An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2018-0014
Sector:	Insurance
Product / Service:	Critical & Serious Illness
Conduct(s) complained of:	Ending of benefit payment Claim handling delays or issues
Outcome:	Partially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant was, at all relevant times, a member of his employer's Group Income Protection Policy. The Policy was incepted on 01st September 2014 and the scheme is underwritten by the Provider.

The Complainant was in receipt of benefit payments for a period but payments ceased after the Provider determined that the Complainant no longer met the definition of disability under the Policy. The complaint is that the Provider incorrectly, or unreasonably, ceased payment of benefits on the Complainant's claim for income protection.

The Complainant's Case

The Complainant underwent keyhole surgery on his back, in 2011, in Germany, specifically, a discectomy, at L5 S1. He subsequently underwent similar surgery in Germany on **06th November 2014**.

Although the Complainant's claim was originally admitted for payment of benefits, those benefits ceased, the Complainant submits, in September 2015. The Complainant believes that he should have received benefit payments until the **31st August 2016.**

Having been out of work since **21st October 2014**, the Complainant began a phased return to employment on **01st September 2016**, but ultimately resigned from his position, with effect from **03rd January 2017**.

The Complainant submits that the first medical assessment which was conducted as part of the Income Protection Review conducted by the Provider, in **November 2015**, was incorrect, as was the report which subsequently issued from the consulting physician. The Complainant believes that the consultant he attended, did not have knowledge of the Complainant's job or the tasks and duties which he performed as part of his employment. Following receipt of this Consultant's report, the Provider decided that the Complainant did not continue to meet the definition of disability under the Policy and it therefore decided not to continue making any further payments. The Complainant appealed this decision.

The Complainant submits that he attended with a second Consultant, on **09th March 2016**. The Complainant arranged for this himself, in order to obtain independent, specialist, medical evidence to support his appeal. However, the Complainant submits that this Consultant did not receive a briefing or a detailed job description from the Provider, in advance of this consultation, either.

The Complainant submits that, as he had to provide this second Consultant with the first Consultant's report, the second Consultant was biased as a result. The Complainant contends that neither of these doctors were aware of the specifics of his job and says that they were not able to answer the question of how he would be able to do his job.

The Complainant submits that when he returned to work, on a phased return basis, on the 01st September 2016, the phased return started with 4 hours per day and after three months (the maximum length of the phased return period) he was able to work for 6 hours a day, for a maximum of 4 to 5 days a week.

The Complainant submits that he resigned from his employment, with effect from 03rd January 2017 and provided notice to his employer, by letter dated 06th December 2016. He submits that he had to resign as he was physically unable to continue with the phased return to work.

The Provider's Case

The Provider's position is that in order for an Income Protection claim to be payable, a claimant must satisfy the definition of disability. It says that for the purpose of the policy, disability is defined as:

"The member's inability to perform the material and substantial duties of their normal insured occupation as a result of their illness or injury; upon occurrence of which the benefit under the policy becomes payable, after the deferred period. The member must not be engaged in any other occupation."

The Provider states that the Complainant completed a claim form in **July 2015**. It says that, on the claim form, the Complainant detailed his illness as a *"Slipped Disc with post-surgery back pain*". The Provider submits that it also received a General Practitioner report, dated **04th July 2015**, from the Complainant's G.P., on the 21st September 2015, in which she

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advised that the nature and cause of disability was, "*back pain and weakness and pain in the left foot".*

The Provider submits that the Complainant's employer advised it that the Complainant's absence commenced on **21st October 2014** and this policy has a fifty two week deferred period. It submits that this claim was accepted by it on the basis of the medical evidence supplied at the point of the claim and that it advised in the acceptance letter, which issued to the broker of the policy, on the **02nd November 2015**, that it would review the matter again, once the results of an Independent Medical Examination were available to it.

