

complaint

Mr G complains about the decision by Legal and General Assurance Society Limited (L&G) to terminate his income protection claim.

background

Mr G held income protection cover through his employer's group scheme. He stopped working in his occupation (in a senior management role) because of ill health, and a claim was submitted. Whilst this was being considered by L&G, his employment was terminated.

L&G was told that Mr G's employment had ended, and it made the decision to pay him benefit directly for a period of up to five years. The claim started in October 2006 and was due to end in October 2011.

In 2010, L&G obtained evidence that it thought showed Mr G working in another occupation. Because of this, it concluded that Mr G was no longer incapacitated, and it terminated the claim as of August 2010.

In 2015, unhappy with L&G's decision to stop his benefit before the end of the five year period, Mr G brought a complaint to this service.

I issued a provisional decision on 21 July 2017. My provisional findings were:

"Mr G says that L&G used the wrong definition of incapacity when assessing his claim. He thinks this means L&G wrongly terminated his claim.

I see L&G told Mr G that his claim was assessed against the 'any occupation' definition of incapacity.

Mr G was a 'category 4' member under the policy. The policy schedule explains the definition of incapacity that applies to category 4 members is 'suited occupation' rather than 'any occupation'. I'm satisfied that L&G used the correct definition of incapacity to assess Mr G's claim. I'll explain why.

Usually, an incapacity definition of 'any occupation' means the insured would need to be totally unable to perform any occupation whatsoever. This service has long held that, unless the insurer can show the definition and its significance was fully explained at the time of sale, a strict interpretation of this definition is unfair. We expect insurers to instead interpret this as a 'suited occupation' definition.

L&G has done this. Although it made an error by referring to Mr G's definition of incapacity as 'any occupation' rather than a 'suited occupation', this hasn't made any difference to how it's assessed his claim. It explained to Mr G that 'any occupation' meant he'd need to be unable to perform any occupation to which he is reasonably suited by means of training, education or experience. This is the same as the 'suited occupation' definition of incapacity.

It's very unfortunate that L&G wasn't able to provide this service with the correct policy terms at the outset. If it had done, this would have saved some confusion. Anyway, the correct policy terms state the criteria for benefit to be paid are as follows:

“(i) in the opinion of Legal & General, is incapacitated by a specific, diagnosed illness or injury so that he is unable to undertake any occupation which Legal & General considers to be appropriate to his experience, training or education,

(ii) is not engaged in any other occupation other than one which gives rise to payment of partial benefit...”

‘Partial benefit’ is defined in the policy as:

“A Disabled Member who, on or at any time after Benefit Accrual Date, either returns to his own occupation (as defined within the definition of Disabled Member) on a part-time basis or takes up another occupation but, as a direct result of the illness or injury giving rise to the incapacity at the commencement of the Deferred Period, suffers a loss of earnings compared to when he was following his own occupation will continue to be regarded as a Disabled Member. In this case partial Member’s Benefit and partial Additional Benefit, if any, will be payable. The amount of such benefit will be determined by Legal & General taking into account relevant factors at that time and at any time thereafter, including the reduction in earnings, the hours worked and the capacity of the Disabled Member to undertake his own occupation on any other basis or to take up any other occupation.”

As a reminder, there are a number of relevant dates to take into account here. L&G started paying the claim in October 2006. The longest period it would pay the claim was for five years, so until October 2011. L&G stopped paying the claim in August 2010. So the period I’m looking at is from August 2010 to October 2011. The main issue is what, if anything, L&G should pay for that period. This will depend on whether Mr G was working and if he was, what his income for that period was. If it was less than he was earning in his previous insured occupation, then L&G may need to pay something. But the burden is on Mr G to show his income during that period.

Mr G had previously said that he was qualified to do many other occupations before his claim paid out, including diving. But he’s now provided further explanation about his diving activities. He says he started training to obtain his first diving instructing qualification in July 2007 (which was after his claim was in payment). He achieved this qualification in February 2008, but then crossed over to a different diving organisation and qualified to be a diving instructor with them in November 2008. He says he started teaching students in 2009.

It is perhaps arguable whether or not being able to dive means that this skill is transferable to an occupation. But on balance, given that Mr G apparently wasn’t qualified to be a diving instructor when the claim first started, I don’t think L&G can say that this occupation was suited to him by way of training, qualifications, experience etc. He only qualified to be a diving instructor after his claim was paid. That being the case, I don’t think L&G should have terminated the claim when it did. I think it should have asked Mr G for evidence of his earnings so that it could consider whether he was due partial benefit. But I see that Mr G didn’t dispute L&G’s decision to terminate the claim at the time, so it wasn’t aware that he’d only qualified to be a diving instructor after his claim had started.

