

## **complaint**

This complaint concerns the decision made by Aviva Life & Pensions UK Limited ("Aviva") to terminate Mrs T's claim under an income protection policy.

## **background**

Mrs T held an income protection policy which paid a monthly benefit in the event she was unable to work in her role in the financial services industry because of illness or injury.

In 2002 Mrs T was diagnosed with breast cancer and required time off work for treatment and recovery. She submitted a claim to Aviva which was accepted. After a period of remission, Mrs T returned to work on a part-time basis in 2004. Aviva paid a proportionate benefit under the policy.

In 2005 Mrs T was again diagnosed with cancer and ceased work. Aviva continued to pay Mrs T's claim, subject to periodic reviews. In October 2009 Mrs T attended an independent medical examination (IME) at Aviva's request. The examiner, a consultant psychiatrist ("Dr A"), considered Mrs T was capable of a part-time return to work within six months of the date of his report. Aviva therefore terminated Mrs T's claim in November 2009 as it concluded she no longer met the policy definition of incapacity. It advised Mrs T that the policy included an unemployment clause which allowed the policy to terminate if she did not return to work within three months of the date of its decision to terminate her claim.

As Mrs T did not return to work within three months of the termination of her claim, Aviva cancelled her policy in February 2010. Also in February 2010, Mrs T began having investigations for tiredness that she had been experiencing for some time.

In May 2010 Mrs T was diagnosed with chronic fatigue syndrome (CFS) and it was confirmed she was medically unable to work.

A representative for Mrs T appealed against Aviva's decision to terminate Mrs T's claim. During the course of the complaint Mrs T was diagnosed with cancer for a third time.

Aviva was not persuaded to alter its decision and was satisfied that its termination of the claim in November 2009 had been correct.

Dissatisfied with Aviva's decision, Mrs T referred a complaint to this service. Our adjudicator considered the complaint should be upheld. He noted that although Mrs T had been diagnosed with CFS after her claim had been terminated and her policy cancelled, Mrs T had experienced symptoms of fatigue throughout the payment of her claim and had still been experiencing the symptoms when her claim was terminated. The adjudicator recommended the claim be reinstated from November 2009 and interest added to backdated payments.

Aviva disagreed with the adjudicator's recommendation. It said that Dr A had treated many patients with CFS and had a vast knowledge of the subject, however Mrs T did not report fatigue as a limiting problem to Dr A during the IME. It noted that Mrs T was not diagnosed with CFS until six months after the claim had been terminated; therefore it considered the evidence relating to Mrs T's inability to work at this time was not material to the termination of the claim in November 2009.

Aviva asked that the complaint be referred to an ombudsman, and so the matter has been passed to me to consider afresh.

### **my findings**

I have included only a brief summary of the complaint (above) but I have considered all the available evidence and arguments from the outset, in order to decide what is fair and reasonable in the circumstances.

The issue for me to determine is whether Aviva's decision to terminate Mrs T's claim was reasonable. Aviva must show, on balance, that Mrs T no longer met the test of incapacity before it terminated the claim.

The policy defines incapacity as:

*"total disablement from carrying out the duties pertaining to normal occupation and not undertaking any other occupation for profit or reward".*

It appears that Aviva has placed significant weight on the conclusions of Dr A in its decision to terminate Mrs T's claim. It is of interest to note that Aviva arranged for Mrs T to have the IME in October 2009 with a consultant psychiatrist. During Aviva's previous periodic reviews of Mrs T's claim, it had arranged two IME's, and these were both carried out by specialists in occupational health. Aviva says it made the decision to use a consultant psychiatrist in October 2009 because there had been multiple references to Mrs T having fatigue, and also a possible diagnosis of depression. Aviva explained that Mrs T was asked to meet with Dr A for the specific purpose of determining if there was a mental health diagnosis preventing her return to work. It further said that by the time Mrs T was asked to undergo the IME in October 2009, her claim was not being paid on the basis of her cancer, but her mental health, as described by the consultant in occupational medicine who carried out the previous IME ("Dr B") in June 2008.

I will therefore consider the conclusions reached by Dr B in June 2008 and Dr A in November 2009.

In 2008 Dr B concluded that Mrs T was suffering with carcinoma of the breast with evidence of metastases to a lymph node, as well as considerable emotional instability/anxiety, possible reactive depression and constant tiredness. Dr B noted that Mrs T was, at that time, disease free but in spite of this, she complained of constant fatigue, being emotional and having joint pains. Dr B was of the opinion that Mrs T could not undertake the material and substantial duties of her occupation.

In 2009 Dr A concluded that there were no mental health reasons why Mrs T could not go back to work on a part-time basis within the following six months. He explained that Mrs T believed that if she returned to the stressful environment of her previous occupation, then this would bring back her cancer and that her life expectancy would be shortened.

