Decision Ref:	2019-0038
Sector:	Insurance
Product / Service:	Income Protection and Permanent Health
Conduct(s) complained of:	Rejection of claim - did not meet policy definition of disability
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant's Employer is the policyholder of a Group Income Protection Policy with the Company. The Complainant, as an Employee, is an insured person under this policy.

The Complainant's Case

The Complainant commenced employment as an Assembler with his Employer on 12 June 2009; however he has not worked since 30 July 2013. In this regard, he states, as follows:

> *"I was employed by* [my Employer] *since January 2009. I had nerve operation in April 2010 which was unsuccessful. However I was able to return to my normal duties in…June 2010 and had no problem until 2013. I was sent to a specialist. He had me go for scans on my elbow and nerve conduction studies. He then sent me to see a neurologist in Cork. He sent me for scans on my neck and brain. Brain scan was clear. Neck scan showed disc protrusion on to nerve root in neck.* [My Employer] *informed me that I could no longer work there"*.

The Complainant submits that *"I have 3 medical problems: Neck – disc on nerve, Arm – ulnar nerve damage, Arm – arthritis at elbow"* and that he is not fit to return to work.

The Company declined the Complainant's ensuing disability claim in the first instance on 16 September 2014, on review on 27 April 2015 and more recently on review again in 2017.

The Complainant is seeking for the Company to admit his disability claim into payment.

The Complainant's complaint is that the Company wrongly or unfairly declined his disability claim made under his Employer's Group Income Protection Policy.

The Provider's Case

The Complainant's Employer is the policyholder of a Group Income Protection Policy with the Company. The Complainant, as an Employee, is an insured person under this policy. Company records indicate that the Complainant completed a Long Term Disability Claim Form on 30 July 2013, detailing his illness as *"Ulnar Nerve Damage Left Arm/Wrist"*. The Complainant's Employer advised that the Complainant's absence commenced 30 July 2013, and continues to date. The Company notes that as the policy has a 52 week deferred period, which ended on 29 July 2014, the first date for which cover could commence from was 30 July 2014. In this regard, in order for a claim to be payable, the claimant must satisfy the policy definition of disablement, as follows:

> *"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"*.

As part of its assessment of his claim, the Company arranged for the Complainant to attend an independent medical examination with an Occupation Physician, hereafter referred to as Dr F., on 25 August 2014. The Company provided Dr F. with a copy of the Complainant's medical records that it had earlier received from his GP on 18 June 2014 for this assessment. The ensuing report received from Dr F., dated 12 September 2014, provides, as follows:

> "[The Complainant] *tells me that he is not currently on any regular medications. He rarely requires over the counter analgesia …*
>
> *With regards to his thoughts regarding returning to work, he tells me that he could return to work, but he would want to ensure that the duties were going to be safe for him …*
>
> *In my opinion he is fit for work. Prior to returning to work, however, I recommend that an occupational therapist observe him while engaged in work duties so that any required supports can be identified"*.

As a result, the Company was of the opinion that the Complainant did not satisfy the policy definition of disablement and was unable to admit his claim into payment. The Company

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advised the Complainant's Employer as the policyholder of its decision on 16 September 2014.

The Company also advised that if the Complainant was unhappy with this decision, there was an appeal facility and that in order to appeal, the Complainant should provide up to date objective medical evidence to support his appeal by 16 December 2014.

Company records indicate that the Company did not receive any such evidence from the Complainant's own treating doctors, however it did receive on 10 November 2014 a report from the Occupational Health Physician that the Employer referred the Complainant to for assessment on 25 September 2014, hereafter referred to as Dr D.M., dated 30 September 2014 wherein Dr D.M. stated that *"*[The Complainant] *is fit for some work"*. The Complainant's Employer asked the Company to consider this evidence and further review.

In order to reconsider the Complainant's claim, the Company arranged for the Complainant to attend on 24 March 2015 a Functional Capacity Evaluation (FCE) with an Osteopath and Accredited Functional Capacity Assessor, hereafter referred to as Mr D.N. The Company notes that the Functional Capacity Evaluation is a rigorous assessment comprised of various objective tests which evaluate a person's work day tolerances and abilities to perform the duties of their normal occupation. In this regard, the Complainant participated in an upper limb Functional Capacity Evaluation in order to establish his current safe capabilities over an 8-hour day and to determine his ability to return to his normal form of employment as an Assembler on a fulltime basis. The ensuing Functional Capacity Evaluation report received from Mr D.N., dated 24 March 2015 provides, as follows:

> *"*[The Complainant] *states that the barrier preventing a return to work is his ability to use his left upper limb …*
>
> [The Complainant] *demonstrated an ability to lift weights between 10 and 20lbs on a frequent to occasional basis (1-33% of the working day); and 10lbs bilaterally on a frequent basis (34-66% of the working day).*
>
> *Carry* ***Complete*** [The Complainant] *demonstrated an ability to carry 20lbs bilaterally on an occasional, and 10lbs bilaterally on a frequent basis.*
>
> **[The Complainant]** ***is therefore classified for work at the light physical demand level (PDL)*** *…*
>
> *Whilst* [the Complainant] *both reported and demonstrated a significant level of disability as a result of his neck and upper limb conditions, which would appear to prevent him from returning to his normal role as an assembler on a full time basis, the results of the FCE indicate that he performed with poor reliability of effort. This is based on the number of inconsistencies and discrepancies demonstrated by him throughout the assessment…*

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Based in these areas of concern, [the Complainant]*'s above work-day tolerances cannot represent his true functional capabilities, and one therefore must presume that his actual abilities are greater than he was willing to demonstrate during the FCE.*

Bearing in mind [the Complainant]*'s poor reliability of effort during the FCE, together with his symptom exaggeration profile, I am unable to provide a reason for his continued absence from the work-place in his normal role as an assembler"*.