The Provider submits that, in order to review the claim, it arranged for an independent medical examination of the Complainant, with Professor John O'Byrne, Orthopaedic Surgeon, on **10th November 2015**. The Provider says that it sent a copy of the medical records received from the Complainant's GP and Specialist to Professor O'Byrne in advance of this assessment.

The Provider submits that it received Professor O'Byrne's report on the **19th November 2015** and that during the course of the report, he stated,

"On examination of this man during the consultation he moves freely around during the consultation and sits quite comfortably

…[The Complainant] is describing a history of having had surgery to his 1.5 S/ disc. He has been left with some residual weakness of his Sl nerve root on the right side. This is longstanding and I believe unlikely to improve or dis-improve. His pain is being managed by techniques such as home exercises and alternative techniques. He is not taking any pain medication.

…I am of the opinion that his pain management is adequate for his needs.

…In my opinion [the Complainant] is fit to undertake the tasks associated with his role and / would regard him as fit now.

…I think that [the Complainant] will be left with some on going back pain but this will not be relieved or aggravated by work and I cannot see anything in his role that would specifically aggravate his situation. I also think his degree of mobility and current status is sufficient for him to be able to work."

The Provider submits that it was of the opinion that the Complainant did not continue to satisfy the definition of disability and, as a result, it made a decision to cease payment of the Complainant's claim. The Provider submits that it communicated its cessation decision to the Broker on **02nd December 2015**. This letter advised that the final payment of €1,644.90 (€822.40 x 2) would be issued on the **15th December 2015** in respect of the period **01st December 2015 – 31st January 2016**, in order to allow time for the necessary return to work arrangements be made.

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The Provider states that the letter also advised that if the Complainant was unhappy with this decision, there was an appeal facility in place. It stated that, in order to appeal, the Complainant should provide up to date objective medical evidence in support his appeal.

The Provider submits that on the **18th January 2016** it received a letter from the Complainant confirming that he was appealing its decision and expressing his concerns in relation to the examination by Professor O'Byrne. The Provider notes that the Complainant also asked what he needed to provide, in order to proceed with the appeal. The Provider states that it issued a response to the Complainant on the **08th February 2016**, in which it advised him that it had sent his comments in relation to his medical assessment to Professor O'Byrne for comment, and that as part of his appeal, the Complainant would need to furnish the Provider with independent specialist evidence, in support of his claim.

The Provider says that it received a response from Professor O'Byrne in relation to the Complainant's comments on **02nd March 2016**, in which Professor O'Byrne stated:

"I note the contents of [the Complainant's] letter. His recollection of the examination is not accurate. I refer to my notes which indicate that he has a well healed discectomy and there was a check of range of motion for the lumbosacral spine."

"This assessment involves taking a history of significant points and also observing the patient as they move around during the consultation. It also involves making a general assessment as to whether somebody would benefit from returning to work."

"I have referred again to my notes which certainly have enough detail for me to form an impression that this man would improve from going back to work. He clearly had a significant problem and required discectomy and he still has some reduced function in the S 1 nerve root. However, he is able to carry out his activities of daily living albeit with symptoms.

"*In my view he is still symptomatic but these symptoms will not be made worse by him returning to work and in fact I think he would in fact be able to work with these symptoms."*

The Provider submits that these comments were sent to the Complainant's GP on the 08th March 2016.

The Provider states that the Complainant furnished it with a Report on the **01st April 2016** from a specialist Consultant Spinal and Paediatric Orthopaedic Surgeon, Mr. Jacques Noel, who the Complainant attended for the first time on the **09th March 2016**, in support of his appeal.

The Provider points to the fact that the Mr Noel's Report contained the following statements:

"I cannot find currently any specific ongoing organic cause for his low-back pain at that level he describes.