Unfortunately, due to the time that’s passed since the claim was terminated, establishing Mr G’s income at this time has proven to be very difficult. We’ve asked Mr G several times for any income evidence he has relating to his diving instructing. But Mr G maintains that he wasn’t running a business, and only taught diving as a hobby. He says the students paid in

cash and he doesn't have any bank statements showing the cash being deposited, accounts or tax returns, and hardly made any profit.

I've therefore considered the evidence Mr G has provided, to see if it's possible to establish his earnings from this.

Mr G has explained that each student he taught to dive must have a diving pack as part of the registration process. He's provided a spreadsheet with a list of purchased diving packs for 2009 and 2010. He said there were 13 packs purchased over that time, which meant he'd taught 13 students to dive. He said he charged €250 per student, so he received a total income of €3,250. After deducting his costs for travel, diving packs, bottle fills, annual certification and liability insurance, he says he was left with total profit of €177 over that two year period. He said he hadn't included the cost of the boats, refreshments or the cost of buying equipment.

I've looked at the prices of diving courses on Mr G's diving company website and this confirms that he charged €250 for a course.

Mr G says the spreadsheet of purchased packs is a direct confirmation of all students he's trained, as you can't train a student without one. But I'm not persuaded that the spreadsheet Mr G's provided is sufficient evidence of the number of students he's taught to dive. I'll explain why.

When L&G arranged for surveillance to take place in 2010, the surveillance operative arranged for Mr G to teach him to dive. Although L&G destroyed the surveillance footage, the report written by the surveillance operative is still available. This confirms that the operative made arrangements with Mr G in June 2010 to teach him to dive in July 2010.

However, I've looked at the spreadsheet of purchased packs that Mr G has provided, and I see there's no record of a pack purchased in June or July 2010 which would correspond with the surveillance operative arranging for Mr G to teach him to dive. I therefore question what Mr G says about the number of packs shown on his spreadsheet being confirmation of all the students he's taught to dive. I assume the packs can't be purchased by Mr G in advance. I say that because there are various diving packs available, depending on the diving course chosen. Mr G wouldn't know in advance which diving course a student would choose (unless it had been pre-booked).

Also, Mr G says he only taught diving three months of the year, over the summer. But the diving packs are purchased at various times of the year, including winter. Mr G says he bought them in winter for the following summer, and that diving in that particular part of the world isn't a credible option as the water is freezing. But I've looked at some other diving schools on the internet and I see that cold water diving does take place in that part of the world during the winter. So I'm not convinced that Mr G restricted his diving instructing to the summer months, when the evidence he's provided shows that diving packs were purchased in the winter as well as summer.

Mr G has also provided invoices from a company that's supplied him with diving equipment. I see that between October 2008 and August 2010, he spent over £14,000 on diving equipment. Given that Mr G says he received €3,250 (around £2,860) income in 2009 and 2010, I find it strange that he would spend such a large amount on diving equipment if he wasn't running a business and only taught diving to a handful of students as a hobby.

I also note the supplier's invoices quote Mr G's company's VAT number, that's registered in the country where he works. Mr G has also provided some annual invoices sent to him by the diving organisation that provides him with a license to teach diving. These quote a different VAT number for his company, also registered in the country where he works. I assume there are two separate VAT numbers because I understand Mr G had two different company names.

Mr G says he didn't have a registered company. I'm therefore not sure why he would register VAT numbers for his company. In the UK, there are rules that require companies to register for VAT if they earn over a certain amount. They must also report the VAT they've charged and paid to the UK tax authority (HM Revenue and Customs). I would assume that similar rules apply in the country where Mr G's company was registered for VAT.

The invoices that quote Mr G's company's VAT number go back as far as October 2008. So it seems Mr G's company was registered for VAT at this time (and perhaps before). If Mr G was simply teaching diving as a hobby to a very small number of students and didn't expect to make a profit, it seems odd that he would register his company for VAT. As he was registered for VAT, I'd expect him to be able to evidence his VAT returns, but he hasn't done this.

Overall, whilst I think Mr G was potentially entitled to partial benefit between the date the claim stopped in August 2010 and the end of the five year claim term in October 2011, it's not reasonable for me to require L&G to make a partial benefit payment when Mr G hasn't been able to evidence his earnings. I can't simply choose a figure without evidence to support it. If Mr G wants me to award him partial benefit, he will need to provide me with evidence such as fully audited accounts, VAT returns and bank statements.