Having carried out a thorough review of the Complainant's claim, the Company remained of the opinion that the Complainant did not satisfy the policy definition of disability and it wrote to the Complainant's Employer on 27 April 2015 to advise of same.

The Company next received additional information from the Complainant's Employer in June 2017 and agreed to reconsider the Complainant's claim again. As a result, the Company arranged for a Jobs Demands Analysis to be carried out at the Complainant's workplace on 11 July 2017 to assess the essential physical and cognitive job demands and tasks associated with the role of Assembler, and to provide a full picture of the Complainant's role in advance of a further Functional Capacity Evaluation.

The detailed results of this Jobs Demands Analysis were made available to Mr D.N., who conducted a full Functional Capacity Evaluation on the Complainant on 26 July 2017, the purpose of this was to explore his physical abilities in addition to restrictions and limitations and compare this to the functional requirements of his own occupation as an Assembler according to the in-depth Jobs Demands Analysis results.

A review of the ensuing Functional Capacity Evaluation report received from Mr D.N., dated 26 July 2017, indicated that the functional abilities demonstrated by the Complainant cannot represent his overall true capabilities and it was concluded therein that his actual abilities are far greater than he was willing to perform during the assessment. As a result, the Complainant's self-perceived exertion levels and demonstrated restriction and limited work-day tolerances during formal testing cannot represent barriers preventing him from returning to his normal role. The Company has based this conclusion on a number of inconsistencies and discrepancies demonstrated by the Complainant throughout the testing. In this regard, the Functional Capacity Evaluation report dated 26 July 2017 provides, for example, as follows:

"Whilst [the Complainant]*'s hands were shaking on inspection of his hands and when his heart rates were being measured on his right hand throughout testing, no evidence of any hand shaking was observed during the grip, pinch, handling or fine dexterity tests …*

There should, in normal circumstances be a consistent correlation between an individual's ratings of perceived exertion and the corresponding heart rates measured following each individual test. However, [the Complainant]*'s perceived exertion levels did not correlate with the heart rates measured in any of the tests*

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> *undertaken, indicating again that there is evidence of symptom exaggeration during testing …*
>
> *I also note that despite the current FCE being undertaken over two year since the previous one, there was no evidence of any significant deterioration on his work-day tolerances as one would expect due to deconditioning. Indeed* [the Complainant]*'s ability to bilaterally grip, bilaterally REG, bilaterally key pinch, bilaterally tip pinch, bilaterally palmar pinch, carry, perform handling activities and perform fine dexterity activities have all increased significantly since the previous assessment".*

Based on the inconsistences and discrepancies detailed in this Functional Capacity Evaluation report, the Company concluded that the Complainant attempted to simulate weakness and disability during the testing.

The Company is satisfied that it has carried out a thorough review of the Complainant's claim and it remains its opinion that the Complainant is fit to carry out the duties of his normal occupation. In order for an income protection claim to be payable, the Complainant must satisfy the policy definition of disablement. The Company notes that the findings of three independent medical examinations show that the Complainant demonstrates a clear ability to work. The most recent Functional Capacity Evaluation found him fit to return to work and fit to meet the physical demands of his job, including the specific demands outlined in the detailed Jobs Demands Analysis carried out on 11 July 2017.

Decision

During the investigation of this complaint by this Office, 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.

In arriving at my Legally Binding Decision 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 am 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 am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

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A Preliminary Decision was issued to the parties 28 June 2018 outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could 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 Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

The following additional submissions were received from the parties:

1. Letter from the Complainant to this office dated 29 June 2018, together with enclosures.

2. E-mail from the Provider to this office dated 23 July 2018.

3. Letter from the Complainant to this office dated 26 July 2018.

4. E-mail from the Provider to this office dated 7 August 2018.

5. Letter from the Complainant to this office (received 4 December 2018), together with attachment.

6. Letter from the Provider to this office dated 13 December 2018.

7. Letter from the Complainant to this office (received 17 January 2019).

8. Letter from the Provider to this office dated 29 January 2019, together with attachments.

Having considered these submissions, and all the evidence, I set out below my final determination.

There were no significant points of fact or law raised in the post Preliminary Decision submissions.

In his submission of 29 June 2018, the Complainant refers to four medical reports.

One was from his GP dated 14 December 2015 which had previously been considered.

A second report from Dr. K which states that the Complainant would "*never be able to work in the construction industry*".

The third report was from the Social Welfare Appeals Officer. This was neither new nor an error of fact or law.

Finally in his submission the Complainant furnished a new report from an Occupational Therapist. This report was completed and supplied some four years after the first

evaluation. It was not available to the Provider at either decision or appeal stage and it would therefore not be appropriate for me to take it into account as my role is to decide if the Provider's conduct in arriving at its decision, based on the medical information available to it at the time, was reasonable.

The complaint at hand is, in essence, that the Company wrongly or unfairly declined the Complainant's disability claim made under his Employer's Group Income Protection Policy. In this regard, the Company declined the Complainant's disability claim in the first instance on 16 September 2014, on review on 27 April 2015 and more recently on review again in 2017. The issue to be decided is whether the Company acted reasonably in assessing and declining the claim.