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…
He had an email on his phone from work requesting a letter stating he was totally disabled from working. Given the current clinical findings it is not possible to state that he is totally disabled. I would suggest however that he work with his employers in terms of seating and ergonomics and perhaps look at a standing work station for a time until he develops better control of his back pain.
…
I have several patients who have the same and worse symptoms and are currently still employed, one whom I saw interestingly in the clinic today who has severe unremitting leg pain from a sciatica over the past 3-months who has been working in a standing station at work for the past 3-months. "

The Provider states that Mr Noel's report did not support the Complainant's position regarding his ongoing disability. The Provider says it acknowledges that the Complainant may have some ongoing residual symptoms but that he is not on regular pain medication and there does not appear to be any restriction on his every day personal and domestic duties.

The Provider states that on the **27th April 2016**, it communicated its decision, following the appeal evidence submitted by the Complainant, that, having considered all new evidence submitted as part of the appeal and based on all the medical evidence on file, it was its opinion that the Complainant did not meet the definition of disability as set out in the policy. The Provider says that it advised that it was unable to make further payments on this claim and says it must stand over its original decision to cease benefit payments.

Decision

During the investigation of this complaint by the Financial Services Ombudsman's Bureau, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I was satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I was also satisfied that the submissions and evidence furnished were sufficient to enable a determination to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Finding was issued to the parties on 19th December 2017 outlining the preliminary determination of the Financial Services Ombudsman in relation to the complaint. The parties were advised on that date, that certain limited submissions could

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then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Finding would be issued to the parties, on the same terms as the Preliminary Finding, in order to conclude the matter.

Following the commencement of the ***Financial Services and Pensions Ombudsman Act 2017***, on 1 January 2018, the final determination of this office is now issued to the parties, by way of this Legally Binding Decision of the Financial Services and Pensions Ombudsman.

In the absence of additional submissions from the parties, the final determination of this office is set out below.

I note, by way of background to this complaint that the Complainant was a member of his employer's Group Income Protection Policy. He underwent a L5/S1 discectomy in Germany, in 2011, and subsequently underwent a repeat discectomy on the same area in 2014, for progressive symptoms.

I would also note, at the outset, that in assessing this complaint, it is not the role of this Office to comment or form an opinion as to the nature or severity of the Complainant's condition, but rather to establish, on the basis of an objective assessment of the evidence submitted, whether the Provider's decision to decline the claim in question was reasonable in the circumstances, adequately supported, and made in accordance with the policy terms and conditions.

I have reproduced below a letter issued by the Complainant's GP, dated 27th October 2016, which sets out the Complainant's medical history, from October 2014:

To whom it concerns,

The below note has been done in conjunction with a sample of contemporaneous notes available to me and recollection of the consultations.

[The Complainant] attended the practice for the first time on the 22/10/14. At that time he advised me of his previous history of L5/S1 discectomy in Germany in 2011. The purpose of his initial visit was to discuss work related issues, specifically that he was not happy with his work related stressors. The following week he presented with sensation changes in the right L5 distribution. This was not associated with any red flag symptoms and reassurance was given. Subsequently whilst in Germany he underwent repeat discectomy for progressive symptoms.

[The Complainant] commenced his sick leave in Ireland on the 30/1/15 as he was out of the country following his procedure. Over the next number of months, the Complainant made relatively slow progress despite physio and other rehab professional intervention. Subjectively he was stiff and sore in his lower back with additional abdominal symptoms. In April of 2015, occupational health from his company informed me that they would put in a special desk set up to aid [the Complainant] return to work. However due to subjective pain and fatigue [the Complainant] did not return to work.

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In late May 2015, [the Complainant] was apprehensive about his impending return to work especially in relation to ongoing interpersonal and work related stressors.

In July of 2015, [the Complainant] stated he was 50% recovered but felt he was unable to return to work until he was approaching 100% fit, which he felt could be 2-3 months away.

In late September 2015, [the Complainant] stated his back was much improved but he has onset of neck symptoms following a flight home to Germany.

In January of 2016, [the Complainant] was deemed fit to return to work by Prof O'Byrne whose report I believe you have access to. [The Complainant] disagreed with this report and requested a second opinion, which I believe you also have access to.

