



<b><u>Decision Ref:</u></b>	2021-0433
<b><u>Sector:</u></b>	Insurance
<b><u>Product / Service:</u></b>	Private Health Insurance
<b><u>Conduct(s) complained of:</u></b>	Rejection of claim - treatment abroad Refusal to insure - failure to renew policy
<b><u>Outcome:</u></b>	Partially upheld

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

The complaint concerns the Complainant's health insurance policy with the Provider. The Complainant is the mother of Ms. M on behalf of whom this complaint is submitted. Ms M is a named insured under the Policy the Complainant holds with the Provider.

#### **The Complainant's Case**

The Complainant's daughter Ms. M underwent surgery for scoliosis on the **4 September 2018** in [European Country]. The Complainant submits that the surgery was successful.

The Complainant submits that Ms. M was first diagnosed in 2017, by Consultant B and was fitted with a "*boston brace*". The Complainant states that Ms. M saw no benefit as a result of the brace and the only form of treatment available for Ms. M was a full spinal fusion, which would have resulted in limitation of movement. The Complainant says that she undertook research into the condition and found out about a consultant in [European Country] providing suitable "fusion less" surgery. She sought to query cover for the procedure with the Provider.

The Complainant submits that Ms. M's consultant in Ireland was not in a position to complete the Provider's referral form as part of the prior approval procedure, as he was not familiar with the surgery proposed aboard.

The Complainant states that on the **5 June 2019** the Provider advised her that the Approval for Treatment Abroad Form could be completed by the surgeon from abroad, who had operated on Ms. M. The Complainant states that having submitted the form, the Provider still declined her claim and explained its decision by reference to (i) the Approval for Treatment Abroad Form not having been completed by an Irish referring consultant and (ii) due to the procedure itself not being an approved form of treatment.

The Complainant states that she feels “*completely let down by the Provider*” and that there was no other option but to “*seek treatment abroad*”. The Complainant submits that the procedure that would have been available for her daughter in Ireland, would have resulted in Ms. M having reduced spine flexibility and as a result her chances to continue her sporting activities would have been undermined.

The Complainant submits that following correspondence with the Provider on the **5 June 2019** she understood that she had permission to have the Approval for Treatment Abroad Form completed by the surgeon abroad, therefore dispensing with the requirement to have the form filled out by an Irish Consultant. The Complainant submits that the Provider has erred in reasoning its decision to refuse the claim, on the basis of the form not being filled out by an Irish based consultant.

The Complainant submits that the treatment her daughter received is a recognised form of treatment and has been approved by the US Food and Drug Administration (FDA). The Complainant has submitted research papers in relation to the treatment to support her statement that the treatment is an approved form of treatment, which has been “*around since 2006*”. The Complainant contends that she has supplied the Provider with information that the treatment in question is effective and safe and she refers to numerous scan results of Ms. M as proof of the success of the procedure.

The Complainant doesn't accept the Provider's decision that the treatment is not an approved form of treatment. The Complainant asserts that the treatment in question is “*not experimental and that it had been around for a number of years*” and that Ms. M was not part of any clinical trial. The Complainant states that proof of the treatment's success is that Ms. M was back competing in high level sporting activities some 12 weeks after the surgery.

Additionally, the Complainant says that the procedure is approved and “*is not stated as experimental in [European Country]*” where Ms. M's treatment was carried out. The Complainant wishes to be reimbursed for the cost of the treatment and associated costs for flights to [European Country].

### **The Provider's Case**

On **20 November 2020** the Provider made submission to this Office, in which it states that the Complainant first queried cover for treatment abroad on the **29 June 2018** and was informed by the Provider's agent about the need for prior approval, and for the necessary form to be filed out by an Irish referring consultant registered with the Provider.

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The Provider submits that by letter dated **15 August 2018** the Complainant informed the Provider that Ms. M was booked in for surgery on the **4 September 2018** and that the Irish based consultant could not complete the Approval for Treatment Abroad form, as he was not familiar with the surgery.

The Provider submits that its agent contacted the Complainant by telephone call on the **29 August 2018** requesting that the Approval for Treatment Abroad form, be completed by an Irish based consultant and to request Ms. M's medical history for the past 5 years to determine if the condition was pre-existing or not because Ms. M's policy had been inceptioned on **22 October 2015**. The Provider's agent also informed the Complainant that for the procedure to be approved, it had to be deemed by the Provider to be an approved form of treatment

The Provider submits that its records show that the next correspondence was on **18 January 2019** in which the Complainant wrote to the Provider and made reference to two letters the Provider had not received. The Complainant said that she had submitted Ms. M's medical history and asked if the Application for Treatment Abroad form could be completed by the treating Consultant A, from [European Country] as the Irish based Consultant would not complete the form.