Although Dr B thought that Mrs T may have had some reactive depression, Dr A was of the opinion that there was no mental health reason why Mrs T could not return to work. As Dr A is a consultant psychiatrist, I consider greater weight should be given to his opinion in this matter. However, Mrs T has maintained throughout her claim that she suffers with fatigue and it is her tiredness which prevents her from working.

As I understand it, cancer itself as well as the treatment can cause fatigue (often known as 'cancer fatigue'). An occupational health physician who carried out an IME on Mrs T in 2004 stated *"no specific diagnostic label has been attached to [Mrs T's] persistent fatigue. Fatigue is well recognised in the first year to 18 months during and following chemotherapy. However, to my knowledge the continuation of symptoms two and a half years after the diagnosis, is unusual."*

Aviva has said that Mrs T did not report fatigue as a limiting problem to Dr A during the IME in October 2009, however I note that Mrs T did report suffering from fatigue together with aching in her elbows and ankle. In addition, when Dr A asked Mrs T what aspects of her job she thought she could do, Mrs T explained that she would not have the energy to do lecturing (which was part of her role). I further note that the IME with Dr A was terminated early, because Mrs T became distressed during the interview. Mrs T's representative has said that this was because Mrs T was frustrated at Dr A's dismissive attitude displayed towards her fatigue.

It is of interest that in the months leading up to the IME of October 2009, there was further reporting of Mrs T's fatigue. In February 2009, Aviva had arranged for a rehabilitation and claims visitor to meet Mrs T, and the claims visitor noted that Mrs T sometimes felt nauseous with her tiredness, and also that Mrs T had reported feeling more tired as the day progresses. The claims visitor also said that Mrs T could not attend exercise classes because of her overwhelming lethargy. In March 2009, Mrs T completed a claim continuation form and explained that her current symptoms were *'persistent lack of energy; fatigue particularly under stress; generally feeling wiped out with low energy; unable to concentrate for long...'* Then in August 2009, Mrs T's GP wrote to Aviva and explained that Mrs T continued to suffer side-effects of lethargy and poor concentration. In the GP's opinion, Mrs T was unable to return to her role in the financial services industry.

Although Aviva has said that Dr A has a vast knowledge of the subject of CFS, it is important to note that Mrs T was not actually diagnosed with CFS until May 2010, which was some months after Mrs T met with Dr A. As Aviva has acknowledged, Dr A's role was to determine if Mrs T had a mental health diagnosis preventing her return to work, and he confirmed she did not.

Whilst I appreciate medical opinions differ about whether or not CFS is a physical or mental condition, I see that Mrs T was diagnosed with CFS in May 2010 by a consultant rheumatologist. He stated that Mrs T's clinical pattern was that of CFS in someone who had previously had metastatic breast cancer but is in long term remission. He confirmed that Mrs T was medically unfit to work when he met her in May 2010.

It therefore seems to me that Mrs T suffered with fatigue for many years, and although she was diagnosed with CFS some months after her claim was terminated, she maintained throughout the course of her claim (by way of claim continuation forms) that it was fatigue that prevented her from working. The evidence throughout 2009 supported that she was still suffering from fatigue, and I am not persuaded that Dr A's opinion - that Mrs T was not suffering with a mental health diagnosis which prevented her from working - was sufficient reason for Aviva to terminate the claim.

Aviva has made reference to Mrs T's treating consultant oncologist's statement to Mrs T's GP in March 2009 which said *"as you know she [Mrs T] remains remarkably well and free of any evidence of recurrence of her breast cancer"*. However I do not think this statement should be considered in isolation. The oncologist made his views on Mrs T's return to work

perfectly clear to Aviva on a number of occasions throughout Mrs T's claim. By way of example, in 2008 the oncologist wrote directly to Aviva and stated *"the situation remains unchanged. By that I can once again confirm that she [Mrs T] remains currently clinically disease free but will perpetually be at risk of recurrence of her breast cancer. It is always difficult to quantify the influence of stress upon this possibility but I would once again recommend that she should not return to her previous occupation..."*.

I have therefore not placed much weight on the oncologist writing to Mrs T's GP and stating that Mrs T was remarkably well. It seems to me that the context of the letter related to Mrs T remaining free of cancer at that time.

Overall, I do not consider Aviva had sufficient grounds to terminate Mrs T's claim when it did.

### **my final decision**

For the reasons set out above, my final decision is that I uphold this complaint.

I require Aviva Life & Pensions UK Limited to reinstate Mrs T's claim from November 2009. Aviva Life & Pensions UK Limited should pay any backdated benefit payments due, from the date they were payable to the date of settlement. It should add interest to those amounts at the rate of 8% simple per year from the date that each benefit payment was payable to the date of settlement.

Chantelle Hurn  
**ombudsman**