In March 2016, [the Complainant] was transferred to a 6 monthly certification by the social welfare department.

In July of 2016, [the Complainant] felt subjectively fit to return to work and began negotiation on a phased return to work with his company.

In summary, [the Complainant] has been subjectively unfit to return to work since his repeat operation on his lower back in 2014. This is on the back ground of work related stresses.

Within the completed Employer Claim Form, dated the **08th September 2015**, which was submitted to the Provider, the Complainant was described by his Employer as having been absent from work from **21st October 2014.**

The "*Employee's work*" is described, in the completed form, as comprising a "*Standard Digital Sales Position, 38h/p.w., no travel, no manual work, no heavy lifting, no shift time*." The form states that the Complainant's salary payments would cease on the **20th October 2015**.

The Policy in question has a one year deferred period. The Provider submits that payments were made by it under the Policy from the **21st October 2015** to **31st January 2016** and the total value of the benefit paid was €3,575.75.

I note that the Complainant is, by way of redress, seeking to have the Provider make payments from September 2015 to 31 August 2016. However, there is a letter on file from the Provider, to the Broker of the Policy, dated 02 December 2015, which advised that the Complainant no longer met the definition of disability as set out in the policy and advised that, "*the final payment of €1644.80 (822.40 * 2) will be issued in the 15/12/2015 in respect of the period 01/12/2015 - 31/01/2016 in order to allow time for the necessary return to work arrangements to be made."*

The Provider has submitted that the claim was initially accepted by it on the basis of the medical evidence supplied at the point of claim. The Provider submits that it advised, in

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the acceptance letter issued to the Broker on the **02nd November 2015**, that it would review the matter once the results of the Independent Medical Examination were available.

The Provider arranged for the Complainant to attend at Prof John O'Byrne, Orthopaedic Surgeon, for such an examination on the **10th November 2015.**

Following this examination and the report which issued from Prof O'Byrne, the Provider formed the opinion that the Complainant did not continue to satisfy the definition of disability and resultantly decided to cease payment of the claim. This decision was communicated to the Complainant's Broker by letter dated **02nd December 2015.**

The Independent Medical Examination

I note that, prior to the Complainant attending at the Independent Medical Examination with Prof O'Byrne, the Provider issued a letter, dated 09th November 2015, in which it advised Prof. O'Byrne, that as part of the assessment:

We would like you to establish whether or not [the Complainant] meets the definition of disability as outlined in our policy. I have enclosed a copy of a job description as received.

"The member's inability to perform the material and substantial duties of their normal insured occupation as a result of their illness or injury; upon occurrence of which the benefit under the policy becomes payable, after the deferred period. The member must not be engaged in any other occupation."

Please note that the illness or disability must be assessed in relation to the exact nature of the job requirements. You should also note that the availability of such work is not an issue. [original underlining]

The Complainant has submitted that his role and duties were not made clear to the examining doctor and that the job description provided to Prof O'Byrne was more suitable for recruitment purposes. I have had an opportunity to read the job description, furnished by the Employer and which the Consultant was asked to have regard to in drafting his report. It begins as follows:

Job Description

1. *Are you an experienced sales person who is excited by technology?*
2. *Do you enjoy a challenge while you build a long lasting rewarding career/*
3. *Are you passionate about helping your clients succeed?*
4. *Would you like the lead in new technologies and not just follow the crowd?*
5. *Do you want to be a part of something big?*

If the answer is yes to all 5 questions, we would love to talk to you about joining our growing team of like-minded sales professionals. We will focus on your long-term career and invest in your future through continuous development and monitoring.

