



<u>Decision Ref:</u>	2019-0092
<u>Sector:</u>	Insurance
<u>Product / Service:</u>	Income Protection and Permanent Health
<u>Conduct(s) complained of:</u>	Rejection of claim - fit to return to work
<u>Outcome:</u>	Upheld

**LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

Background

The Complainant, now a retired Civil Servant, was a member of a Group Income Protection Insurance scheme. The policyholder is a Trade Union and members of this Trade Union can opt to join the scheme. The Company was the underwriter of this scheme from 2002 until May 2015 and again since 1 October 2018 (following a recent 3-yearly review).

The Complainant's Case

The Complainant was diagnosed with Scheuermann's disease in and around November 2006, resulting in her undergoing spinal fusion surgery in 2008.

The Complainant was medically certified as unfit for work on 7 February 2011 as she was at that time *"awaiting a second spinal operation"* and she submitted an income protection claim to the Company in March 2011. In this regard, the Complainant's GP, Dr C. S., completed an income protection insurance GP claim form on 2 March 2011 advising that the Complainant *"has a diagnosis of Scheuermann's disease...plans to perform spinal surgery at the end of this month. She will be in hospital for one to two weeks. Recovery following this will require analgesia and physiotherapy and may take several months"*. The Company admitted the Complainant's income protection claim from 7 February 2011.

The Complainant officially retired from her employment on medical grounds on 15 February 2013.

As part of a review of her claim, the Company arranged for the Complainant to attend for an independent medical examination with Dr D. G., Specialist in Occupational Health on 20 January 2014 and for an independent functional capacity evaluation with Ms A. S., Specialist Chartered Physiotherapist in Occupational Health and Ergonomics and a Functional Capacity Evaluator, on 9 June 2014. Based on the ensuing reports received, the Company ceased payment of the Complainant's claim with effect from 21 November 2014.

In this regard, the Complainant sets out her complaint, as follows:

"I had paid into the...income continuance plan with [the Company] for many years, without any previous health problems. After approximately 6 years of paying into the scheme I developed Scheuermann's Disease. The symptoms of this disease increased quite rapidly, culmination in two major bouts of surgery involving the insertion of titanium rods in my back to halt the curvature of my spine. Although the surgery successfully halted the curvature, ongoing issues with pain meant it was impossible for me to sit in the same place for prolonged periods. I also was unable to complete various simple tasks without causing major pain. After the second bout of surgery in 2011 it was considered unsuccessful and the prognosis deemed uncertain. It was decided at this point that I would retire on medical grounds...[The Company] agreed at this point that I qualified for income continuance in line with all normal qualification procedures. There was a general acceptance on all sides that the income continuance would continue indefinitely. As a result of the negotiations I made the decision to retire on medical grounds. I was officially retired on medical grounds on 15/02/2013.

In 2014 I was asked to attend a functional capacity evaluation by [the Company]. I did so and completed as much of the test as I could. I was completely incapacitated the following day however there was no follow up assessment by [the Company] to assess my physical wellbeing after taking the test. Shortly afterwards on 20/10/2014 I received notification that [the Company was terminating] my payments from them and that the final payment would be made the following month on 24/11/2014. I appealed this decision unsuccessfully with them. [I] present medical evidence including evidence that I had suffered major depression for the first time in my life as a result of ongoing pain management issues. I also cast doubt on the ability of the [functional capacity evaluation] test to decide my ability to work considering that it was quite obvious that my major problem was not undertaking menial tasks but the reaction subsequently to having undertaken these tasks repeatedly resulting in [not] being able to function normally for several days afterwards.

I have not been paid by [the Company] since November 2014. I am still in major pain and regularly attend pain management appointments at the [Location Redacted] Hospital. I was admitted to [a hospital] on 6/10/2015 following a suicide attempt. I remained in hospital for over two weeks and was diagnosed with severe depression.

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I am currently attending the day hospital at [a hospital] 5 days a week as an outpatient.

I believe that [the Company] has completely ignored [its] obligations to me when it is quite clear that I have been unable to work. I had never had back problems or suffered with depression prior to the discovery of my Scheuermann's disease. My illness is a major health problem and [the Company] have responded to this by assessing me and deeming me fit to return to work with only one month's payments. However, one year later, it is quite obvious that I am unable to work, I believe [the Company] have walked away from their responsibility with regard to my insurance policy".

In addition, in her email to this Office dated 4 January 2016, the Complainant submits, as follows:

"With regard to meeting an occupational therapist, as part of my original appeal to [the Company] I questioned the validity of the Functional Capacity Evaluation they carried out on me in determining my ability to go to work every day. Undertaking this test one time in a clinical setting as opposed to every day life where a consistent level of performance is necessary is not useful in my case. My major problems are the effect that every day tasks have on my health. Two hours gardening would leave me in bed for the next 24 hours although I would be able to do the gardening in the first place. I would not be able to sit at an office desk for any amount of time. I can't stand in one place for long. Any repetitive tasks, although achievable by me, have a knock on effect a number of hours later. The spinal fusion has stopped my spine bending however, as is normal in my case, I am left with many serious back related issues as a result. I am quite willing to attend the examination but I would like to place on record that I do not think a FCE examination has any real usefulness in my case".

The Complainant *"believes I should immediately receive all back payments to date. I also believe that I am unable to work in a normal capacity as was determined by [the Company]. I have no faith in their procedures at determining the fitness of claimants such as me and therefore would prefer an overall one time settlement with regard to my future".*

The Complainant's complaint is that the Company wrongly or unfairly ceased payment of her income protection claim on 21 November 2014.

The Provider's Case

Company records indicate that the Complainant was medically certified as unfit for work on 7 February 2011 and completed an income protection insurance claim form on 18 February 2011, advising that she was absent from work due to *"Scheuermann's Disease. Awaiting a second spinal operation"*. In addition, the Complainant's GP, Dr C. S., completed an income protection insurance GP claim form on 2 March 2011, advising that the Complainant *"has a diagnosis of Scheuermann's disease...plans to perform spinal surgery at the end of this*

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month. She will be in hospital for one to two weeks. Recovery following this will require analgesia and physiotherapy and may take several months”.

The Company received these claim papers on 16 March 2011. All income protection claims are assessed against the Group Income Protection Insurance Policy definition of disability. In this regard, Section 1, ‘Definitions’, of the applicable Income Protection Policy document provides, among other things, as follows:

*“**Period of Disability** means the period throughout which the Member is totally unable by reason of accident, illness, injury to follow the duties of normal employment and is not following any other employment for profit or reward”.*

Following its assessment of her claim and based on the medical evidence received, the Company wrote to the Complainant on 26 April 2011 to advise that it had admitted her income protection claim into payment with effect from 7 February 2011, the date that her Employer had placed her on a pension rate of pay.

The Complainant’s claim remained in payment subject to reviews to ensure that she continued to meet the policy definition of disability. Following one such review, the Company ceased payment of her claim on 21 November 2014 as it concluded that the medical evidence no longer supported a claim for the Complainant being totally unable to work in her normal occupation. The Complainant had not worked since February 2011 and took early retirement on ill-health grounds in March 2013. Nevertheless, the Company notes that its ongoing medical assessment of her claim was in respect of the Complainant’s ability to carry out the duties of her previous occupation as a Civil Servant, regardless that she had since decided to take early retirement.