I should also point out, however, that if Mr G were able to provide me with sufficient evidence of his earnings, then any award I may make would need to take into account his earnings from diving instructing in 2009 and 2010. That's because he was still receiving full benefit under the policy up to August 2010, but it seems Mr G should have instead been receiving partial benefit from at least January 2009 to take into account his earnings from that time."

I concluded that I intended to uphold the complaint, and whilst I accepted there was potential for L&G to make payment under the policy, I didn't intend to award compensation as there wasn't enough information for me to decide what should be paid.

I invited both parties to provide me with any further evidence or comments they wished to make.

Mr G provided a detailed response. I've summarised below what I consider to be the main points.

- In terminating the claim, L&G was only focused on considering his physical injuries. However, post traumatic stress disorder (PTSD) is the reason he's unable to work in his previous occupation.
- L&G previously alleged that he committed benefit fraud, however this was found not to be the case. He says L&G froze his bank account when it thought he was guilty of benefit fraud, and I haven't addressed this.
- L&G didn't ask him for evidence of his income, and it should have done.

- He's concerned that this service is acting on behalf of L&G by applying the partial benefit option. He thinks this shows a bias towards L&G by carrying out an investigation on its behalf.
- He's not a PADI instructor, but a BSAC instructor. He says experienced PADI instructors earn around £13,000 - £18,500, and even if he were earning this level of income, it wouldn't exceed the £38,000 threshold that his income would need to reach before L&G would be able to reduce the benefit payments.
- He says L&G has had in its possession his medical records which refer to him being Type 1 diabetic and having a heart condition. He says he only saw these in 2018 and had previously been unaware he had these conditions. He goes on to explain that he's found information on the internet which advises against diving with either of these conditions. He says if he'd known about them, he wouldn't have started diving. He says despite knowing about these conditions, L&G allowed him to carry on diving and put his life at real risk.
- He's provided information relating to the VAT numbers that were on various invoices, and a letter from his lawyer which gives an explanation of the companies he's been involved with.
- L&G didn't obtain a court order to carry out its investigation of him. He thinks the legality of its action is in question.
- He says the student packs were bought in advance. He explains he usually purchased several at a time when BSAC (the UK National Governing Body for scuba diving) had a special offer at the time. He says he spent the £14,000 I'd referred to in my provisional decision on diving equipment to fund his hobby and this was funded from the settlement he received from his previous employer.
- He's provided some bank statements.
- He's provided some information from BSAC.

L&G responded with the following:

- It thinks the date when Mr G was able to perform the role of diving instructor is irrelevant. And the only relevance is that he was doing this role, and was trained and capable of doing the role. It remains of the opinion it was right to terminate benefit on the claim.
- It says partial payment isn't warranted due to Mr G's lack of credible evidence to support his diving activities and his subjective reporting of his capabilities and the clear inconsistencies.
- It has provided a video of Mr G which had been made whilst the claim was in payment. This video is of Mr G referring to himself training people in business management. L&G thinks this shows Mr G was capable of working in a role to which he was suited by way of training, education and experience.

my findings

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

As I've said, Mr G has provided a detailed response to my provisional decision. I don't intend to answer every point he's made, and have therefore focused on the main points. However, I would like to reassure him that I've considered all the information he's provided and the comments he's made before making this decision.

Mr G says that in terminating the claim, L&G was only focused on considering his physical abilities. However, he says PTSD is the reason he can't work.

The medical evidence says that Mr G was unable to work in his previous role because of a combination of his psychological and physical injuries. L&G did focus on Mr G's physical abilities when terminating the claim. It says it had surveillance footage of him teaching one of its operatives how to dive, and it thought the physical abilities he displayed in that footage directly contrasted with his stated physical limitations at the time. However, as Mr G knows, L&G wasn't able to provide me with a copy of this surveillance footage, so I haven't taken it into account in my decision, and I've already said I think L&G shouldn't have terminated the claim when it did.

Mr G says L&G thought he'd committed benefit fraud, but despite investigations, this was found not to be the case. He also says L&G froze his bank account, despite L&G denying this and wants me to address it.

Any concerns L&G may have had about benefit fraud weren't relevant to its decision to terminate the claim, so I didn't take any of it into account when considering Mr G's complaint. As Mr G points out, L&G denies freezing his access to his bank account, and I haven't seen any evidence to confirm that it did this.

Mr G says L&G didn't ask him for evidence of his income, and it should have done.

