

complaint

The complaint concerns the decision by The Royal London Mutual Insurance Society Ltd trading as Bright Grey to decline Mr A's claim under a joint life decreasing term assurance and critical illness plan ('the policy') he had taken out with his wife.

background

A claim was submitted by Mr A in August 2011 under the critical illness benefit. The claim was in respect of total and permanent disability (TPD) following Mr A's diagnosis with Chronic Fatigue Syndrome/Myalgic Encephalomyelitis (CFS/ME).

The policy had been cancelled by Mr and Mrs A with effect from July 2011, so Bright Grey assessed whether Mr A had met the requirements prior to this date. Bright Grey declined the claim on the basis that the permanency of Mr A's condition had not been demonstrated.

Our adjudicator disagreed with this conclusion. After a review of the original documentation, she was satisfied the medical evidence and opinion established that the TPD definition had been met. She therefore considered Bright Grey should pay Mr A's claim.

Bright Grey did not agree with the adjudicator and referred to medical evidence, which in its opinion showed that Mr A was at the beginning of a recovery. Bright Grey also referred to activity diaries which indicated Mr A's ability to undertake physical tasks.

The adjudicator did not agree and maintained her position.

As a result of the continued disagreement, Bright Grey asked for the complaint to be referred to me for a final decision.

my findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

The issue I have to determine is whether the medical evidence demonstrates that Mr A met the following definition of TPD:

"Total Permanent Disability for Critical Illness and Life or Critical Illness Cover"

We will pay if the person covered is diagnosed as suffering Total Permanent Disability. All diagnoses must:

- be made by a consultant at a hospital within the geographical limits shown in Section C1 who is a specialist in an area of medicine appropriate to the cause of the claim;*
- be the first and unequivocal diagnosis of the disability; and*
- be confirmed by our Chief Medical Officer.*

The TPD benefit under the policy is on an 'own occupation basis' which is defined as:

Own occupation definition of Total Permanent Disability

Any illness or injury arising before age 65 which permanently:

- a) prevents the person covered from doing the essential duties of their own occupation; or*
- b) causes mental failure*

The essential duties of an occupation are those duties which cannot reasonably be omitted without affecting the ability to carry out that occupation."

For Mr A's claim to be met, he must satisfy two tests. He must firstly demonstrate that his disability is *permanent* – in other words, it is more likely than not that his disability will never improve.

Secondly, he must show that his disability is *total* – in other words, he is totally unable to carry out the essential duties of his own occupation. The policy was cancelled in July 2011, and so the medical evidence must therefore show the above criteria was established prior to this date.

In a letter dated 14 June 2011, Mr A's consultant occupational physician said:

"I am writing to confirm that in my opinion [Mr A] is permanently medically incapacitated to undertake his role as a technical specialist at [his employer] ...Both myself and [Mr A's] general practitioner are of the opinion that he has exhausted all possible investigation and treatment options...I feel that it is unlikely he will achieve the level of improvement which would be needed for him to return to work and function reliably in regular paid employment before his normal retirement date."

In a TPD questionnaire dated 27 September 2011 the consultant responded to the following questions:

"Q2l: What is the patient's prognosis?" The consultant responds:

"Unfortunately after 10 years of symptoms and after no improvement despite stopping work I do not anticipate that his level of functioning will improve."

"Q2m: Do you think the patient may make a sufficient recovery to be able to return to sedentary work?" The response is:

"He has difficulty with prolonged reading & computer use so this is unlikely"

"Q2n: Is the patient's disability expected to last throughout life without the prospect of improvement?" To which the consultant ticks "Yes".

"Q3a: In your opinion, is your patient permanently unable to perform their own occupation on either a full or part time basis? Please provide details of the symptoms which prevent them from performing their duties." The consultant's response is:

"Profound fatigue, poor balance & coordination, memory impairment hearing impairment, chronic leg & hip pain affecting mobility blurred vision/double vision."

In its response to our adjudicator's opinion, Bright Grey raised two issues.