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It goes on to list the "*Principal Responsibilities*" of the role as follows:

Principal Responsibilities:

- *You will be responsible for a defined territory or client set and reach or overachieve targets and goals*
- *Working with various sources you will develop new sale opportunities and drive them to closure.*
- *Through continuous personal development you will become a subject matter expert and act as an influencer and trusted advisor for your clients.*
- *Social media will play a big part in how you engage, interact and influence your clients.*
- *You will need to have personal drive and ambition to make you stand out.*
- *You will need to build your network of contacts both within [the Employer] and your client base, making yourself the go to person for your specific field.*
- *You will need to take personal interest in everything you do, putting your client first, being prepared to take on challenges, solve problems and work with your team to get things done.*
- *You must have strong communication skills and be able to present complex concepts, designs and solutions, verbally and visibly.*
- *You will always be well informed and be able to articulate changing trends in information Technology, particularly cloud based solutions around IaaS, PaaS and SaaS.*

The letter asks Prof O'Byrne to provide, within his report, answers to a number of questions, including, "*In your opinion is [the Complainant] fit to undertake the tasks associated with his role?"*

The Complainant has submitted that this document did not provide the Consultant he attended at with sufficient information about the nature of the tasks and duties which he undertook as part of his role and that as a result the Consultant was not in position to assess his fitness or otherwise to undertake the duties of his occupation. I would agree with the Complainant's observation that the description provided by the Complainant's employer is less than satisfactory as it does not indicate the day to day duties of the Complainant, on a practical level. It is difficult to see from this document alone, how the medical examiner could have assessed the Complainant's disability in relation to the exact nature of the job requirements, as requested by the Provider.

Medical Report

In the Report, dated **10th November 2015**, under the heading "*Presenting Complaint*", Prof O'Byrne stated that:

"He states that he has intermittent low back pain and still has some numbness in his leg and weakness in the lower right limb. He states that he is good in the morning. He can sit for variable periods of time. He walked 30 minutes to this appointment."

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The report continues with the heading "*Examination"*:

On examination of this man during the consultation he moves freely around during the consultation and sits quite comfortably. On examination of his lumbar sacral spine he has a healed discectomy scar. He has a full range of motion in his lumbrosacral spine. He has reduced calf girth on the right compared to the left side. He has reduced sensation and reduced power in the S1 nerve root in the right. This is longstanding.

In summary [the Complainant] is describing a history of having had surgery to his L5 S1 disc. He has been left with some residual weakness of his S1 nerve root on the right side. This is longstanding and I believe unlikely to improve or dis-improve. His pain is being managed by techniques such as home exercise and alternative techniques. He is not taking any pain medication. [The Complainant] describes that physiotherapy has not been helpful to him.

I am of the opinion that his pain management is adequate for his needs. I think [he] can continue with his rehabilitation options and return to work. In my opinion [the Complainant] is fit to undertake the tasks associated with his role and I would regard him as fit now.

I think that [the Complainant] will be left with some ongoing back pain but this will not be relieved or aggravated by work and I cannot see anything in this role that would specifically his situation. I also think his degree of mobility and current status is sufficient for him to be able to return to work."

Following receipt of this Report and by letter dated **02nd December 2015**, the Provider wrote to the Broker of the Policy and advised that it was of the opinion that the Complainant no longer met *"the definition of disability as set out in the policy*". It continued that,

"With due consideration to the recommendations of the Independent Medical Evaluation on the 10/11/2015, [the Complainant] has been deemed medically fit to return to work to full time duties. In arriving at our decision, we must be guided by the weight of the objective evidence obtained which, in or opinion, clearly indicates that [the Complainant] no longer meets the definition of disablement under the policy.

…

If [the Complainant] is unhappy with the decision on his case, there is a facility for him to appeal the decision. The appeal must be submitted within three months. In [the Complainant's] case by the 01/03/2015. It would be up to [the Complainant] to provide us with up-to-date objective specialist evidence to support his appeal. The evidence submitted should clearly indicate to us that he is totally disabled from following his normal occupation. If no such evidence is available, our decision will remain unchanged."

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This letter makes it clear that Prof O'Byrne's recommendations were relied upon by the Provider in deciding to cease payment of benefits, in circumstances where the Complainant was *"deemed medically fit to return to work to full time duties."* It is of some concern to me, however, that, as set out above, Prof O'Byrne was asked to make his recommendations in the context of, and by having regard to "*the exact nature of the job requirements"* and I am not satisfied that the job description furnished, and reproduced in part, above, contains adequate information to ground such an exercise.