As part of the review of her claim, the Company arranged for the Complainant to attend for an independent medical examination with Dr D. G., Specialist in Occupational Health on 20 January 2014. The Company notes that her ensuing report dated 20 January 2014 concluded, *“I find it difficult to support [the Complainant’s] claim that she is unfit for work. There are many patients with similar history who are engaged in gainful employment”.*

In addition, the Company also arranged for the Complainant to attend for an independent functional capacity evaluation with Ms A. S., Specialist Chartered Physiotherapist in Occupational Health and Ergonomics and a Functional Capacity Evaluator on 9 June 2014. The Company notes that her ensuing report dated 26 June 2014 concluded that the Complainant *“qualified for a return to her former employer”.* In a clarification dated 8 September 2014, Ms A. S. advised that the Complainant *“qualified for Sedentary-light PDC work, which is a category above the PDC demanded by her former occupation”* and that *“she is therefore qualified for fulltime work in a Sedentary PDC role”.*

Having considered these two reports, the Company Chief Medical Officer concluded on 9 September 2014 that the *“FCE [functional capacity evaluation] confirms capacity at job demands. No concerns that mental health of sufficient severity to prevent working. Terminate claim”.*

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As a result, the Company wrote to the Complainant on 8 September 2014 advising that *“we are unable to consider that you continue to fulfil the definition of disability as required by the policy conditions...however, we are prepared to continue to pay your full monthly benefit until 21 November 2014 (3 further payments)”*. The Company thus ceased payment of the Complainant’s income protection claim with effect from November 2014.

The Complainant submitted an appeal to the Company dated 7 January 2015, which included reports from Dr M. J., Consultant in Anaesthesia and Pain Medicine, and her GP, Dr C. S..

As a result, the Company arranged for the Complainant to attend again for an independent medical examination with Dr D. G., Specialist in Occupational Health on 3 February 2015. The Company notes that her ensuing report dated 10 February 2015 advised that *“the functional capacity evaluation found [the Complainant] to be fit for work for light sedentary PDC which is one category above her job demand”* and that *“there is no change in [the Complainant’s] clinical status since I assessed her over a year ago. She has recovered from surgery for Scheuermann’s disease of the spine called Kyphoscoliosis”*.

In addition, Dr D. G. concluded that *“I believe [the Complainant] has a good prognosis for remaining well...my opinion remains that [she] is fit to return to the sedentary role of [her normal occupation] and perform her duties reliably, safely and effectively...I find her fit to return to full normal duties without restriction”*.

As a result, the Company wrote to the Complainant on 18 March 2015 declining the appeal, as follows:

“In line with our appeals procedure, our Health Claims Executive has now completed a full review of your claim. Following this review, he has confirmed, based on the medical evidence available, that he is unable to consider that you are continuing to suffer a Period of Disability, which requires you to be totally unable to follow your normal occupation.

As a result, he has confirmed his agreement with the decision to terminate your claim”.

The Complainant next made a complaint to the then Financial Services Ombudsman Bureau. The Company, when later reviewing her complaint papers, learnt that there had been recent developments in relation to the Complainant’s health and she provided a report from her GP, Dr C. S., dated 25 November 2015.

As a result, the Company arranged for the Complainant to attend for a further independent medical examination with Dr D. G., Specialist in Occupational Health on 9 May 2016.

The Company notes that her ensuing report, dated 20 May 2016, provided, among other things, as follows:

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“My opinion remains that [the Complainant] is fit to return to full normal duties without restriction. She managed to work despite Scheuermann’s disease and surgery for many years and I believe she is fit to continue to do so if this was her choice. There is no objective medical evidence before me to indicate that [the Complainant] lacks the physical or mental capacity to return to work and perform her duties reliably, safely and effectively ...

In my opinion [the Complainant] is not motivated to return to work. She has withdrawn from the workplace and I do not expect that she will ever resume any work duties. Nevertheless, there are no objective clinical signs to indicate that she is unfit for work...

I note that [the Complainant] functions normally in her daily life including the ability to fly overseas and I find it difficult to accept her subjective reports and tolerance of work activities as sufficient grounds to support permanent withdrawal from the workplace ...

My opinion remains that [the Complainant] does not meet the definition of disability as defined under the policy. I am unable to categorise her as totally unable by reason of sickness to follow her occupation of civil servant”.

Having considered this report, the Company Chief Medical Officer concluded on 31 May 2016 to *“Decline to admit on appeal. Note ADL’s [Activities daily Living] are not restricted looking after grandchildren/travelling abroad etc – job is sedentary”*. As a result, the Company wrote to the Complainant on 7 June 2016 to advise that *“the outcome of the review is that we are maintaining our decision to decline this claim”*.

In addition, the Company finds that there was no *“general acceptance”* by the Company, as contended by the Complainant, at any stage *“that the income continuance would continue indefinitely”*. In this regard, the Company wrote to the Complainant on 14 November 2012, prior to her taking early retirement, advising that her claim would be *“subject to regular review”* and that it would be obtaining a further medical report. In addition, the Company had no involvement in the decision taken by the Complainant to retire on ill-health grounds in February 2013 and its records indicate that it was not made aware of this decision until some months after the event, in December 2013. The Company states that it is satisfied that contractually income protection claims are always subject to review and that the Complainant was informed of this prior to her making a decision to retire early on ill-health grounds.

In conclusion, the Company notes that this complaint is essentially about its 2014 review of the Complainant’s income protection claim and its subsequent decision to cease payment of this claim based upon the medical evidence.

The Company is satisfied that the claim was assessed and reviewed on the Complainant’s fitness to work on conditions of mental health and Scheuermann’s disease. The assessment of the claim was in respect of the medical evidence provided by the medical advisors of the Complainant and the information provided by the independent medical examinations

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requested by the Company. In this regard, the Company is satisfied that the Complainant's claim has had three assessments (that is, the review carried out in 2014, the appeal in 2015 and a further review in 2016) and that the medical evidence before it did not support a continuance of her claim.

As a result, the Company is satisfied that in ceasing payment of the Complainant's income protection claim that it acted in accordance with the terms and conditions of the Group Income Protection Insurance scheme.

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.

A Preliminary Decision was issued to the parties on 18 December 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.

Following the issuing of my Preliminary Decision, both parties made further submissions as follows:

1. E-mail from the Complainant to this Office dated 17 January 2019.
2. Letter from the Provider to this Office, together with attachments, dated 16 January 2019 (received 17 January 2019), a copy of which was transmitted to the Complainant for her consideration.

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3. E-mail from the Provider to this Office dated 1 February, together with attachments, a copy of which was transmitted to the Complainant for her consideration.

These submissions were exchanged between the parties and an opportunity was made available to both parties for any additional observations arising from the submissions.

Following the consideration of those additional submissions, together with all of the evidence submitted, I set out below my final determination.

The complaint at hand is, in essence, that the Company wrongly or unfairly ceased payment of the Complainant's income protection claim on 21 November 2014. In this regard, the Complainant, now a retired Civil Servant, was a member of a Group Income Protection Insurance scheme and the Company was the underwriter of this scheme at the time it ceased payment of the income protection claim.

The Complainant was diagnosed with Scheuermann's disease in and around November 2006, resulting in her undergoing spinal fusion surgery in 2008. She was later medically certified as unfit for work on 7 February 2011 as she was at that time *"awaiting a second spinal operation"* and she submitted an income protection claim to the Company in March 2011. The Company admitted this income protection claim into payment from 7 February 2011. The Complainant later officially retired from her employment on medical grounds on 15 February 2013.

As part of a review of her claim, the Company arranged for the Complainant to attend for a medical examination in January 2014 and for a functional capacity evaluation in June 2014. Based on the results received, the Company ceased payment of the Complainant's claim on 21 November 2014. The Complainant appealed this decision in January 2015 but based on the medical evidence before it, the Company upheld its decision to cease payment of her claim. The Company also reviewed the Complainant's claim in May 2016, but again it upheld its decision to cease payment of her claim.