The Provider says that by letter dated **21 January 2019** it informed the Complainant that it did not receive medical information references and it reiterated the requirement to have the Approval for Treatment Abroad form completed by a consultant in Ireland recognised by the Provider, in accordance with the terms and conditions of the policy.

The Provider submits that on the **1 February 2019** the Complainant was contacted by the Provider's agent by telephone, to advise her, that the Provider would review the possibility of accepting the Approval for Treatment form completed by Consultant A from abroad, and would then revert to the Complainant.

The Provider submits that by telephone call on the **22 May 2019** the Complainant reiterated that she could not get the Irish Consultant to complete the Approval for Treatment Abroad Form and again enquired about Consultant A completing the form.

The Provider submits that its agent contacted the Complainant by telephone on **5 June 2019** to request re-submission of medical notes from the general practitioner and to question the possibility of the Complainant requesting a supporting letter from the Irish based consultant. The Provider submits the Complainant stated that the Irish based consultant would be reluctant to do that. The Provider submits that its agent told the Complainant at that point, to have Ms. M's consultant from abroad fill out the form. The Provider states that this was an *"exception to give the case every opportunity and to get as much medical information as possible to review the application"*.

The Provider says that by correspondence dated the **7 February 2020** it informed the Complainant that the medical panel had reviewed the medical information received. It explained however that no benefit would be paid.

The reasons given by the Provider for the refusal of cover were firstly that under section **6 c) 22)** of the terms and conditions of the policy, if the Complainant wished to apply for treatment abroad he/she must have the Irish based consultant referring, complete the prior approval application form. The Provider outlined that Ms. M's Irish based consultant had not referred her abroad for treatment. Additionally, the Provider stated that no benefit was payable because in accordance with terms and conditions of the policy, treatment abroad must not be a "*new, not proven form of surgery*".

The Provider submits that to determine this aspect, the treatment carried out abroad must be considered by the Provider's Medical Director to be "*generally accepted as a proven form of treatment*". The Provider states that based on the information received the treatment did not meet the Provider's "*criteria to be considered a proven form of treatment*".

The Provider says that the Complainant appealed the decision to the Provider's medical director and was informed on the **25 February 2020** in the Final Response Letter that following review of the case the Provider was denying benefit citing **Rule 6 C)** of the Terms and Conditions of the policy relating to treatment abroad. The Provider again asserted that the Prior Approval Application form was not completed by an Irish based consultant and that the procedure undertaken by Ms. M did not come within its definition of an approved form of treatment.

The Provider outlined the specific criteria that must be met to be eligible for treatment abroad as follows:

- *"Prior approval has been sought*
- *The referral is by a consultant recognised by [the Provider].*
- *There is an urgent medical necessity for treatment of the condition from which the customer is suffering.*
- *The treatment or a reasonable alternative is not available in this country*
- *The treatment abroad is considered by [the Provider]'s Medical Director to be generally accepted as a proven form of treatment.*
- *There is a reasonable medical prognosis.*
- *The treatment abroad is provided in an institution or a hospital which would be equivalent to those recognised in Ireland by [the Provider].*
- *The treatment is provided by a consultant who would otherwise also be eligible for recognition by [the Provider] if practising in Ireland"*

The Provider states that in order to be considered as a proven form of treatment the Provider requires that:

- i. *There is reliable evidence that the procedure has been the subject of well-controlled studies with clinically meaningful endpoints, which have determined its safety and efficacy compared with standard treatments.*
- ii. *There is reliable evidence that the consensus among experts regarding the procedure is that further studies or clinical trials are not necessary to determine its safety or its effectiveness as compare with standard treatments.*

- iii. *Long term outcomes are available, defined as 5-year follow up, unless there are exceptional extenuating circumstances related to specific well-defined population groups for whom there is no other reasonable alternative form of treatment otherwise available...*

The Provider submits that in coming to its decision the Provider's Medical Director considered a number of international sources which support its decision that the procedure does not meet the Provider's standard to be deemed an approved form of treatment. Furthermore, the Provider outlines that during its decision making process it had regard to approach taken by other large international insurers.

The Provider outlines that in relation to this treatment there are:

*"There are still ongoing Clinical Trails designed to determine whether [the procedure] is a safe and feasible method of treatment"*

The Provider submits that it considered evidence provided by the 'NHS England Specialised Services Clinical Reference Group for Spinal Services' which published a report in **July 2019** from which the Provider quotes that while there is some advantages of this treatment it also indicates that:

- *"the published evidence is only available for small cohorts of patients and there are no long term published outcomes beyond 2 years" ("evidence is limited in that it consists entirely of clinical case reports, with no experimental or controlled studies in humans, and thus no systematic reviews or randomised controlled trials")*
- *"there is not sufficient evidence to support the routine commissioning of this treatment for the indication" and*
- *"further research, including experimental studies, is needed to confirm the safety, patient acceptability and effectiveness of this technique"*

The Provider references four other sources (International Society on Scoliosis Orthopaedic and Rehabilitation Treatment; UpToDate; British Scoliosis Society and Aetna) which support the Providers conclusion that there is no evidence to suggest consensus amongst experts on this treatment and that further studies are needed to determine safety and effectiveness.

