entire deferred period between March and September 2023 and beyond.

It's a general principle of insurance that it's for a policyholder to show they have a valid claim on their policy. This means it was Mr N's responsibility to provide L&G with enough medical evidence to demonstrate that an illness had led to him being incapacitated from carrying out the essential duties of his role.

L&G assessed the evidence Mr N provided in support of his claim, including seeking the opinion of its clinical staff. And it wasn't persuaded that he'd shown he met the policy definition of incapacity. So I've next looked at the available medical evidence to assess whether I think this was a fair conclusion for L&G to draw.

I've first looked at Mr N's GP records, which show that Mr N had been suffering with a frozen

left shoulder since April 2022 and migraines since March 2023. Fit notes signing Mr N off from work with a frozen shoulder were issued for the entirety of the deferred period. But the records show that Mr N also first sought medical attention for migraines in March 2023. And later in March 2023, Mr N was referred for private neurology due to the persistence of his symptoms. He was prescribed medication at this point.

In June 2023, Mr N saw Mr T. Mr T's clinic letter states that Mr N reported severe migraines of three to four days' duration. He was diagnosed with chronic migraine. Mr N was prescribed medication, which was adjusted in dosage.

Mr N had regular consultations with L&G's VCS – a clinical specialist. I've looked carefully at the VCS' reports. In April 2023, the VCS concluded that Mr N wasn't fit to work and referred him to a physiotherapist for assessment, who felt Mr N could carry out 70% of his role due to his shoulder symptoms. In June 2023, L&G's VCS concluded that Mr N wasn't fit for work due to a deterioration in his symptoms of migraine. And in October 2023, the VCS again reached the same view.

I've also taken into account the FCE report. The FCE was carried out by a physiotherapist. In brief, the FCE concluded that '*Mr N's demonstrated capabilities during today's assessment were compatible with the physical demands of his sedentary job role.'* The assessor also said:

'During today's assessment, Mr N was able to demonstrate good levels of function at the left shoulder/upper limb which did not correlate with his reporting of very limited function….Furthermore, there were a number of inconsistencies demonstrated today…that indicated non-physical factors were impacting on behaviour. Mr N acknowledged today that workplace stress had impacted significantly on his physical symptoms.'

The FCE assessor concluded Mr N was fit to return to work on a phased basis. However, they also said:

'It was noted during today's assessment that Mr N reported ongoing migraine headaches and he reported feeling they are a barrier for him to return to work; this is outside the area of expertise of today's examiner to assess or comment on in regard to impact on return to work.'

Based on the FCE report, L&G's VCS concluded that Mr N was now fit to start a graduated return to work.

Mr T provided a letter, dated May 2024, which I've also considered carefully. Mr T said:

'Mr N has suffered with chronic migraines since February 2023 and he remains very much affected by these. They have proved refractory to preventative treatments and he is currently trialling his third oral preventative treatment option…

Mr N has severe headaches which persist for the whole day with nausea, light and smell sensitivity and him needing to lie down to try and get relief from his symptoms. He gets these on most days in a week and may occasionally have a headache free day. This affects all of his personal activities….and would undoubtedly affect his ability to continue his work as (insured role)…

I would have no doubt that Mr N is significantly affected by his condition that would affect his ability to work.'

I've also looked very carefully at L&G's CMO's opinion of November 2024. I've set out below

what I consider to be the CMO's key findings:

'In general, if an individual has not responded adequately to at least two preventative treatments, it would be expected that the individual is referred to the appropriate multi-disciplinary headache clinic for a more holistic understanding of their reported symptoms…

The member's income protection policy…is not based on a specific diagnosis but an evaluation of functional ability…

As you are aware, when considering prolonged absence of this nature from an occupational health physician's perspective, it can be helpful to consider both clinical issues and psychosocial factors and flags…

While there is a clear diagnosis of left frozen shoulder…this has responded well to physiotherapy and treatment (in my view)…

In this case, while I note the member's subjective reporting of ongoing headaches, this would not be regarded as the basis to totally exclude an individual from work on an 'all or nothing' basis for 18+ months, in my experience as an occupational health physician…

I note the significant reported work-related factors in this case, which are likely non-medical factors prolonging absence, in my view…

In summary, there is insufficient evidence of illness or injury of sufficient severity to result in total incapacity for the member relative to the demands of his own occupation at any employer throughout the deferred period and beyond.'

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. In reaching a decision about whether I think L&G treated Mr N fairly, I must consider the evidence provided by both medical professionals and other experts to decide what evidence I find most persuasive.

I appreciate Mr N's GP consistently signed him off with shoulder pain during the deferred period. But I find the FCE, VCS and CMO have provided compelling evidence which indicates that Mr N's shoulder symptoms likely wouldn't have incapacitated him from carrying out his insured role throughout the deferred period and beyond. So I don't think it was unfair for L&G to conclude that Mr N's shoulder pain didn't incapacitate him in line with the policy definition.

However, based on all I've seen, I'm not satisfied that L&G has fairly assessed whether Mr N's migraines incapacitate him in line with the policy terms. I say that because the FCE assessor clearly stated that this condition was outside of their expertise and so this condition didn't form part of the FCE. Mr T, a consultant neurologist, who's had the chance to assess Mr N and prescribe treatment for his condition, has concluded that he has no doubt that Mr N's condition would significantly affect his ability to carry out his insured role. I think there's sufficient evidence that Mr N has significant symptoms which mean it would be unfair for L&G to fully decline this claim at this stage.

But I've also taken the CMO's expert opinion into account, as a specialist in occupational medicine. Given their comments, I don't think I could fairly find that L&G should accept and pay Mr N's claim, based on the evidence it has available.

On balance, I don't think L&G has enough medical evidence to fairly assess whether or not Mr N's migraines form an illness which would meet the policy definition of incapacity. And so I find that the fair and reasonable way to put things right is for L&G to appoint an IME with

expertise in neurological conditions to assess Mr L and provide a report on whether they believe Mr N's migraines prevent him from carrying out the essential duties of his role. L&G must then reassess the claim, in line with the policy terms, and in line with its regulatory obligations.

If Mr N is unhappy with the outcome of L&G's review of the claim, following the IME's assessment, he may be able to make a new complaint about that issue alone.

I appreciate L&G has concerns that any IME assessment would take place over two years after Mr N first became absent from work. However, I think it had been made aware of Mr N's migraine symptoms from early on in the claim, given Mr N referred to them in his member statement. So I think it was open to L&G to arrange an assessment of how those symptoms impacted on Mr N's ability to carry out his insured role both during the deferred period and at the point it arranged the FCE. It chose not to do so. I'm satisfied then that it's fair and reasonable to direct L&G to arrange an IME assessment for Mr N now.

Putting things right

I direct Legal & General Assurance Society Limited to appoint an Independent Medical Examiner, with a specialism in neurological conditions, to assess the impact of Mr N's migraines on his ability to perform his insured role and to reassess the claim in line with the IME's report and the policy terms and conditions.

My final decision

For the reasons I've given, I partly uphold this complaint and direct Legal & General Assurance Society Limited to put things right as I've outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 24 July 2025.

Lisa Barham
Ombudsman