The Complainant, however, is adamant that *"it is quite obvious that I am unable to work, I believe [the Company] have walked away from their responsibility with regard to my insurance policy"*. In this regard, the Complainant does not accept the Company decision that she is fit to return to work. The Complainant also questions whether the Company was correct in even carrying out a review of her claim as she notes that *"There was a general acceptance on all sides that the income continuance would continue indefinitely. As a result of the negotiations I made the decision to retire on medical grounds"*.

Income protection policies such as the Group Income Protection Insurance Scheme which the Complainant was a member of, like all insurance policies, do not provide cover for every eventuality; rather the cover will be subject to the terms, conditions, endorsements and exclusions set out in the policy documentation. In this regard, Section 1, 'Definitions', of the applicable Income Protection Policy document provides, among other things, as follows:

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“Period of Disability means the period throughout which the Member is totally unable by reason of accident, illness injury to follow the duties of normal employment and is not following any other employment for profit or reward”.

In addition, Section 7, ‘Payment of Benefit and Claims Procedure’, of the applicable Policy document also provides, among other things, as follows:

“7.2 Payment Procedure

Payment of Benefit in respect of a Member will be made to the Member directly ...

The liability of [the Company] will at all times be subject to production by the Member and/or employer of such reasonable information and evidence satisfactory to [the Company] as [the Company] at its absolute discretion may require. This will include, as often as [the Company] may require,

- (a) the Member travelling to and being examined by a Medical Officer appointed by [the Company], at the expense of [the Company], so as to provide evidence that the Period of Disability continues ...*

7.3 Entitlement to Disability Benefit

The Disability Benefit will commence on the expiry of the Deferred Period and will continue until:

- (a) the Member is no longer deemed to be disabled by [the Company]”.*

As a result, the Complainant must satisfy the policy definition of disability in order to be eligible for benefit or, in this instance, in order to remain eligible for benefit. I accept that it is appropriate and reasonable that the Complainant’s income protection claim is subject to reviews to assess whether the claimant continues to meet the policy definition of disability and in this regard I accept that the above policy provisions clearly provide for reviews of the Complainant’s income protection claims.

To ensure that the Complainant continued to satisfy the policy definition of disability, her income protection claim was subject to reviews. In this regard, when the Company wrote to the Complainant on 26 April 2011 to inform her that it was admitting her claim into payment, it also advised *“the claim is subject to regular review”*.

Similarly, in its correspondence dated 12 March 2012 the Company advised the Complainant that *“we are currently reviewing your claim”*. Likewise, in its correspondence dated 14 November 2012 the Company advised, as follows:

“We have now completed the review of your claim and advise that we will be maintaining your benefit.

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As you are aware all claims are subject to regular review. [Dr M. S. J.] has confirmed that you are due for review around December 2012, therefore we will request an update from [him] following this review”.

As a result, I accept that the Complainant was provided with appropriate notice that her income protection claim was subject to reviews.

In addition, whilst the Complainant submits that *“there was a general acceptance on all sides that the income continuance would continue indefinitely”*, I have not been provided with any documentary evidence that bears out her recollection of events in this regard.

I note that as part of its review of her income protection claim in 2014, the Company arranged for the Complainant to attend for a medical examination with Dr D. G., Specialist in Occupational Health on 20 January 2014 and I note that her ensuing report, dated 20 January 2014, provides, among other things, as follows:

“1. PRESENTATION:

This [age and job title] has been out of work for the past 2 years due to chronic back pain, she underwent surgery for Scheuermann’s disease in 2008 and 2010. She has been retired on health grounds.

2. HISTORY OF PRESENTATION:

[The Complainant] says she experienced back pain since her childhood. In 2004 the pain became more severe. She had an MRI scan and was found to have multiple fractures in her spine and underlying Scheuermann’s disease. In 2008 she underwent surgery to insert rods and screws into her spine. She had further surgery in 2010 to remove some screws. She continues to experience chronic severe low-back pain.

[The Complainant] says she tried to keep working but was unable to do so because the back pain was aggravated by sitting and standing for long periods.

[The Complainant] attends a pain specialist. She had facet joint injections and various other injections which have been of some help. She has not availed of cognitive behavioural therapy and says she has not completed a pain management programme she was retired on health grounds with effect from March 2013 ...

5. CURRENT SYMPTOMS:

[The Complainant] says she is not great after the drive to today’s appointment. She complained of thoracic back pain which is worse on the right side and radiates to her right shoulder. She has pain in her right arm and pins and needles in her right hand. Her symptoms are aggravated by prolonged sitting and prolonged standing and are relieved by gentle exercise and medications ...

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8. OCCUPATIONAL FACTORS: ...

She has no plans to return to work and says she would never be fit to do so since she cannot sit for long periods.

9. ACTIVITIES OF DAILY LIVING:

[The Complainant] does the daily school run. She walks the dog. She is able to drive her automatic car and drove herself to today's appointment. She went to [abroad] on holidays in 2013.

She is able to do light household chores. She does not do any heavy housework or gardening. She cannot swim due to pain in her back. She is able to use a computer, read, watch television and use her phone for short periods She uses a special chair adapted for her back condition at home ...

11. COMMENT ON MEDICAL REPORTS:

The very helpful pain report from the pain specialist outlines history of Scheuermann's disease requiring surgery and subsequent development of chronic pain which is being treated with multiple pain intervention modalities. He advises [the Complainant] not to engage in heavy manual handling but otherwise does not state any restrictions to her work ability.

12. CONCLUSIONS AND RECOMMENDATIONS:

[The Complainant] has Scheuermann's disease of the spine resulting in kyphoscoliosis and chronic back pain. She required major spinal surgery 6 years ago and subsequently developed chronic back pain, her symptoms of chronic pain are well managed by a pain specialist. She is otherwise in excellent health.

I find it difficult to support [the Complainant's] claim that she is unfit for work. There are many patients with a similar history who are engaged in gainful employment. Her job is sedentary and she is not required to perform any heavy manual tasks. There is no reason why she cannot be provided with a specialist chair at work similar to her home. There are a variety of work station aids to assist people with musculoskeletal problems engage in the workforce.

I believe it would be discriminatory to prevent [the Complainant] from working as a civil servant should she choose to do so. Nevertheless I note that she has been retired on health grounds and therefore is not motivated to return to work".

In addition, as part of its review of her income protection claim in 2014, the Company also arranged for the Complainant to attend for a functional capacity evaluation with Ms A. S., Specialist Chartered Physiotherapist in Occupational Health and Ergonomics and a Functional Capacity Evaluator (FCE) on 9 June 2014 and I note that her ensuing report, dated 29 June 2014, advises, among other things, as follows:

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“During the Functional Capacity Evaluation (FCE), [the Complainant] gave excellent effort and produced valid results, indicating she is qualified for Sedentary-Light Physical Demand Classification (PDC) work, from a functional perspective.

She demonstrated a PDC which is one level in excess of the PDC demand of her occupation, which was Sedentary PDC.

She has significant range of motion deficits in Whole Body Impairment Rating for the Lumbar Spine of 19%, Cervical Spine 11% and Thoracic Spine 8%, with valid results.

Her Combined Whole Body Impairment Rating was 37%, a very significant impairment rating which also included a 5% Impairment Rating for the Right Upper Extremity.

She has a 15% Average Strength Deficit for the Right Upper Extremity. She lifted 8kgs from floor to waist and at shoulder level and demonstrated good frequent lifting capacity.

Her Overall Average Strength Profile was only 8% percentile, indicating she has Very Poor Strength.