The Complainant's Employer is the policyholder of a Group Income Protection Policy with the Company. The Complainant, as an Employee, is an insured person under this policy. The Complainant commenced employment as an Assembler with his Employer on 12 June 2009; however he has not worked since 30 July 2013.

The Complainant completed a Long Term Disability Claim Form on 30 July 2013, detailing his illness as *"Ulnar Nerve Damage Left Arm/Wrist"*. The Complainant's Employer has confirmed that the Complainant's absence commenced 30 July 2013, and continues to date. As the Company's Group Income Protection Policy in question has a 52 week deferred period, which ended on 29 July 2014, the first date for which cover could commence from was 30 July 2014. In this regard, in order for a claim to be payable, the claimant must satisfy the policy definition of disablement. In this regard, the Policy Conditions of the Group Income Protection Policy booklet defines 'Disability' at pg.4, as follows:

> *"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"*.

I note from the documentary evidence before me that as part of its assessment of his claim, the Company arranged for the Complainant to attend an independent medical examination with an Occupational Physician, Dr F., on 25 August 2014.

The ensuing report received from Dr F., dated 12 September 2014, provides, as follows:

> *"**EXAMINATION:** Gait was normal.* [The Complainant] *was emotional at times, but remained composed throughout.*
>
> *He maintained good eye contact and there was no evidence of a flattened affect or manner.* [The Complainant] *is naturally left handed but was taught to use his right hand predominately as a child.*
>
> *General examination: … There was evidence of a scar on the left elbow consistent with previous surgery and a small healed scar on his left hand (between thumb and*

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2nd digit) from a previous accident. Cardiovascular, respiratory, abdominal examinations were normal. Neurological examination was normal with power 5/5 throughout. Phalen and Tinel tests were negative at the left wrist. C-spine movements were limited, i.e. lateral flexion and rotation movements reduced by approximately 50%. On examination of his elbow, flexion was limited to approximately 80 degrees and extension is limited to approximately 160 degrees. There is a fine tremor in both hands. Left hand strength is 5/5, i.e. finger abduction, finger adduction, thumb opposition, thumb flexion, thumb extension, thumb adduction, thumb abduction; there is no muscle wasting …

This 52-year-old gentleman has been absent from work since August 2013 as a result of neck pain and left hand paraesthesia. He is considering returning to work, although he has reasonable concerns.

In my opinion he is fit for work. Prior to returning to work, however, I recommend that an occupational therapist observe him while engaged in work duties so that any required supports can be identified".

I note that as a result the Company concluded that the Complainant did not satisfy the policy definition of disablement and declined to admit his claim into payment. I note that the Company advised the Complainant's Employer as the policyholder of this decision on 16 September 2014 and it also advised that if the Complainant was unhappy with this decision, there was an appeal facility and that in order to appeal, the Complainant should provide up to date objective medical evidence to support his appeal by 16 December 2014.

I note from the documentary evidence before me that the Complainant's Employer requested the Company to review its decision and submitted to it on 10 November 2014 a report from Dr D.M., the Occupational Health Physician that the Employer referred the Complainant to for assessment on 25 September 2014, dated 30 September 2014, which provides, as follows:

"CONCLUSION

[The Complainant] *has reduced function of his left upper limb. If you have suitable employment to facilitate him at work, I would be happy to review and recommend on his fitness for such a role.*

I acknowledge that typically employment work duties are planned to be balanced where there is equal use of both upper limbs in an effort to protect the individual at work. However [the Complainant] *requires a role that involves significant reduced use of a left upper limb to prevent symptoms hindering his wellbeing.*

[The Complainant] *is fit for some work. I described in this report that likely work restrictions necessary to ensure that individual remains well at work.* [The Complainant]*'s restrictions in the workplace are likely to be long-term".*

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As a result, the Company arranged for the Complainant to attend on 24 March 2015 a Functional Capacity Evaluation with Mr D.N., an Osteopath and Accredited Functional Capacity Assessor. I note that the Company did so as it states that a Functional Capacity Evaluation is a rigorous assessment comprised of various objective tests which evaluate a person's work day tolerances and abilities to perform the duties of their normal occupation and that the Complainant participated in an upper limb Functional Capacity Evaluation in order to establish his current safe capabilities over an 8-hour day and to determine his ability to return to his normal form of employment as an Assembler on a fulltime basis.

I note that the ensuing Functional Capacity Evaluation report received from Mr D.N., dated 24 March 2015 provides, as follows:

> "[The Complainant] *states that the barrier preventing a return to work is his ability to use his left upper limb …*
>
> [The Complainant] *demonstrated an ability to life weights between 10 and 20lbs on a frequent to occasional basis (1-33% of the working day); and 10lbs bilaterally on a frequent basis (34-66% of the working day).*
>
> *Carry* ***Complete*** [The Complainant] *demonstrated an ability to carry 20lbs bilaterally on an occasional, and 10lbs bilaterally on a frequent basis.*
>
> **[The Complainant]** ***is therefore classified for work at the light physical demand level (PDL)*** *…*
>
> *Whilst* [the Complainant] *both reported and demonstrated a significant level of disability as a result of his neck and upper limb conditions, which would appear to prevent him from returning to his normal role as an assembler on a full time basis, the results of the FCE indicate that he performed with poor reliability of effort. This is based on the number of inconsistencies and discrepancies demonstrated by him throughout the assessment.*
>
> *These areas of concern are as follows:*
>
> - [The Complainant] *disclosed in the pre-test questionnaires and clinical history inabilities to mop, do some gardening, undertake some DIY, use a keyboard with his left hand, use cutlery in the left hand, use a mobile or telephone in the left hand, and tie up shoelaces; and with respect to his left upper limb symptoms, that the pain, numbness and tingling severely limits use of the hand; he can only partially use his hand for personal care;*
>
>   *He is unable to write or type with the left hand; he can only do about half his normal work;* [the Complainant] *can only drive for 10 minutes or less; and can only do the minimum of housework. However, his level of function during the FCE testing would indicate far greater capabilities than he self-perceives them to be*

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- [The Complainant] *demonstrated markedly reduced ranges of cervical flexion and bilateral rotation on formal testing. These ranges of movement were observed to increase significantly on distraction testing*

- *He demonstrated a markedly reduced range of left wrist dorsi-flexion during formal testing. This range of movement increased on distraction*

- *He demonstrated a markedly reduced range of left elbow flexion during formal testing. This range of movement again increased on distraction testing*

- [The Complainant] *demonstrated a markedly reduced range of left shoulder flexion during formal testing. This range of movement again increased on distraction*

- *There was a poor correlation between his self-perceived exertion ratings and corresponding heart rates in a number of tests undertaken, indicating that there is evidence of some symptom exaggeration present*

- *The coefficients of variation (CV) in the left tip pinch, left REG test, and left grip position 4 test, were far higher than expected and represent invalid test results*

- *Please note the non-bell shaped curves in the right and left hands during the 5-position grip strength tests, representing further invalid test results*

- *The REG force in the right hand greatly exceeded the corresponding 5-posiition grip strength force representing an invalid test result.*

Based in these areas of concern, [the Complainant]*'s above work-day tolerances cannot represent his true functional capabilities, and one therefore must presume that his actual abilities are greater than he was willing to demonstrate during the FCE.*

Bearing in mind [the Complainant]*'s poor reliability of effort during the FCE, together with his symptom exaggeration profile, I am unable to provide a reason for his continued absence from the work-place in his normal role as an assembler"*.

I note that having carried out a review of the Complainant's claim, the Company remained of the opinion that the Complainant did not satisfy the policy definition of disability and it wrote to the Complainant's Employer on 27 April 2015 to advise of same.

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I accept that it was reasonable for the Company to conclude from the contents of this Functional Capacity Evaluation report and from the report of Dr D.M., and the report from the Occupational Health Physician that the Employer referred the Complainant to for assessment on 25 September 2014, which concluded that *"*[The Complainant] *is fit for some work"*, that the Complainant did not meet the policy definition of disablement and thus decline the Complainant's claim.

I note that the Complainant later submitted a report from Dr P.K., a Consultant Neurologist and Clinical Neurophysiologist, dated 20 January 2017, which provides, as follows:

> *"Many thanks for referring* [the Complainant] *back for neurological consultation. He presents with a 6 to 8 week history of paraesthesia in both hands. This is primarily at night time and it can be in either hands. He says the whole hand will go numb and tingly but he is able to shake it out. He does not think it is due to the way he is lying. In addition he had a couple of episodes where he felt a tingly sensation across his lower back but they seem to be transient and has not recurred. More recently he has noticed that sometimes at night he wakes up with a pain in his left foot. He does have neck pain on restricted movements around his neck.*
>
> ***Examination***
>
> *On examination today he had no wasting or fasciculation. Tone was normal. He had a postural tremor of both hands. Power was normal throughout. I had difficulty eliciting his triceps reflex on the left but otherwise reflexes were present. On sensory exam he described reduced pinprick sensation in the C5, C6 distribution in the left arm.*
>
> *He had nerve conduction studies which were apparently unremarkable, I need to check this.*
>
> ***Summary***
>
> *In summary, he presents with a history of paraesthesia in his hands over the last couple of months. These are mainly at night. Whilst the symptoms were quite suggestive of carpal tunnel syndrome his nerve conduction studies showed normal median nerve responses. There is a likely probability these symptoms are coming from his neck. Previous scans did show some degenerative change at C5/C6, this may be progressed in the meantime. I will organise a repeat MRI of his cervical spine".*

In addition, the Complainant also submitted a report dated 2 May 2017 from Dr D.M., the Occupational Health Physician that the Employer referred the Complainant to for assessment on 2 May 2017, which provides, as follows:

> *"This man holds the position of operator …*

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This man last attended for medical review in 2015. I felt he was unfit for normal work duties at the time. I recommended some restrictions to facilitate a return to work in a protected role if available. I understand, no suitable role was identified. He has remained absent from work since his last medical review in 2015.

This man attended today for a follow up medical review. Regrettably, his health issue has deteriorated further since his last medical review. He has less function today than when last reviewed in 2015. I feel today, his ability to return to work has been further impaired.

I feel this man is not fit to return to work on normal/full duties.

I feel this man will remain permanently unfit for work in a normal operator role.

I anticipate this man will not recover to return to his normal work duties as an operator indefinitely"

Upon receipt of this additional documentation, the Company agreed to reconsider the Complainant's claim once again.