As Mr G is aware, L&G terminated the claim because it thought he was capable of working in another occupation. As I explained in my provision decision, the policy allows for partial benefit to be paid if Mr G has taken up another occupation but as a result of his illness, has suffered a loss of earnings compared to when he was following his own occupation. As Mr G took up diving instructing after stopping work in his previous occupation, I found that L&G shouldn't have terminated the claim when it did and should have considered a partial benefit payment instead. I've therefore upheld this aspect of Mr G's complaint, but as I've explained, I haven't seen enough evidence of his income in order to require L&G to make a partial benefit payment.

Mr G's concerned that this service is acting on L&G's behalf by applying the partial benefit option. He thinks this shows a bias towards L&G.

I would like to reassure Mr G that this service is impartial. He asked us to consider his complaint about L&G terminating his claim. In considering that complaint, I noticed that L&G should have applied the partial benefit clause to the claim. I therefore upheld Mr G's complaint and agreed that L&G shouldn't have terminated the claim.

Mr G explains he's not a PADI instructor, but is a BSAC instructor. He says experienced PADI instructors earn around £13,000 - £18,500, and even if he were earning this level of income, it wouldn't exceed the £38,000 threshold that his income would need to reach before L&G would be able to reduce the benefit payments.

It's unclear why Mr G's diving centre was advertised on websites as being both a BSAC diving school and PADI centre if he isn't a PADI instructor. In any event, I assume the £38,000 to which Mr G refers is the 50% benefit payment L&G was making to him before it terminated his claim. I should explain that any income he was receiving from teaching students to dive wouldn't need to *exceed* the 50% benefit amount in order for L&G to reduce the benefit payments. Instead, the 50% benefit payment would be *reduced* by his income

from diving instructing, so that the maximum he received overall would be 50% of his previous salary.

It's for that reason that I've repeatedly asked Mr G to provide evidence of his income, so that I can calculate by how much his benefit payment should be reduced. As I pointed out in my provisional decision, Mr G had been earning money from teaching students to dive from at least January 2009 (and perhaps before) but had been in receipt of full benefit under the policy until August 2010. Therefore, partial benefit should have been paid from at least January 2009 rather than full benefit, but without evidence of his earnings from this time, I can't say what the benefit payment should have been.

Mr G says L&G had his medical records in its possession which referred to him having Type 1 diabetes and a heart condition. He says he only saw these in 2018, and wasn't aware until 2016 or 2017 that he had diabetes. He doesn't say when he found out about his heart condition. He thinks L&G ought to have realised that it was dangerous for him to continue diving with the conditions. As L&G allowed him to continue diving, he thinks this put his life at risk.

L&G has provided information from 2006 that shows Mr G was aware he had diabetes at that time. So I'm not sure why he says he didn't know about this condition until 2016/2017. In any event, L&G wasn't to know if Mr G's medical practitioners hadn't made him aware of his medical conditions. I don't agree with Mr G that L&G ought to have known that he shouldn't have been diving with those particular conditions. I don't find L&G did anything wrong here.

Mr G has provided information relating to the VAT numbers that I referred to in my provisional decision. He's also provided some helpful information from his lawyer regarding his companies.

In my provisional decision I noted that some invoices Mr G had provided quoted two different VAT numbers (one ending in 02 and the other ending in 03), registered in the country where he taught diving.

Mr G has explained that the VAT number ending in 03 was a registered company that allowed him to buy and sell land, but it had nothing to do with diving. He says (and his lawyer confirms) that the VAT number ending in 02 had nothing to do with him and he doesn't know why it was on the invoices. He thinks this was an administrative error.

Mr G's lawyer says that Mr G is the owner of four registered companies, none of which are relevant to this complaint. Mr G has also provided me with company accounts, though they aren't in English.

I accept Mr G and his lawyer's explanations regarding the VAT numbers and the companies they've referred to.

Mr G says L&G didn't obtain a court order to carry out its investigation in the country where he taught diving. He thinks this was illegal.

Insurance companies in the UK are able to carry out investigations into claims, and that includes surveillance. I can't comment on the legality of this in the country in which Mr G taught diving. If he wishes to take the matter further Mr G would need to obtain legal advice about the matter in that particular country.

Mr G says the student packs referred to in my provisional decision were purchased in advance. He says he usually bought several at the same time when there was a special offer on. And he spent £14,000 on diving equipment to fund his hobby and because to do a limited amount of teaching, he would need a certain amount of equipment.

Mr G has previously provided me with a spreadsheet he's created of the student packs he says he purchased. He's also provided me with some invoices from the company that provides the packs. But the invoices only reflect the number of student packs purchased in three months spanning a three year period. So even if I were to accept Mr G's explanation that he purchased student packs in advance, I don't know if any other packs were purchased in the other months. I therefore still don't think Mr G has shown his spreadsheet of purchased packs is sufficient evidence of all the students he's taught to dive.