She did not demonstrate any symptoms or disability behaviour during the evaluation, and did not demonstrate positive non-organic signs or self-limiting behaviours. She did report high disability perception in the pre-evaluation disability questionnaires however, and has no expectation of return to work.

She has been retired from work on health grounds since March 2013. She has no motivation to retrain or seek other employment.

She did give indications of borderline clinical depression in the Beck Depression Inventory Questionnaire. Work capacity interference was 75% in the Dallas Pain Questionnaire. Of concern was the high anxiety/depression interference perception of 65%.

She would benefit from continuance in the gym to maintain her aerobic fitness level, which was GOOD. She is qualified to commence a phased, part-time return to work, starting at 3 hours per day and increasing days worked over 3 months or possibly longer to achieve safe working conditioning and ensure work stability ...

The FCE lasted 4 hours and 15 minutes ...

[The Complainant] qualified for a return to her former occupation, Deficits in range of motion were quantified but don't preclude her from qualification for Sedentary PDC work.

She has a good level of cardiovascular fitness, but would benefit from rehabilitation to maximise her spinal range of motion and right shoulder range of motion values.

Phased return to work is recommended. It is advisable that adaptations to her workstation are facilitated with examples of an alternate sit-stand adjustable workstation and optimal supportive chair, enclosed in the appendices.

The hours worked should commence at 3 hours daily for 4 days and progress to 4, 6, 8 hours over a 3 month period, so work hardening can take place.

She would benefit from case management and support from a Chartered Physiotherapist to ensure work stability is achieved”.

I note from the documentary evidence before me that in her later correspondence dated 8 September 2014, Ms A. S. advises, as follows:

“[The Complainant] qualified for Sedentary-Light PDC work, which is a category above the PDC demanded by her former occupation ...

She is therefore qualified for fulltime work in a Sedentary PDC role currently, provided she can be facilitated to rise from sitting frequently, which her former work tasks would allow.

She has a good level of fitness overall, her cardiovascular fitness level is good, indicative of a good exercise level currently.

Her capacity to lift weights of 8kgs from floor level and at shoulder level and absence of any self-limiting behaviours, augurs well for her capacity to meet the job demands of a sedentary office role”.

Having considered these two reports, I note that the Company Chief Medical Officer concluded on 9 September 2014 that the “FCE [functional capacity evaluation] confirms capacity at job demands. No concerns that mental health of sufficient severity to prevent working. Terminate claim”.

I note from the documentary evidence before me that the Company then wrote to the Complainant on 8 September 2014 to advise, among other things, as follows:

“I refer to your claim and your recent Functional Capacity Evaluation (FCE) with [Ms A. S.]...and your Independent Medical Examination with [Dr D. G.]. Our Chief Medical Officer has now considered the information contained in the reports mentioned above, together with all medical evidence received in respect of your claim ...

we are unable to consider that you continue to fulfil the definition of disability as required by the policy conditions ...

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[Dr D. G.]’s opinion was that you would be fit to return to full normal duties without restriction. She stated that there was no evidence that it would be unsafe for you to work or that you would lack the physical or mental evaluation to attend work and perform your role reliably, safely and effectively.

We agreed with [Dr D. G.] that it would be useful for you to attend a Functional Capacity Evaluation in order to obtain a fully objective evaluation of your abilities as well as [Dr D. G.]’s opinion.

We have now received the report following your FCE and [Ms A. S.] has confirmed that you would be capable of performing a job with a Physical Demand Classification of Sedentary-Light. On fact, this is a category above that required in your former occupation which was classified as Sedentary.

She stated that you have a good level of overall fitness and your capacity to lift weights of 8kgs from floor level and the absence of any self-limiting behaviours, augurs well for your capacity to meet the demands of a sedentary office role.

We do appreciate that you have now been given early retirement and therefore you do not have a role to return to.

However, I hope you will understand that this policy provides cover whilst you are unable to perform your occupation due to illness or disability and availability of work is not a factor that we take into account when determining your fitness to return to work. Ideally, if you had still been employed we would have suggested a graded return to work to help you get back into the workplace. However, all parties mentioned above do agree that this would not have been essential in your case given your overall fitness levels.

I regret to advise you that as you no longer satisfy the above definition we must terminate your benefit. However, we are prepared to continue to pay your full monthly benefit until 21 November 2014 (3 further payments). Whilst outside of the strict contract terms, we acknowledge the length of time you have been on claim with us and this is to allow you time to make any necessary adjustments.

I understand that this decision may come as a disappointment, however we must base our decision on the medical evidence available to us”.

I note that the Complainant submitted an appeal to the Company by way of correspondence dated 7 January 2015, wherein she submitted, as follows:

“At the request of [the Company], I went for IME with [Dr D. G.] and Functional Capacity Evaluation with [Ms A. S.]. I undertook both tests in good faith and tried my best to complete all tasks set out for me. Although I could complete a certain amount of these tasks, my difficulty, as in the case in my day to day life, is the impact that the completion of these types of actions has on my physical condition afterwards. [Ms A. S.] was aware that I was pushing myself to the limits and I reiterated that I would

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most likely suffer as a consequence – in fact, I took to my bed for the rest of the day and most of the following day.

Were I to return to work, even part time, I would have to disclose my medical history to any potential employer. What employer, in their right mind, would want to employ me? I cannot sit or stand for long periods, I can't do certain activities for long periods, e.g., I can't Hoover the stairs in my home. I empty the dishwasher with great difficulty because of the bending and stretching involved. Typing this letter has been done in stages because I cannot tolerate sitting at a computer for any length of time.

I appreciate that [Ms A. S.] stated I have a good level of fitness. This is true because part of my pain management strategy includes walking, threading water and some light weight training. This is vital to me as my condition worsens following periods of inactivity”.

Enclosed with this appeal was correspondence from the Complainant's GP, Dr C. S., dated 11 December 2014, wherein she advised, as follows:

“I wish to confirm that [the Complainant] is a patient of mine for several years now. She suffers with persistent pain in her upper and mid back. She attends the surgery regularly, usually every month or every two months. Most recently, this November 2014, she attended with right sided back pain and sciatica and was advised to increase her medications. Her medications include Lyrica and amitriptyline for nerve pain and a general pain reliever. She is on maximum dose of analgesia daily. She still continues to suffer with back pain on an ongoing basis. She has daily pain and is unable to perform household chores such as Hoovering. She is unable to jog or cycle as a result of her back conditions.

As [the Complainant] was diagnosed with Scheuermann's disease in 2006. Since that time she has had no relief from back pain and has continued to attend the hospital. She had surgery to correct the deformity and to control pain. She attends the pain clinic and has regular repeat injection treatments to her right shoulder and to the middle of her back.

Most recently, in December 2013 she had a facet joint medial branch block. She is due to have further injections soon. Usually she attends the pain clinic every three to six months.

A physiotherapist sees her for treatment which she attends every week to two weeks. Unfortunately, none of these treatments give her any significant improvements in her pain.

As her back condition is ongoing and continuing and unlikely to significantly improve, in my opinion she is unfit to work”.

Also enclosed was correspondence from Ms C. S., Clinical Specialist in Musculoskeletal Physiotherapy, dated 10 December 2014, wherein she advised, as follows:

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“[The Complainant] has been attending this clinic since 2004. She was diagnosed in 2007 with significant Scheuermann’s disease with marked thoracic kyphosis. Since then she has had major spinal surgery on two occasions 2008 and 2011 – the end result being internal fixation of her thoracic spine into an upright position with titanium rods.

[The Complainant] has worked hard on improving her physical tolerances over the last number of years, however she continues to have significant problems.