I note that the Company arranged for an in-depth Jobs Demands Analysis to be carried out at the Complainant's workplace on 11 July 2017 to assess the essential physical and cognitive job demands and tasks associated with the role of Assembler, and to provide a full picture of the Complainant's role in advance of a further Functional Capacity Evaluation. The detailed results of this Jobs Demands Analysis were made available to Mr D.N., who conducted a full Functional Capacity Evaluation on the Complainant on 26 July 2017, the purpose of this was to explore his physical abilities in addition to restrictions and limitations and compare this to the functional requirements of his own occupation as an Assembler according to the in-depth Jobs Demands Analysis results.

In this regard, the Functional Capacity Evaluation report of Mr D.N., dated 26 July 2017 provides, as follows:

"8. Review

8.1 It is possible to gain an understanding of sincerity of effort within each test performed during the assessments by the results obtained, in addition to comparison against verbal and non-verbal information provided by [the Complainant] *during the assessment.*

8.2 Where the individual has provided consistent and reliable effort during the assessment, the demonstrated work-day tolerances represent a true reflection of the physical capabilities, and the results can be used to determine through work-focused extrapolated peer-reviewed and published standards, the individual's fitness to return to the essential and material demands of their normal role.

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8.3 Conversely, in situations where an individual has provided poor reliability of effort and there is evidence of symptom exaggeration, it is not possible to comment on the fitness to work, as the true capabilities have not been performed, unless the minimum function demonstrated in the assessment already meets or exceeds the physical demands of the job.

8.4 A review of the FCE results indicate that the functional abilities demonstrated by [the Complainant] *cannot represent his overall true capabilities and I can only therefore conclude that his actual abilities are far greater than he was willing to perform during the assessment. His self-perceived exertion levels, and demonstrated restricted and limited work-day tolerances during formal testing therefore cannot represent barriers preventing him from returning to his normal role. This conclusion is based on the number of inconsistencies and discrepancies demonstrated by* [the Complainant] *throughout testing.*

8.5 These areas of concern are listed in detail within the Conclusion and Opinion section below, and can be summarised as follows:

- *A poor correlation between his disclosed level of disabilities in his neck, elbows, and hands and his demonstrated levels of function during the FCE*
- *Lack of organic signs (sweating, breathlessness, and constant agitation) normally associated with the levels of exertion reported by* [the Complainant]
- *Lack of correlation between* [the Complainant]*'s reported exertion levels versus the heart rates measured*
- *Extended duration grip strength test results indicating poor effort sincerity in both hands*
- *Grip strength of short duration and alternate hands indicating poor effort sincerity*
- *Poor correlations between his demonstrated reductions in cervical flexion, extension and bilateral rotation and his observed ranges when not directly tested*
- *Poor correlations between his demonstrated reductions in bilateral shoulder flexion and internal rotation and his observed ranges when not directly tested*
- *Poor correlations between his demonstrated reductions in bilateral cervical flexion, extension and bilateral elbow supination and his observed ranges when not directly tested*
- *Poor correlation between his demonstrating reductions in bilateral wrist dorsi-flexion and his observed ranger when not directly tested*

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9. Conclusions and opinion

9.1 [The Complainant] *undertook an FCE assessment on 26 July 2017 over a 3 hour period.*

9.2 As noted above, whilst [the Complainant] *was provided an opportunity to demonstrate his limitations and restrictions during the FCE, the functional abilities performed by him during the assessment cannot represent his true overall capabilities.*

9.3 This conclusion is based on the following inconsistencies and discrepancies demonstrated by him during the assessment:

- [The Complainant] *reported in the clinical history taking that his left arm use was "gone" and that his multiple conditions have had a significant impact on his capabilities to undertake normal activities of daily living. Furthermore, he disclosed in the Dallas Pain Questionnaire restrictions to take personal care of himself, lift, sleep, socialise, and travel; and inabilities to walk, stand, or perform his normal working activities. In the Wrist/Hand Disability Index questionnaire,* [the Complainant] *reports constant numbness and tingling which moderately limits use of the hand, he frequently drops even light objects due to weakness, he is able to write or type only up to 10 minutes, he can hardly do any work at all, he can only drive for 10 minutes or less; he can only do the minimum of housework; and he cannot undertake any recreational* [activities]. *In the Neck Disability Index questionnaire, he reported that he requires some help with personal care; he can hardly do any work at all; he cannot drive as long as he likes due to moderate pain; and he can hardly engage in any recreational activities. However, a review of his actual capabilities…as performed during both the FCE direct and indirect tests indicates that he should not have any difficulties using his left upper limb, hand or neck to perform any activities*

- [The Complainant] *reported moderate to high exertion levels during testing. However, it is noted that he was able to converse normally at all times and there were no organic signs (sweating, breathlessness, and constant agitation) normally associated with these levels of exertion, thus indicating evidence of symptom exaggeration during FCE testing*

- *There should, in normal circumstances be a consistent correlation between an individual's ratings of perceived exertion and the corresponding heart rates measured following each individual test. However,* [the Complainant]*'s perceived exertion levels did not correlate with the heart rates measured in any of the tests undertaken, indicating again that there is evidence of symptom exaggeration during testing*

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- [The Complainant] *demonstrated a significantly reduced range of cervical flexion during direct, formal testing. However, normal and sustained flexion was observed when you read and completed the pre- and post-test questionnaires and pain and exhaustion scales, and whilst he looked down during the shoulder, elbow and wrist inclinometry, power, grip, pinch handling, fine dexterity, walking, balancing, stooping, floor to knuckle lift, and carry tests, all of which he performed without any apparent difficulty.*