Firstly, comments from Mr A's specialist occupational therapist in chronic fatigue syndrome (CFS), provides evidence that TPD is not permanent. This relates to a report dated 20 November 2011 where the occupational therapist says:

"[Mr A] is managing his condition but I feel that he is only at the beginning of recovery and feel that he has further potential over the coming years rather than months."

The occupational therapist also commented:

"[Mr A] is a very pro-active patient and is willing to change many aspects of his life for his pathway to recovery. I have no hesitation that he will implement coping strategies discussed in therapy, [Mr A] with support of breaks and breaking up his day will be able to complete his job role. It is essential that his employers do support and make reasonable adjustments required to keep patients in the work-place which I know [Mr A] does want for the future."

I accept these comments, if read in isolation, may indicate that improvement is possible. However, an amended report was sent to Bright Grey by the occupational therapist. This is date stamped by Bright Grey on 9 January 2012 and is endorsed by the occupational therapist:

"Please find my report attached, due to administration errors the last section of report incorrect."

The report now shows the following section which had been omitted in error:

"Currently and for foreseeable future [Mr A] will not be able to be fit for work, which I fully support in regards to his condition. If [Mr A] does want to return to part-time employment or volunteer work in the future, this would be very optimistic."

I am mindful that the occupational therapist has confirmed the first report contained an error, and it seems Bright Grey has accepted this and effectively disregarded that report. Therefore, the corrected report from the therapist can only view Mr A's prospects of returning to employment, even on a part-time basis, as "very optimistic".

In reaching my decision, I have placed weight on the evidence provided by Mr A's consultant occupational physician. The consultant has been involved with Mr A's treatment for three years prior to the claim. I am therefore satisfied that the consultant is able to provide expert comment on Mr A's health and his ability to work at the time of his claim.

The consultant confirms in the TPD questionnaire that Mr A's condition will last throughout life. The consultant's response to Q3a lists symptoms which prevent the insured pursuing his duties. The list is extensive and relate to those essential duties required to perform the role of a telephone engineer. I note the consultant also confirms that it is "unlikely" that Mr A will be able to return to any sedentary employment.

Secondly, Bright Grey also referred to physical activities contained in Mr A's activity diaries. It considered these demonstrated that Mr A was able to undertake a number of physical and mental tasks that would not be compatible with the suggestion that his condition was permanent.

In the adjudicator's response to Bright Grey she pointed out that Mr A's medical condition would only be pertinent if it demonstrated that Mr A was able to perform his insured occupation. Mr A's covered occupation when the policy was taken out in 2005 was that of a telephone engineer. I have seen no evidence to demonstrate that the physical activities referred to show that Mr A is able to carry out the essential duties of his covered employment. Nor am I persuaded that Mr A's apparent attempts to improve his physical state, whilst very laudable, outweigh the medical opinion that his condition is unlikely to improve.

I accept that when dealing with claims of this nature it can be very difficult to establish, without any doubt, that an individual has become permanently disabled. Nevertheless, on balance I am persuaded that the medical evidence demonstrates that Mr A satisfies the TPD 'own occupation' condition. The consultant's confirmation of TPD from June 2011 is prior to the cancellation of the policy in July 2011.

I note Bright Grey has suggested that it should be allowed to obtain further, and more up to date, evidence of Mr A's condition to establish if the expected recovery has taken place. Whilst I understand the reasoning for this request, I am not persuaded it is appropriate in this case. The point where it is necessary to assess the claim is when the cover ceased, which is now approaching three years ago. In any event, as I have explained, I am satisfied Bright Grey has received sufficient evidence to show that Mr A has met the requirements to allow the claim to be paid.

my final decision

My final decision is that I uphold this complaint

I require that The Royal London Mutual Insurance Society Ltd pay the claim, backdated to 9 January 2012, the date the amended specialist occupational therapist report was received. Interest at the rate of 8% per annum should be added from this date to the date of settlement.

Doug Mansell
ombudsman