Firstly, she cannot tolerate being stationary (whether sitting or standing) for prolonged periods – if she does, it causes her significant pain. For example, towards the end of October this year, she sat in a chair with her sister in a hospital, afterwards she developed severe Lower back pain and right sided sciatica.

She lost the reflex in her right ankle with this episode (likely lumbar disc pathology) which has not returned. It took her two weeks to be able to stand upright again after this episode and about six weeks for the pain to settle.

Secondly, while she has improved her physical tolerances, she does not tolerate extra load through her spine. Lifting, bending, repeated reaching etc. all cause significant problems. This is likely as a result of the significant altered mechanics of her spine, with having her whole thoracic spine fused, the strain of a normal movement is taken above and below the fusion.

[The Complainant] was deemed unfit for work by a medical officer in the civil service. Obviously she would be obliged to disclose this professional judgement when applying for a job, making it highly unlikely for her to be successful in gaining employment in the future.

[The Complainant] continues to attend the pain clinic in the [hospital] for management of her chronic pain. The surgery fixed the extreme kyphosis (her spine is now upright) however she continues to suffer significant disability”.

Also enclosed with the Complainant’s appeal was correspondence from Dr M. J., Consultant in Anaesthesia and Pain Medicine at the [Dublin hospital], dated 5 December 2014, wherein he advised, as follows:

“[The Complainant] has been attending the pain management clinic for persistent pain in her upper and mid back. [The Complainant] reported getting diagnosed with Scheuermann’s disease resulting in abnormal curve called thoracic kyphosis of her mid and upper back, She had surgery a couple of times to correct the deformity and to control pain but unfortunately she continued to experience pain therefore, she got referred to pain management clinic in the [hospital]. Her most recent visit was on 17th November for routine follow up.

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[The Complainant] had facet joint medial branch block in December 2013. She reported getting good pain relief in her upper back pain but not in the mid back pain. Pain gradually returned. I suggested repeat block and proceeding to radiofrequency denervation for which her name is placed on waiting list. Her medications were not changed. In addition, continuation of physiotherapy, exercise therapy and use of TENS machine, thought to be beneficial for symptomatic pain control, was recommended. TENS machine was provided from pain clinic for trial.

We'll review her again in near future at the time of her proposed medial branch block".

As a result of this appeal, the Company arranged for the Complainant to attend again for a medical examination with Dr D. G., Specialist in Occupational Health on 3 February 2015 and I note that her ensuing report, dated 10 February 2015, provides, among other things as follows:

"1. PRESENTATION:

This [age] civil servant has been out of work for the past 3 years due to chronic back pain. She underwent surgery for Scheuermann's disease in 2008 and 2010.

2. HISTORY OF PRESENTATION:

[The Complainant] tells me she is no better since I last assessed her. She has notes with her and reads from them. She tells me that the insurance process is unfair, that she was never asked for her opinion – the focus is on the disease and not on her, She says she was exhausted following the functional capacity evaluation and had to go to bed for several days afterwards.

She says she will never be out of pain because of the underlying Scheuermann's disease and surgical procedures. She says she cannot sit for long periods and complains about the couch in the waiting area.

[The Complainant] continues to attend the Pain Clinic. She had facet joint injections in December 2013 and will have further injections in March 2015. She uses a TENS machine. Her medication is regularly adjusted.

She had not attended a pain management programme or available (sic) of cognitive behavioural therapy. She attended physiotherapy in 2014. She tries to walk every day and plans to do Pilates classes. She says that she is doing everything she possibly can to help her condition ...

5. CURRENT SYMPTOMS:

[The Complainant] reports pain in the middle of her back. She also has upper back pain. She has sciatica in her right hip and buttock. Her sleep is disturbed by pain and she requires sleeping tablets, she has difficulty sitting still for long periods ...

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7. OCCUPATIONAL FACTORS: ...

[The Complainant] *has been retired on health grounds. She is in receipt of pension rate of pay from the Civil Service. She has no plans to return to the work place and believes herself totally incapable of any form of work.*

8. ACTIVITIES OF DAILY LIVING:

[The Complainant] *says she does "absolutely nothing". She says she cannot vacuum or do any gardening. She tries to go to the swimming pool. She does not swim but treads the water. She sits on a special chair at home but not for long periods she is able to read, watch television and use the iPad for short periods of time, but not for any more than an hour. She finds it difficult to get comfortable. She is able to do some light household chores including cooking. She is able to drive for short distances. She is able to walk for 3km at the most. She travelled to [abroad] in 2014 and says she required lots of painkillers before and during the flight.*

9. CLINICAL EXAMINATION: ...

Mental state examination: *There is no evidence of anxiety, depression or mental illness. There is no evidence of cognitive impairment ...*

10. COMMENT ON MEDICAL REPORTS:

The functional capacity evaluation found [the Complainant] to be fit for work of light sedentary PDC which is one category above her job demand. The functional capacity evaluator also gives advice on a special work desk and work chair.

The treating doctors advocate for [the Complainant] to remain on long term sick leave. She has not required any further surgical intervention. Her condition is stable and the focus of treatment is symptomatic pain control.

11. CONCLUSIONS AND RECOMMENDATIONS:

There is no change in [the Complainant's] clinical status since I assessed her over a year ago. She has recovered from surgery for Scheuermann's disease of the spine called Kyphoscoliosis. She appears to have a chronic back pain syndrome.

She is receiving optimum and appropriate treatment from a Pain Clinic. She appears quite well and is not in any obvious distress. Her condition is stable and there is no evidence of deterioration or progression of disease. I believe she has a good prognosis for remaining well.

My opinion remains that [the Complainant] is fit to return to the sedentary role [job title] and perform her duties reliably, safely and effectively. [The Complainant] has disengaged from work and withdrawn from the work place, and is unlikely ever to return to gainful employment It is regrettable that she has been retired on health

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grounds at such a young age, since I believe she is capable of contributing to the work force and obtaining the benefits of gainful employment.

The objective clinical evidence indicates that [the Complainant] is fit for work. She functions quite well in her daily life, including the ability to travel overseas. There is no evidence that she lacks the physical or mental capacity to attend work and perform her role reliably, safely and effectively.

Regretfully I am unable to alter my opinion. I am unable to categorise [the Complainant] as totally unable by reason of sickness to follow her occupation of Civil Servant. I find her fit to return to full normal duties without restriction”.

I note that the Company then wrote to the Complainant on 18 March 2015 declining the appeal, as follows:

“In line with our appeals procedure, our Health Claims Executive has now completed a full review of your claim. Following this review, he has confirmed, based on the medical evidence available, that he is unable to consider that you are continuing to suffer a Period of Disability, which requires you to be totally unable to follow your normal occupation.

As a result, he has confirmed his agreement with the decision to terminate your claim”.

The Complainant made a complaint to then, Financial Services Ombudsman on 5 November 2015. I note that the Company, when shortly before that reviewing her complaint papers, learnt that there had been developments in relation to the Complainant’s health and she provided a report from her GP, Dr C. S., dated 25 November 2015, as follows:

“1. Scheuermann’s disease ...

[The Complainant] was diagnosed with Scheuermann’s disease in 2006. Since that time she has had no relief from back pain and has continued to attend the hospital.

Surgery

She had surgery to correct the deformity and to control pain in 2008. On 20/8/08 she had thoracic kyphoplasty done which [Mr A. P., Consultant Orthopaedic Surgeon] described as ‘very extensive spinal surgery’, he inserted ‘screws and rods from T2 to L1. She had further surgery to ‘remove hardware’ in 4/2011.