I accept that the document comprising the Complainant's job description details was furnished to the Provider by the Complainant's employer. However, the ultimate responsibility rests with the Provider to satisfy itself and to ensure that adequate detail is provided to the Consultant in this regard, so as to allow him carry out the assessment, as directed. The Provider's instructions to the Consultant were very specific, and without the Consultant having an awareness as to the exact nature of the Complainant's job requirements, it is not clear that the Report which issued the Prof O'Byrne, on the back of the medical examination was fit, or appropriate, for its stated purpose. Resultantly, it is not clear that it was fair or reasonable of the Provider to rely on this in deciding to cease benefit payments.

I note that the Complainant detailed his concerns about the examination and the consultation which took place, within his appeal letter of the **18th January 2016**.

The Complainant's Concerns

The Complainant noted that while Prof. O'Byrne had mentioned in his report that he was not taking pain medication, that the doctor did not however ask him how he managed the pain instead and did not discuss how many times, and for how long, he needed to lie down every day during the day, nor were his digestion problems discussed, which he says also prevented him from taking pain medication.

The Complainant submitted that while Prof. O'Byrne's report stated "*he is good in the mornings"*, that this was incorrect and that, in fact, mornings could be the worst part of the day with a high degree of stiffness and pain.

The Complainant submitted that although he can sit for variable short periods, the length of these periods was not discussed at all, despite that fact that his is a desk based job.

The Complainant commented on the fact that Prof O'Byrne's report included the remark that "*He walked 30 minutes to this appointment*", but not the fact that he felt wrecked after walking these 30 minutes.

The Complainant submitted that there was no further discussion about his digestion problems *"and the possible influencing character of this on the back*", which the Complainant says he mentioned to Prof. O'Byrne and had addressed with his GP since early 2015.

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The Complainant submitted that Prof O'Byrne's comment that the Complainant "*moves freely around"* was only correct insofar as it meant that that he was moving without the assistance of a wheelchair or crutches, but that if he had been asked to take his shoes/socks/trousers off and on again, then the doctor "*would have seen how un-freely [he] moved".*

Similarly, the Complainant questioned Prof. O'Byrne's remark that "*He sits quite comfortably*" and submitted that he could not sit comfortably for a period of more than a few minutes, without pain or strain. The Complainant submitted that, contrary to the statement in the Report that, "*on examination of his lumbar sacral spine he has a healed discectomy scar. He has full range of motion in his lumbosacral spine"*, he had remained fully dressed during the consultation, that the scar was not looked at and instead Prof. O'Byrne had looked at 1 year old MRI scans.

The Complainant submitted that no test was conducted to test for reflexes in the feet or knees and that neither was there any bending over, or the flexibility of his spine checked.

The Complainant submitted that he and Prof. O'Byrne did not talk about how long he is able to sit and stand, how often he needed to lie down.

The Complainant submitted that although Prof. O'Byrne was of the opinion that he was "*fit to undertake the tasks associated with his role*" he did not understand how Prof. O'Byrne came to this opinion, without knowing what his tasks are, namely, 8 hours sitting or standing on the desk in front of phone and laptop.

By letter dated **15th February 2016** Prof O' Byrne issued a response to the Complainant's comments. The letter submits that *"[the Complainant's] recollection of the examination is not accurate.*" He goes on to say that:

"*I have referred again to my notes which certainly have enough detail for me to form an impression that this man would improve from going back to work.*

He clearly had a significant problem and required discectomy and he still has some reduced function in the S1 nerve root. However, he is able to carry out his activities of daily living albeit with symptoms.

The questions to be answered by me are
1 Would his symptoms be present whether he is at work or not
2 Would he be able to return to work?