Mr G has provided me with some bank statements. He says they're for the period 2009 to the present and show he wasn't receiving an income. I've looked at the statements but I can only see transactions from January 2009 to December 2010. I accept there don't seem to be many transactions, but the statements aren't in English so I don't know what they relate to.

Finally, Mr G has provided a letter from BSAC. This says that Mr G is a qualified BSAC instructor and BSAC instructors usually only charge for expenses and are not normally set up as a commercial business model.

conclusion

In my provisional decision, I concluded that L&G shouldn't have terminated Mr G's claim as I thought he was entitled to partial benefit.

L&G thinks the date when Mr G was able to perform the role of diving instructor is irrelevant. And the only relevance is that he was doing this role, and was trained and capable of doing the role. I disagree. The policy terms say benefit would be paid if the member was incapacitated and unable to undertake a suited occupation, and was not engaged in any other occupation other than one which gives rise to partial benefit. When the claim started to be paid in October 2006 (after the end of the waiting period) Mr G wasn't qualified to train people to dive. That qualification was obtained after the claim was in payment.

The policy allows for partial benefit to be paid if after the benefit accrual date, a disabled member takes up another occupation, but as a direct result of the illness giving rise to the incapacity, suffers a loss of earnings compared to when he was following his own occupation. If that happened, then partial benefit would be payable. The benefit accrual date is the day immediately following the last day of the waiting period (the period between the member stopping work and the claim payment starting).

It is therefore relevant when Mr G was able to perform the role of diving instructor, because he only became suited to this role *after* the benefit accrual date and therefore partial benefit would be payable. If Mr G had been suited to this occupation and able to carry it out *before* the benefit accrual date, then he wouldn't have been incapacitated and I probably would have agreed with L&G's termination of the claim.

I therefore remain of the opinion that Mr G was entitled to partial benefit.

Mr G wants me to accept that teaching diving was merely a hobby. I find it difficult to accept that when his online profile suggests it was more than a mere hobby. He had his own website for his dive centre, and also advertised the dive centre on other websites. One such website refers to the dive centre operating out of three separate locations, and another refers to his dive centre having three instructors working there. This doesn't seem like one person teaching the occasional tourist how to dive.

However, regardless of whether or not Mr G was teaching diving as a hobby or as a source of income, it's still the case that he taught people to dive in exchange for money. That means he was receiving an income and this needs to be taken into account.

Mr G has confirmed he would charge €250 to teach someone to dive. He says that over 2009 and 2010 he earned €3,250. Whilst I've accepted he charged €250 per student, as I've explained, the evidence he's provided me relating to student packs isn't enough for me to say with any certainty how many students he taught and therefore that he only received €3,250 income. It wouldn't be fair for me to require L&G to pay partial benefit based on that amount without evidence supporting it.

I also can't be sure when Mr G started teaching people to dive. Mr G says this was after January 2009. But information from BSAC is that a diving centre was first registered in April 2008 and its records show there were two proprietors of the centre, one of which was Mr G. I know Mr G says he wasn't involved with that particular diving centre and it is run by a friend, but it's also the case that invoices he's provided from BSAC relating to the student packs quote the name of that dive centre.

I've considered whether to estimate the amount of income Mr G may have received from teaching people to dive and calculate the partial benefit on that basis. But given that I don't know when he started teaching people to dive, and I also don't know how many students he had, it would be difficult for me to choose an appropriate figure.

Overall, I think that Mr G probably was due some partial benefit between the date the claim terminated in August 2010 and the date cover was due to end in October 2011. However, it's also the case that Mr G owes L&G a refund of some of the benefit it paid him between the date he started teaching people to dive and the date the claim was terminated.

Without sufficient evidence for me to base any calculations on, I think the fairest outcome is that the outstanding payments owed by both parties to each other should effectively cancel each other out.

L&G has provided a video of Mr G which had been made whilst the claim was in payment. The video referred to him training people in business management. It thinks this shows he could work in a suited occupation.

L&G terminated the claim because it thought Mr G was able to carry out the occupation of a diving instructor, not because it thought he could train people in business management. It would be unfair for L&G to try and change the reason for the claim termination at this late stage. I therefore haven't taken the video into account, but even if I were to do so, I would say this video on its own isn't enough evidence to say Mr G could work in a suited occupation and that his claim should have been terminated.

my final decision

My final decision is that I uphold this complaint. However, I don't require L&G to pay any compensation as there isn't enough information for me to decide what should be paid.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 30 April 2019.

Chantelle Hurn-Ryan
ombudsman