Non-surgical treatments – injections and physiotherapy

She attends the pain clinic and has regular repeat injection treatments to her right shoulder and to the middle of her back. She has had facet joint and trigger point injections.

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Most recently she had a facet joint medial branch block. She is due to have further injections soon. Usually she attends the pain clinic every three to six months.

A physiotherapist sees her for treatment which she attends every week to two weeks.

Unfortunately, none of these treatments give her any significant improvements in her pain.

Medications

She suffers with persistent pain in her upper and mid back. She attends the surgery regularly, usually every month or every two months. Most recently, this November 2014, she attended with right sided back pain and sciatica and was advised to increase her medications. [List of medication redacted]

Current Condition

She has daily pain and is unable to perform household chores such as hoovering. She is unable to jog or cycle as a result of her back condition.

2. Depression

A diagnosis of depression was made in August 2010 when she consulted with low mood and suicidal thoughts.[List of medication redacted]. She was referred for cognitive behavioural therapy and remained on medications throughout 2011 and 2012. They were discontinued around 2013 from the records.

On 6th October she consulted with a history of a suicide attempt. This resulted in a three week admission to a psychiatric hospital, [name of hospital]. After this there was a further month of follow-up in the day hospital and [the Complainant] is now being cared for in the community and has three weekly appointments with [Dr O’N.] her psychiatrist. Her recovery will require time and medical input. She remains on high doses of anti-depressant medication; [List of Medication Redacted] I would consider her to have severe depression which will require intensive follow-up.

Visits to Doctor

Over the past eight years at least, [the Complainant] has attended doctors regularly. I have her file showing multiple GP visits, on average one every three months at least. Her hospital visits are also recorded, she attends each doctor at least every six months, she attends the surgery every three months for her prescription and review.

Prognosis

As her back condition is ongoing and continuing and unlikely to significantly improve, in my opinion she is unfit for work. Her back condition is chronic and will continue in the long-term future”.

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As a result of this correspondence and as part of a further assessment of her appeal, I note that the Company arranged for the Complainant to attend for a further medical examination with Dr D. G., Specialist in Occupational Health on 9 May 2016 and I note that the ensuing report, dated 20 May 2016, provides, among other things, as follows:

“1. PRESENTATION:

This [age] civil servant has been out of work for the past four years due to chronic back pain. She has Scheuermann’s disease of the spine and underwent surgery in 2008 and 2010.

2. HISTORY OF PRESENTATION:

[The Complainant] tells me there is no change in her condition since I last saw her. She attended physiotherapy and pain management serviced and last had a facet joint injection about a year ago. She has not seen her specialist since then but believes she will be called for review shortly.

[The Complainant] no longer attends the orthopaedic clinic and has not seen the orthopaedic consultant for about 5 years.

[The Complainant] says she became quite anxious and depressed and her doctor referred her to the local mental health clinic and she is attending a psychiatrist there since October 2015. [She] says she became very depressed at one point and experienced suicidal thoughts but fortunately did not act on these. She was admitted to a psychiatric unit and treated with anti-depressant therapy and made some improvement. She saw her psychiatrist last week and has a follow up appointment in 6 weeks. She is awaiting counselling. She says she does not have suicidal thoughts now but experiences an occasional passive death wish. She says she cannot sit for more than half an hour without severe pain and sciatica. She says she still gets frequent episodes of severe pain which she self manages by walking or going to bed ...

4. CURRENT SYMPTOMS:

[The Complainant] says she has constant severe back pain. She has insomnia. She has pain in her upper back, her right shoulder area and also in the middle of her back. Any exertion aggravates the low back pain and sciatica to her right leg. Her arm goes dead at times. Her mood is up and down. She feels fed up and frustrated because of chronic pain and admits to a passive death wish. She worries about the future. She has low energy ...

8. OCCUPATIONAL FACTORS:

[The Complainant] was retired on health grounds with effect from February 2013. She does not believe herself fit to return to any form of work. She is in receipt of

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invalidity pension She says that if she returns to work the consequences will be devastating and that her back will be "in bits" again. She says she cannot provide reliable or effective service to any employer to any occupation.

9. ACTIVITIES OF DAILY LIVING:

[The Complainant] leads a quiet life. She requires assistance with grocery shopping. She does the school run. She is able to drive for short distances. She meets some of her ex-colleagues for tea and coffee. She is able to read and watch the television whilst lying down.

She is able to use her iPhone. She has just returned from a holiday to [abroad]. She says she took lots of pain killers and pain patches to help her through the flight. She may go [abroad] later in the year. She minds her grandchild which she says is a struggle at times.

9. CLINICAL EXAMINATION:

Mental state: [The Complainant] does not appear to be suffering with acute depression or anxiety today. She scores 11/54 on the Hamilton Depression rating scale however objectively she is euthymic with no evidence of anxiety or depression. There is no evidence of cognitive impairment.

Physical examination: Examination of the spine is unchanged. The scars of previous surgery are visible. Nevertheless, she has reasonably good range of spinal movement although her range of movement is limited at end range. She is able to raise arms overhead. She is able to forward flex and squat. She complains of tenderness on palpation of the left thoracic area, right scapular area. Straight leg raise is 90 degrees right and left. Neurological examination is normal. She is wearing pain patches. Ear, nose and throat, ophthalmology, cardiovascular, respiratory, abdomen, skin, neurology are normal to examine.

11. COMMENT ON MEDICAL REPORTS:

Her GP confirms the history of Scheuermann's disease and thoracic kyphoplasty performed in 2008 followed by further surgery to remove pins and plates in 2011. She subsequently attended a pain specialist and underwent pain relieving modalities. She also attended a physiotherapist. She continues to complain of chronic persistent pain and requires pain relieving medication. She has also suffered with depression since 2010. This was treated with Lexapro and cognitive behavioural therapy. She was admitted to the psychiatric hospital for 3 weeks in October 2015. The GP believes she has severe depression.

I note that [the Complainant] no longer attends an orthopaedic surgeon and the orthopaedic specialist report is dated from 5 years ago.

12. CONCLUSIONS AND RECOMMENDATIONS:

[The Complainant] has chronic back pain which relates to underlying Scheuermann's disease and previous spinal surgery. In my opinion the time has come for her to adapt and move forward with her life despite chronic pain.

[The Complainant] also appears to have experienced an episode of significant depressive illness in 2010 with a relapse in 2015. I find her to be in good mental health today with no evidence of acute depression or anxiety.

In my opinion it will be therapeutic for [the Complainant] to return to work as this would assist her overall recovery and help her to adapt and move forward with her life. Remaining out of work puts her at risk of the health effects of long term worklessness. In my opinion the treating doctors should encourage her to return to gainful employment as part of her overall recovery programme and in line with evidence based medical care for patients with chronic pain.

My opinion remains that [the Complainant] is fit to return to full normal duties without restriction. She managed to work despite Scheuermann's disease and surgery for many years and I believe she is fit to continue to do so if this was her choice. There is no objective medical evidence before me to indicate that [the Complainant] lacks the physical or mental capacity to return to work and perform her duties reliably, safely and effectively. I believe that it would be discriminatory to prevent her resuming work should she chose to do so.

As noted before her job is sedentary and she could be provided with a good work seat and a work station that conforms to optimum ergonomic standards. She could be provided with a sit stand desk to allow her stand and vary her posture intermittently. She could also be facilitated with an occupational health rehabilitation programme whereby she returns to work on a phased basis over a period of 6 to 8 weeks to rebuild her stamina and confidence.

In my opinion [the Complainant] is not motivated to return to work. She has withdrawn from the workplace and I do not expect that she will ever resume any work duties. Nevertheless, there are no objective clinical signs to indicate that she is unfit for work.