In my view he is still symptomatic but these symptoms will not be made worse by him returning to work and in fact I think he would in fact be able to work with these symptoms. I understand he does need to sit for periods of time and these can be uncomfortable and I appreciate he is not completely asymptomatic. However I think it is reasonable that he should return to work.

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I am not at all convinced by the adequacy of the Consultant's response and, to my mind, there are two rather worrying statements made by Prof O'Byrne here: firstly, he stated that he was satisfied that the Complainant "*is able to carry out his activities of daily living albeit with symptoms".* This is not however what he was asked by the Provider to offer his opinion on. My concern in this regard is heightened by the fact that the questions the Consultant believed he had to answer were (i) whether the Complainant's symptoms would be present whether he was at work or not and (ii) whether he would be able to return to work. It is unclear why the Consultant believed these were the questions to be addressed in reporting to the Provider.

It is therefore not at all clear to me that the Provider acted correctly or reasonably in taking the contents of this Report into account in coming to its determination.

The Complainant decided to appeal this decision.

To recall, as part of the appeals procedure, the Provider stated that, *"It would be up to [the Complainant] to provide us with up-to-date objective specialist evidence to support his appeal. The evidence submitted should clearly indicate to us that he is totally disabled from following his normal occupation. If no such evidence is available, our decision will remain unchanged."* [my emphasis]

In accordance with the Provider's appeal policy, the Complainant made an appointment with another Orthopaedic Surgeon in order to provide his own specialist medical evidence, in support of his position.

Objective Specialist Evidence

The Complainant attended at Mr Jacques Noel, Consultant Orthopaedic Surgeon, Sports Surgery Clinic, Santry, on **09th March 2016**, (referred by his GP). Mr Noel subsequently issued a report as to his findings, upon examination of the Complainant.

During the course of this Report, Mr Noel stated as follows:

I cannot find currently any specific ongoing organic cause for his low-back pain at that level he describes.
…
He had an email on his phone form work requesting a letter stating he was totally disabled from working. Given the current clinical findings it is not possible to state that he is totally disabled. I would suggest however that he work with his employers in terms of seating and ergonomics and perhaps look at a standing work station for a time until he develops better control of his back pain. [my emphasis]
I note that the Complainant was dissatisfied with the consultation with Mr Noel, which dissatisfaction he expressed by email, dated 01st April 2016, to the Provider.

"I have a sit standing desk in work since my first surgery. There is an ergonomic chair with back support. The doctor said to get up and walk around and I explained him that the pain does not resolve just by walking around. I cannot lie down in work like I do during the days,

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at the moment. My job is desk based and the phone line needs to be covered. On my question how I can deal with these things in work, he had no answer for it."

By email to this Office dated 16th January 2017, the Complainant also complained that the Provider had not furnished a detailed job description to Mr Noel:

"I had to find a second specialist on my own, which was not provided with any details by the insurance. I had to inform Dr Noel, during the assessment about the whole situation and had to show him the report of Prof. O'Byrne. Based on that 1st report from Prof O'Byrne, I feel that Dr Noel wrote a biased report in favour of the result of the 1st specialist report…The insurance missed to provide both doctors with appropriate information about my job such as detailed job description etc. (Dr Noel even described the behaviour of the Insurance as completely unprofessional.) My current situation resulting in resigning from work proves that the findings in both reports were rather optimistic wishes than a picture of my real health situation."

I note that Mr Noel was not provided with a job description/ specification by the Provider and the Complainant's submission regarding Mr Noel's remark that this was "*unprofessional*". However, it is not clear to me that, in circumstances where the consultation was arranged by the Complainant, (by way of referral from his GP) to obtain objective specialist medical evidence, to support his appeal, that the Provider had any part to play, or any obligation, in communicating with Mr Noel or in providing him with a description of the Complainant's job, unless it was asked to do so.