  This indicates that [the Complainant]*'s actual range of movement is far greater than he was willing to demonstrate on direct testing*

- [The Complainant] *demonstrated a significantly reduced range of cervical extension during direct, formal testing. However, normal extension was observed during the knuckle to overhead lift. This again indicates that* [the Complainant]*'s actual range of movement is far greater than he was willing to demonstrate on direct testing*

- [The Complainant] *demonstrated significantly reduced ranges of bilateral cervical rotation during direct, formal testing. However, normal and sustained bilateral rotation was observed when he looked around during the shoulder, elbow and wrist inclinometry tests. This indicates that* [the Complainant]*'s actual ranges of movement are far greater than he was willing to demonstrate on direct testing*

- *He demonstrated significantly reduced ranges of bilateral shoulder flexion during direct, formal testing. However, normal bilateral shoulder flexion was observed during the reaching up tests. This indicates that* [the Complainant]*'s actual ranges of movement are far greater than he was willing to demonstrate and direct testing*

- *He demonstrated significantly reduced range of bilateral shoulder internal rotation during direct, formal testing. However, normal bilateral shoulder internal flexion was observed during the handling tests. This indicates that* [the Complainant]*'s actual ranges of movement are far greater than he was willing to demonstrate on direct testing*

- *He demonstrated reduced ranges of bilateral elbow supination during direct, formal testing. However, normal bilateral elbow supination was observed during that carry test. This indicates that* [the Complainant]*'s actual ranges of movement are far greater than he was willing to demonstrate on direct testing*

- [The Complainant] *demonstrated reduced ranges of bilateral wrist dorsi-flexion during direct, formal testing. However, normal bilateral wrist dorsi-flexion was observed during the push and pull power tests, tip and palmar pinch tests, and when turning the dexterity box around.*

/Cont'd…

This indicates that [the Complainant]*'s actual ranges of movement are far greater than he was is willing to demonstrate on direct testing*

- *Whilst* [the Complainant]*'s hands were shaking on inspection of his hands and when his heart rates were being measured on his right hand throughout testing, no evidence of any hand shaking was observed during the grip, pinch, handling or fine dexterity tests*

- *Despite* [the Complainant] *reporting that his left upper limb use was "gone", there was no evidence of any muscle wasting in this limb, indicating that his actually left limb use is far greater than he disclosed*

- *The 5-position grip strength testing is designed to examine grip strength but the results of these tests are also able to determine consistency and sincerity of effort. In normal circumstances where there is sincerity of effort, one would expect to see a bell-shaped graph during 5-position grip strength testing. However, in* [the Complainant]*'s case, the graphs were non-bell shaped in both hands indicating that he performed with submaximal effort and an attempt to simulate weakness. The results of the left and right 5-position grip strength tests should therefore be viewed as invalid and is further indicative of his ability to function to great extent than he was prepared to demonstrate on direct testing*

- *The REG forces should in normal circumstances be lower than the corresponding 5-position grip strength forces. This was however not the case in the left and right hands and again indicates that he performed with submaximal effort and an attempt to simulate weakness during the left and right 5-position grip tests*

9.4 Based on the above inconsistencies and discrepancies, it is concluded that [the Complainant] *attempted to simulate weakness and disability during FCE testing, and therefore his self-perceived exertion levels, and demonstrated restricted and limited physical work-day tolerances during formal testing cannot be viewed as barriers preventing him from returning to his normal role.*

9.5 Notwithstanding the above conclusions, a comparison between [the Complainant]*'s (very minimum) work-day tolerances during the FCE and the in-depth Job Demands Analysis indicate that he is fit to return to his normal role on a full-time basis.*

9.6 You will note that [the Complainant] *did not meet the demands for neck and balancing frequencies required to return to work. I have dealt with his normal ranges of cervical flexion, extension, and bilateral rotation in section 9.3 above.*

/Cont'd…

> *Furthermore,* [the Complainant] *demonstrated an inability to balance on any more than occasional basis during formal testing. However, it is concluded that based on the results of this test in addition to ankle dorsi- and plantar-flexion power testing, he should have no difficulty balancing on a frequent basis at the very least.*
>
> *9.7 I also note that despite the current FCE being undertaken over two year since the previous one, there was no evidence of any significant deterioration on his work-day tolerances as one would expect due to deconditioning. Indeed* [the Complainant]*'s ability to bilaterally grip, bilaterally REG, bilaterally key pinch, bilaterally tip pinch, bilaterally palmar pinch, carry, perform handling activities and perform fine dexterity activities have all increased significantly since the previous assessment".*

I note that the Company concluded, based on the inconsistences and discrepancies detailed in this Functional Capacity Evaluation report, that the Complainant had attempted to simulate weakness and disability during the testing. As a result, the Company states that it is satisfied that it has carried out a thorough review of the Complainant's claim and it remains its opinion that the Complainant is fit to carry out the duties of his normal occupation.