I note that [the Complainant] functions normally in her daily life including the ability to fly overseas and I find it difficult to accept her subjective reports and tolerance of work activities as sufficient grounds to support permanent withdrawal from the workplace.

[The Complainant] has not attempted to return to work for 4 years and I see no reason why she cannot at the very least make an attempt at resuming her work duties.

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My opinion remains that [the Complainant] does not meet the definition of disability as defined under this policy. I am unable to categorise her as totally unable by reason of sickness to follow her occupation of civil servant.

Insurer may consider chronic pain ability determination or functional capacity evaluation to provide further objective evidence of her work ability and this could be incorporated into a work hardening programme. The functional capacity evaluator could also provide advice to the employer on suitable ergonomic adjustments to her work station”.

I note from the documentary evidence before me that having considered this report, the Company Chief Medical Officer concluded on 31 May 2016 to “Decline to admit on appeal. Note ADL’s [Activities daily Living] are not restricted looking after grandchildren/travelling abroad etc – job is sedentary”.

As a result, the Company wrote to the Complainant on 7 June 2016 to advise, as follows:

“We have since received the independent medical report from [Dr D. G.], Specialist in Occupational Health dated 20th May 2016. This has now been reviewed with the full medical file by our claims team in conjunction with our Chief Medical Officer (CMO).

The outcome of the review is that we are maintaining our decision to decline this claim. It was noted that [your] ‘Activities of Daily Living’ were not restricted to a level that would impact a return to a Job position that is sedentary in nature. The medical evidence did not support a total disability claim as required under the policy terms and conditions. [Dr D. G.]’s report states under section 12.2 Fitness for Work:

‘I note that [the Complainant] functions normally on her daily life including the ability to fly overseas and I find it difficult to accept her subjective reports and tolerance of work activities as sufficient grounds to support permanent withdrawal from the workplace’.

And under Section 12.3 Suitability for insurance benefit [Dr D. G.] states:

‘My opinion remains that [the Complainant] does not meet the definition of disability under the policy’.

We have considered the need for a further Functional Capacity Examination (FCE) with our CMO and it is our view that this is not now required based upon the strength of opinion in [Dr D. G.]’s report and the previous medical file that also included a FCE. The previous FCE in June 2014 concluded that [the Complainant] qualified for a return to her former occupation’.

It therefore continues to be our view that [the Complainant’s] claim under this group scheme is not medically supported”.

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I note that the Medical Reports refer both to the Complainant's physical medical condition and her psychological medical condition. The references to both medical conditions are set out in reports that pre-date the Provider's assessment of the claim. For example, a consultant orthopaedic surgeon mentions the Complainant's depression in his report of 16th February 2011.

The Provider sought advices from the Complainant's treating specialists in respect of her physical ailments, but did not specifically consult a specialist dealing with her psychological issues.

Medical Report from Consultant Orthopaedic and Spinal Surgeon of 10/06/2011:

"Obviously she will take a period of time to recover from this and I would not be entirely optimistic that she will gain full relief from this procedure".

The Complainant's GP referred to the medication that that the Complainant was receiving, that is, *"antidepressant (10mg daily)"*.

A Consultant in Anaesthesia and Pain Medicine (Report of August 2012) stated:

"Patients who go through such pain management programmes report over all better pain control and improved function however, they do report flare up during and after physical or psychological stresses. I think this is going to be the case with [the Complainant] for the foreseeable future".

The Complainant's GP report of 2nd September 2013 concluded that:

"[The Complainant] continues to suffer from ongoing continuing back pain and depression and is unable to return to work"

A report sanctioned by the Provider dated 7th October 2013 from the Department of Pain Medicine advised:

"Usually multidisciplinary pain management approach is most appropriate which involves injection therapy, physiotherapy and occupational therapy along with psychotherapy. I think this is going to be the case for the foreseeable future".

I note the Provider's appointed Specialist in Occupational Health in her report dated 20/01/2014 stated that in relation to the Complainant's Mental state examination: *"There is no evidence of anxiety, depression, mental illness or cognitive impairment"*.

The Functional Capacity Evaluation dated 8th July 2014 stated:

"19. She did give indications of borderline clinical depression in the Beck Depression Inventory Questionnaire. Work capacity interference was 75% in the Dallas Pain Questionnaire. Of concern was the high anxiety / depression inference perception of 65%".

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It is my view that the Provider's appointed Specialist in Occupational Health had insufficient regard to the Complainant's psychological condition despite having the reports referring to the Complainant's Depression.

It is of note that this specialist stated that in relation to the Complainant's Mental state examination:

"There is no evidence of anxiety, depression, mental illness or cognitive impairment".

In the Specialist's conclusion she states:

"There is no evidence that she lacks the physical or mental capacity to attend work and perform her role reliably, safely and effectively".

A Provider File note dated 30th October 2013 states:

"she also suffers depression which is stable"

File note of 7th May 2015:

"There doesn't seem to be a suggestion of psychological overlay on this case and we need to understand why Dr G [Occupational Health Specialist] has suggested CPAD rather than the usual FCE".

3rd September 2014 – Functional Capacity Evaluator noted that the Complainant:

".. would benefit from a phased return to work and may only ever achieve part-time work if her pain reports do not improve".

The Provider's comment on the above conclusion was as follows:

"Comment

She has been given early retirement so she does not have a job to go back to. Discussed with .. and we feel that best way forward would be to discuss further with [Functional Capacity Evaluator]. We recognise that best practice is for a phased return to work, but given that can't happen, what would be her opinion on a full time return to work, particularly taking into account the fact that she is fairly active in her day to day lifestyle. Difficult to reconcile activity levels with the comments made in section 6.11.14 of the report".

Provider File note of 8th September 2014

"Discussed her recommendations. [The Functional Capacity Evaluator] confirmed that claimant would be physically capable of a return to work full time. She also mentioned that in the terms of her physical ability is "over qualified" ie she could

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work at a higher level of physical activity than that required. She will write to us to confirm this”.

On the same date the Functional Capacity Evaluator advised the Provider in writing that:

“She is qualified for fulltime work in a Sedentary PDC role currently, provided she can be facilitated to rise from sitting frequently, which her former work tasks would allow”.

Provider File note of 9th September 2014:

“No concerns that mental health is of sufficient severity to prevent working”.

25th November 2015 - The Complainant’s medical doctors appeal submission to the Provider:

“Depression

A diagnosis of depression was made in August 2010 when she consulted with low mood and suicidal thoughts. A prescription for [Medication Redacted] was given. A referral to psychiatry was made who diagnosed her with “a major depressive episode”. After this she was given an increased dose of [Medication Redacted]. She was referred for cognitive behavioural therapy and remained on medications throughout 2011 and 2012. They were discontinued around 2013 from the records.

On 6th October she consulted with a history of a suicide attempt. This resulted in a three week admission to a psychiatric hospital ... After this there was a further month of follow up in the day Hospital and [the Complainant] is now being cared for in the community and has three weekly appointments with Dr N her psychiatrist. Her recovery will require time and medical input. [List of Medication Redacted]. I would consider her to have severer depression which will require intensive follow-up”.

The Provider’s response to the appeal submission was that a further medical examination with its Occupational Health Specialist would be required. The Provider then arranged for the Complainant to be examined by the same Occupational Health Specialist it had previously sought an opinion from. The Specialist’s opinion was:

“Mental State: [The Complainant] does not appear to be suffering with acute depression or anxiety today. She scores 11/54 on the Hamilton Depression rating scale however objectively she is euthymic with no evidence of anxiety or depression. There is no evidence of cognitive impairment”.