I believe that there is, however, an issue with the appeal procedure as communicated to the Complainant by the Provider. The Complainant was required to provide evidence that "*he is totally disabled from following his normal occupation."* It is unclear why this new test was introduced in circumstances where the definition of disability under the Policy, is an "*inability to perform the material and substantial duties of their normal insured occupation."* It is difficult to understand why the Provider advised the Complainant in these terms, who in turn advised Mr Noel, by showing him the letter in question.

Mr Noel determined that it was not possible to state that the Complainant was totally disabled but his recommendation was that the Complainant work with his employers in terms of seating and ergonomics until he developed better control of his back pain.

Regarding the Complainant's contention that Mr Noel's decision in this regard was influenced by the fact that he was furnished with a copy of Prof O'Byrne's report, any such issue is not a matter coming within the jurisdiction of this office and indeed the conduct of Mr Noel who was instructed directly by the Complainant, via his GP is not a matter for the Respondent Provider.

Further to the above Reports, I have also had regard to the General Practitioner's report, dated **04th July 2015**. The Complainant's GP includes the observation that, "*at present [the Complainant] is making good progress but feels he is not 100%. The previous injury and associated work pressure is negatively impacting on his return to work. He is well motivated and it is my opinion he should be fit to return in 3-6 months from now.*"

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On the basis of this timeline, the GP anticipated that the Complainant would be in a position to return to work in the period between October 2015 and January 2016.

I identified, at the outset, that the issue to be determined herein is whether, on the basis of an objective assessment of the evidence submitted, the Provider's decision to decline the claim in question was reasonable in the circumstances, adequately supported, and made in accordance with the policy terms and conditions. In the circumstances outlined above, I am not satisfied that this was the case, or that the medical evidence which it obtained and relied upon (without adequately instructing the Consultant as to the Complainant's job specification) was adequate to so support this decision. In my opinion, the flaws identified above, in the obtaining of this medical evidence, caused weaknesses in its subsequent use by the Provider. It may well have been, that had the Provider furnished adequate instructions to the Consultant, the medical evidence obtained might have entitled it to reach the same conclusion that it did. However, at this remove of time, it is simply not possible to now know what the outcome would have been if correct and adequate instructions and information had been given to the Consultant, for the purpose of the independent medical examination. The Complainant is no longer a member of the particular Income Protection Scheme, and it is no longer appropriate or timely to direct the Provider to re-assess the Complainant now, by arranging a further independent medical examination and report. I am also conscious that a considerable period has elapsed since the events giving rise to this complaint and it is not possible to conduct a medical assessment retrospectively.

In those circumstances, bearing in mind the period which has since elapsed, while I do not consider it appropriate to uphold the substantive element of the complaint, nevertheless, having examined all of the evidence before me, and to reflect the Provider's very poor claims handling procedure, I consider it appropriate to partially uphold the complaint and, to mark that finding, I direct the Provider to make a compensatory payment of €3,000.00 to an account of the Complainant's choosing within a period of 35 days of the Complainant's notification of account details to the Provider.

Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is partially upheld, on the grounds prescribed in ***Section 60(2)(g).***

Pursuant to ***Section 60(4)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct that the Respondent Provider make a compensatory payment of €3,000.00 to an account of the Complainant's choosing within a period of 35 days of the Complainant's notification of account details to the Provider.

Pursuant to ***Section 60(6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in ***Section 22*** of the ***Courts Act 1981***, where the amount is not paid within a period of 35 days of the Complainant's notification of account details to the Provider.

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Pursuant to ***Section 60(8)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** the Respondent Provider is now required, not later than 14 days after the period specified above for the implementation of the direction pursuant to Section 60(4), to notify this office in writing of the action taken or proposed to be taken in consequence of the said direction outlined above.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

MARYROSE MCGOVERN
DIRECTOR OF ADJUDICATION AND LEGAL SERVICES

18 January 2018

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—
(a) ensures that—
(i) a complainant shall not be identified by name, address or otherwise,
(ii) a provider shall not be identified by name or address,
and
(b) in accordance with the Data Protection Acts 1988 and 2003.