In this regard, I note that the Complainant, in his correspondence to this Office received 4 October 2017, submits, as follows:

> *"I am writing to you to outline results of F.C.E. carried out by* [Mr. D.N.] *on 26-07-2017.*
>
> *After agreeing to undergo medical examination by* [the Company] *I was somewhat unhappy to hear that the same doctor would be attending and asked* [the Company] *if there was another doctor they could use. They told me that* [Mr D.N.] *was the only doctor they used …*
>
> *On arriving at the venue at 3.00pm* [Mr D.N.] *ordered coffee. He offered me one. I said I had brought water. I did not think that this was appropriate and it unsettled me as he could have had his coffee beforehand.*
>
> *I then asked him if he could give me any explanation as to why my previous test was deemed invalid. I asked him if he could let me know if he was not happy with anything I was doing and if so let me know. He seemed to be taken aback by me and made no reply. I told him I did not want a repeat of invalid result and was prepared to put in my best effort.*
>
> [Mr D.N.] *took my blood pressure. I asked how it was. He told me it was good. He did not tell me the reading. I was not happy to find out that it was 154/89 as this is a bit high. In my opinion it should have been monitored during the test. At breaks I took notes myself and now I wish to outline what I am not in agreement with.*

/Cont'd…

I note that [Mr D.N.] *categorises me to be dominant right handed. I was born left and made to change over. Social Welfare Doctor had told me that if born left dominant one cannot become truly right handed …*

[Mr D.N.] *stated that nerve conduction study showed no abnormality at left elbow or wrist. This is not correct …*

[Mr D.N.] *states…I sat on an office chair for a period of 70 minutes which is misleading as this 70 minutes is divided into firstly 10 approx. completing pre-test questionnaires. Then approx. 5 mins sitting 5 mins standing for remainder of test. In other words it would appear 70 minutes sitting, 65 minutes standing. At work I would have to sit for 30-40 minutes continuously and I have previously stated I can sit or stand for no more than 15 minutes before it becomes an issue.*

I also note [Mr D.N.] *states that assessment was carried out over a 3 hour period …*

I arrived at 3pm for test.

I left at 5.15pm after test.

I had 3 10 minute breaks.

My test time was 2 hours 15 minutes [minus] *30 minute break.*

I also note [Mr D.N.] *states…standing 70 minutes, sitting 63 minutes. Total 133 = 2 hours 13 minutes, so 3 hours is incorrect.*

[Mr D.N.] *also questions the tremor in my hands…I have been seen by many specialists and sent for brain scan by* [named Doctor in Cork]. *If I did not have this problem, he would not have done this.*

[Mr D.N.] *states that I performed with submaximal effort. This is not true and the REG force should in normal circumstances, maybe circumstances are abnormal based on my left right dominance.*

He compares previous test with present test. I have always claimed I was not fit to fully participate in first test and his comparisons back my claim.

[Mr D.N.] *reports no evidence of muscle wasting in left limb. I have enclosed photographs and they will show this to be untrue and why* [my named Doctor] *is so concerned.*

In addition, I also wish to comment on the fact that lesser effort tests were done over the first hour. Harder tests were saved until last and on last 4 tests a 10 minute break between tests.

/Cont'd…

I conclude that this is an attempt to distort results by recording lower heart rate. I also commented on the crunch sound in my left elbow. I note he did not mention this report.

Before last test I had a dizzy spell I sometimes get when I stand up too fast. I am told by my GP that this can happen while on blood pressure tablets. I noted this to [Mr D.N.]*, also not mentioned in his report.*

I asked him to examine my shoulder as [my named Doctor] *was concerned with this. Although he felt my shoulder and back, he did not ask me to remove my t-shirt and didn't seem to be of concern.*

I believe [Mr D.N.]*'s report to be unreliable an cannot be trusted … I believe he is used by insurance companies as he says what they need him to say".*

In addition, in his correspondence to this Office dated 9 October 2017, the Complainant further submits, as follows:

"I attended [Dr F.] *on 25-08-2014. At that time I had not considered the possibility of not returning to work so I did offer an opinion that I wished to return to protected duties. This has not happened.*

I take issue with [Dr F.]*'s statement saying I had a small healed scar on my left hand…I had an accident in New York in early 90s and received 9 internal stitches to pull muscle together as I had cut some away completely and 10 stitches to close this has left me with limited use of my thumb extension between index finger and thumb.*

L hand 5¾ inch
R hand 7¼ inch

On report dated 12 September 2014 she goes into great detail as to the condition and ability to use thumb and finger on left hand. I contest this as being an accurate account.

[Dr F.] *also called me about 2 weeks later to know if I knew the purpose of medical as she informed me that she had no formal referral for me. This arose my suspicions of how much medical information she based her exam on. As you will see from her report that I supplied some reports to her and I am not happy about this as some scans and tests I did not have at that time to give her. My GP…advises me that without formal referral she would not have all medical records and this report must have been undertaken without proper and full medical disclosure. Therefore the report is questionable.*

Moving on to [Mr D.N.]*'s first report. I have already explained previously that I was not able to fully engage in this test as I was worried about my health.*

/Cont'd…

Blood Pressure	*HIGH*
Neck Disc	*PAIN*
Arm Elbow	*PAIN*

My own GP doubled my blood pressure tablet the week after this test and had me attend pharmacy 2 times weekly for monitoring.