The Occupational Health Specialist’s final comments were that:

“Insurer may consider chronic pain ability determination or functional capacity evaluation to provide further objective evidence of her work ability and this could be incorporated into a work hardening programme.”

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There was no follow up by the Provider with the Complainant's own specialists on her psychological condition and the Provider also considered that there was no need for a further functional capacity evaluation.

The Provider, in its post Preliminary Decision submission dated 16 January 2019, submits that "reports referring to the Complainant's depression" must be placed in the context that there were two brief references to a prior history of depression/treatment for depression and only one suggestion as to its impact on her ability to work. I would expect that any assessment would take into account all relevant matters irrespective of how brief the reference to the issue is once it has been identified as having an impact on the Complainant's ability to work.

Conclusions

From a review of all of the above, I consider that the Provider could have taken a more reasonable approach in relation to this claim. The following issues were of a particular concern from my examination of the Provider's claim assessment.

While the Complainant did not initially claim in respect of her psychological health, the medical reports that were submitted clearly made reference to this aspect of her health.

When this aspect of her health was raised by the Complainant's doctor (in 2015) as a significant element of her wellbeing and ability for work, I consider that the Provider should have reasonably sought the Complainant's Psychiatrist's opinion on its impact on her ability to work, but did not.

In addition I consider that the Provider could reasonably have arranged for the Complainant to be further assessed by its own appointed specialist in this area (a psychologist), but did not.

I am also concerned about the Provider's discussions with its appointed Specialist (the Functional Capacity Evaluator) in September 2014 after she had issued her opinion on the Complainant's ability to return to work. The Specialist recommended that the Complainant should ideally return to work on a phased basis and offered the opinion that she may only ever achieve part time work if her pain reports do not improve.

The following comment appears in the Provider's file notes:

"Comment

She has been given early retirement so she does not have a job to go back to. Discussed with .. and we feel that best way forward would be to discuss further with [Functional Capacity Evaluator].

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We recognise that best practice is for a phased return to work, but given that can't happen, what would be her opinion on a full time return to work, particularly taking into account the fact that she is fairly active in her day to day lifestyle. Difficult to reconcile activity levels with the comments made in section 6.11.14 of the report".

Provider File note of 8th September 2014

"Discussed her recommendations. [The Functional Capacity Evaluator] confirmed that claimant would be physically capable of a return to work full time. She also mentioned that in the terms of her physical ability is "over qualified" ie she could work at a higher level of physical activity than that required. She will write to us to confirm this".

My concern here is that the Functional Capacity Evaluator clearly recommended a phased return to work. However, when further opinion was sought from her by the Provider, a note on the Provider's file indicates that the Complainant would be physically capable of returning to work full-time. I note there is no mention of her mental capacity to return to work full-time. No reason has been given as to why the Functional Capacity Evaluator changed her recommendation of a phased return to work to state that the Complainant was physically capable of returning to work full-time.

Further, I have not been provided with any evidence that the Provider engaged with the Complainant on foot of the recommendation for a partial return to work or the workings of the policy in relation to partial benefit.

I believe the fact that the Complainant's position with her employer was no longer available should not have been an influencing or deciding factor or a factor thought necessary by the Provider to have been particularly brought to the specialist's attention or to be reflected in the specialist's opinion of the Complainant ability to work.

On the same date the Functional Capacity Evaluator advised the Provider in writing that:

"She is qualified for fulltime work in a Sedentary PDC role currently, provided she can be facilitated to rise from sitting frequently, which her former work tasks would allow".

My other concern with this claim assessment is that when the Complainant appealed the Provider's claim decision, the Provider had the Complainant further examined by the same Specialist in Occupational Health, that had previously examined the Complainant. That same Specialist in Occupational Health was the only doctor that the Provider referred the Complainant to for a re-evaluation when her mental health was raised as an issue. As I have already stated, I believe it would have been appropriate to have had the Complainant assessed by an appropriate specialist in mental health.

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The Provider, in its post Preliminary Decision submission of 16 January 2019, states:

“The [Preliminary] decision to uphold the complaint and direct the reinstatement of benefit from the date it was ceased, and to continue to pay the benefit, is based on a finding that the assessment carried out by the Provider was not sufficiently thorough and that it should have taken a more reasonable approach to the claim.

It is submitted that in order to be entitled to benefit under the Policy, the Complainant must provide, amongst other things, that she is ‘totally unable by reason of accident, illness, injury to follow the duties of normal employment’. The Decision, in particular the direction that the benefit be reinstated, is not grounded on a finding (by reference to the available medical evidence) that the Complainant meets the criteria set out in the Policy as at November 2014. Instead it is based on perceived shortcomings in the Provider’s assessment of the claim, in particular concerns regarding the consideration of the Complainant’s mental health and the Provider’s communications with the FCE Specialist, all which have been addressed [in the Provider’s post Preliminary Decision submission].

It is respectfully submitted that this is an error of law. The perceived issues regarding the Provider’s assessment of the claim, which it does not accept, are not sufficient, as a matter of law, to provide for the reinstatement of benefit. The Complainant is only entitled to benefit if she meets the criteria set out in the policy conditions. The Decision does not find, through an assessment of the medical evidence relied upon by the respective parties, that the Complainant meets the said criteria.

Separate to the issue of the Complainant’s entitlement to benefit, it is submitted that the direction that the Provider make a compensatory payment to the Complainant is also an error of law in circumstances where the issues of concern that have been relied upon in the Decision to support this payment are based on errors of fact.

My role is not to determine the state of health of the Complainant or to establish whether or not her health was such that she was fit to work or meet the terms and conditions of the policy such that she was entitled to receive benefit under the policy.

My role is to examine the conduct of the Provider in assessing the Complainant’s claim for benefit and decide whether the conduct of the Provider in arriving at its decision was reasonable in the circumstances.

While I accept that the Functional Capacity Evaluator appointed by the Provider did have regard to both the Complainant’s physical and mental health in the assessment undertaken, my view is that the Provider could have more fully assessed the Complainant’s ability to work with regard to all aspects of her health.

/Cont’d...

It is not clear to me that sufficient weight was given to those aspects of her health. Further, I believe the availability of the Complainant's job should not have had any influence on the decision as to the assessment of her ability to work either part-time or full-time.

Having considered the matter at length, including all of the evidence and submissions, including the post Preliminary Decision submissions, I am not satisfied that the Provider's assessment of the Complainant's claim for continuation of benefit was sufficiently thorough. I consider that the Provider should have fully examined the Complainant's ability for work based on the totality of her health issues. The availability of the Complainant's job should not have played any role in the assessment of her ability to work.

Therefore, I believe the assessment process was not undertaken in a reasonable manner and I uphold this complaint and I direct that the Provider reinstate benefit from when it ceased, and continue to pay benefit in accordance with the policy provisions. In addition I direct the Provider to make a compensatory payment of €5,000 to the Complainant for the identified issues of concern that I have noted above and the inconvenience caused to her. In the event that the Provider wishes to review this claim in the future, I would expect that the totality of the Complainant's health be fully reviewed by specialists in the given areas and that to ensure thoroughness in the claim process, that any specialist appointed to carry out such a review should be independent of the specialists who provided the previous reports.

Conclusion

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

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to reinstate benefit from when it ceased, and continue to pay benefit in accordance with the policy provisions. In addition I direct the Provider to make a compensatory payment of €5,000 to the Complainant for the identified issues of concern that I have noted above. This payment of €5,000 is to be made to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider.

I also 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**, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with **Section 60(8)(b)** of the ***Financial Services and Pensions Ombudsman Act 2017***.

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

9 April 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.