I attended [Dr D.M. (the Occupational Health Physician that the Employer referred the Complainant to)] *about two weeks later. He was not prepared to assess me as he told me I was unwell and he would see me later on when I had blood pressure under control.*

I saw [Dr D.M.] *again on 25th of Sept 2014 when he put 13 restrictions on me before work.*

I also wish to note [Mr D.N.] *states*

52 tears old right handed	*24-03-2015*
Not under care of specialist	*24-03-2015*

Not accurate as I was attending [named Doctor] *Cork.*

In summing up I wish to bring to your attention that GP history held by [the Company] *only go to 17-02-2014. They are 3½ years with no medical records in which a lot has happened between me and my GP.*

I also wish to note that my GP was not the one who sent me for scans between 2013 and 2017 and only had records I supplied to him as I got them …

I take issue also with [the Company] *referring to* [Dr D.M.] *as* [my Employer's] *Occupational Health Doctor.* [Dr D.M.] *is a…doctor who was brought to* [the Employer] *to conduct independent examination. He tells me he has not sided with anyone and the account he gives is fair and honest.*

Having received all documents from [the Company] *I do not see much of anything new in them. A lot of charts and graphs computer produced and depending on information put into computer being fair and accurate which only* [Mr D.N.] *can vouch for and considering what I have already sent you on his report of 26-07-2017 I believe he cannot be entirely honest.*

Also I note [Mr D.N.] *did not mention my left thumb restriction in either of his reports and this certainly would affect results of most of his tests.*

/Cont'd…

On 25 August 2015 I received a letter from [my Employer] *stating that following review they had no role available to satisfy current restrictions. I also note that* [my Employer] *sent me home from restricted work. It was not my choice".*

Furthermore, in his correspondence to this Office dated 6 November 2017, the Complainant submits, as follows:

"I attended my GP last Friday and he had a copy of my latest F.C.E. Report. He informed me that this cannot be used on my medical history as when he checked [Mr D.A.] *is not a registered medical practitioner.*

He offered me F.C.E. report. I already had one. He said he would shred it as it is not of any value to him. He then informed me that [Mr D.A.] *is in fact Director at* [a named Health Assessor firm] *and that it is his opinion that test is therefore not dependable as* [Mr D.A.] *has his company's interest to look after".*

I note that in its correspondence to this Office dated 5 December 2017, the Company submits, as follows:

"The Functional Capacity Evaluation (FCE) is not a medical assessment. A functional Capacity Evaluation (FCE) is a comprehensive battery of performance-based tests that objectively measure the individual's current level of function and ability to perform work-related tasks.

The FCE protocol was developed in conjunction with, and validated by both the Virginia Commonwealth Medical School and William and Mary University in the USA. Each individual objective component within the protocol has been extensively researched and evidenced-based peer reviewed, ensuring a high sensitivity to scientific basis, validity, and extrapolations for fitness to work determination. Standardization of the protocol ensures the elimination of variability and assessor bias.

The FCE is a widely recognised assessment used throughout insurance industry. This assessment was carried out by [Mr D.A.] *who is an Osteopath and Functional Capacity Assessor.*

The presence of an illness alone is not of paramount important to [the Company] *as medical diagnosis does not automatically equate to work disability.*

We are not disputing that [the Complainant] *has a verified medical condition. However, the FCE is a very detailed assessment lasting 3-4 hours which determines an individual's functional ability to work even in the presence of an illness or injury.*

/Cont'd…

> [Mr D.A.] *confirmed that the abilities demonstrated by* [the Complainant] *throughout both FCE's cannot demonstrate his true actual capabilities. His self-perceived exertion levels, and demonstrated restricted and limited work-day tolerances during formal testing therefore cannot represent barriers preventing him from returning to his normal role.*
>
> *This was based on a number of inconsistencies and discrepancies during the assessment and it questions the level of genuine effort* [the Complainant] *gave throughout the FCE's. As a result,* [the Company] *felt it could not reach any other conclusions".*

I note from the documentary evidence before me that the Company has now assessed the Complainant's claim on three separate occasions, in 2014, in 2015 and in 2017. As part of its most recent assessment, I note that the Company arranged for a comprehensive Jobs Demands Analysis to be carried out at the Complainant's workplace on 11 July 2017 to assess the essential physical and cognitive job demands and tasks associated with the role of Assembler, and to provide a full picture of the Complainant's role in advance of a further Functional Capacity Evaluation. The results of this Jobs Demands Analysis were made available to Mr D.N., who conducted a Functional Capacity Evaluation with the Complainant on 26 July 2017, the purpose of which was to explore his physical abilities in addition to restrictions and limitations and compare this to the functional requirements of his own occupation as an Assembler according to the in-depth Jobs Demands Analysis results.

I have considered the contents of all the reports of the examinations as to the Complainant's fitness to return to work provided to the Company as part of its assessment of the Complainant's claim, as well as the concerns the Complainant himself has raised in respect of the manner in which some of these examinations were conducted.

In that regard, the Complainant has called into question the objectivity of the people who carried out some of the assessments. This is not a matter on which this Office will adjudicate. If the Complainant has a complaint in relation to those persons, it should be made to another appropriate forum.

It is not disputed that the Complainant has medical conditions that cause him difficulty. The issue to be decided is whether the Provider acted reasonably in deciding whether or not he met the definition in the policy.

Having considered the weight of the objective evidence before it, I accept that it was reasonable for the Company to conclude that the Complainant did not satisfy the policy definition of disablement and that in declining the Complainant's claim the Company acted in accordance with the terms and conditions of the policy.

Accordingly, I accept that the Company administered the Complainant's policy in accordance with its terms and conditions and I do not therefore uphold this complaint.

/Cont'd…

<u>Conclusion</u>

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is rejected.

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.

GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

28 February 2019

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)* ensures compliance with the Data Protection Regulation and *the Data Protection Act 2018.