The Provider submits that it has acted in accordance with principles of fairness and accepted the Complainant's application after the treatment had already been undergone, and in so doing set aside the requirement for written prior approval to be sought before the treatment was carried out.

The Provider acknowledges that in correspondence dated **7 February 2020** it informed the Complainant that the claim was not approved because the Prior Approval application form was not completed by an Irish based consultant. The Provider accepts that it was an error to cite this as a reason, having previously agreed to accept the completion of the application form by Consultant A from abroad.

As a gesture of compensation for this, the Provider has offered a goodwill gesture of €250.00. The Provider notes that despite this, the application form completed by Consultant A was in fact accepted and it was considered in full, as part of the Provider's claim assessment.

The Provider asserts that the cover was denied based on the determination that the treatment does not come within its definition of an approved form of treatment.

### **The Complaint for Adjudication**

The complaint is that the Provider incorrectly declined the Complainant's claim for the treatment for the Complainant's daughter, Ms. M, undertaken by her abroad in [European Country].

### **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 Complainants were 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 **14 October 2021**, 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 consideration of additional submissions from the parties, the final determination of this office is set out below.

I have considered the terms and conditions of the Complainant's policy that are applicable to the assessment and payment for the claim in question.

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I note **part 6 C)** titled "*Prior Approval for Treatment Abroad*" which states as follows:

*" 20) We will in certain circumstances provide benefit for your planned treatment abroad during a temporary stay abroad as outlined in points (i) and (ii) below.*

- i) For surgical treatment that is available in Ireland, we will pay benefit for medically necessary surgical procedures that are currently listed in the [Providers] Schedule of Benefits for Professional Fees, Surgery and Procedures Section. We will pay up to the average benefit that we would have paid in respect of the same surgical procedures in Ireland under your level of cover (including professional fees). We will pay up to plan amounts as specified in your Table of Benefits.*
- ii) For a therapeutic procedure that is not available in Ireland we will pay up to the plan amounts specified in your Table of Benefits, unless a reasonable alternative therapeutic procedure is available here in which case the benefit will be as outlined in (i) above.*

*21) If you wish to apply for benefit for planned treatment abroad, we require a fully completed Prior Approval Application form by your Irish based referring consultant.*

*22) We must receive the completed application 20 business days prior to commencement of your treatment.*

*23) We require a copy of the referral letter from your Irish consultant to your treating consultant abroad and this must detail the medical urgency of your treatment.*

*24) All treatment must be pre-authorized by [the Provider] and satisfy a list of specific criteria set out by [the Provider]. You must receive written approval from [the Provider] before you travel"*

And under:

*"6 c) 26) Exclusions for Prior Approval Medical Treatment Abroad Benefit is not payable for:*

*... v ) New, not proven forms of surgical procedures."*

I note that in order to consider a treatment to be a proven form of treatment the Provider requires that:

- i. There is reliable evidence that the procedure has been the subject of well-controlled studies with clinically meaningful endpoints, which have determined its safety and efficacy compared with standard treatments.*
- ii. There is reliable evidence that the consensus among experts regarding the procedure is that further studies or clinical trials are not necessary to determine its safety or its effectiveness as compare with standard treatments.*

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- iii. *Long term outcomes are available, defined as 5-year follow up, unless there are exceptional extenuating circumstances related to specific well-defined population groups for whom there is no other reasonable alternative form of treatment otherwise available...*"

Having carefully reviewed the medical information submitted by both parties I accept the Provider's position that it cannot be said that the treatment carried out, comes within the Provider's definition of a "proven form of treatment".

I accept the Complainant has supplied information that the procedure is FDA approved, however I note no evidence of approval by the European Medicines Agency. I note the Complainant in audio recording of telephone call from **7 February 2020** acknowledged that the treatment was "*approved in America, not in Europe, it will be Europe next year*"

I note from evidence provided by Consultant A, that the treatment at the time, was carried out in 15 hospitals in the United States of America and within three private hospitals in Europe. I note the positive elements of the medical reports submitted on behalf of Ms. M, and it is noted that happily in this instance, the patient has benefitted from the surgery. I must however take account of all the details of the medical evidence submitted. I note that while Consultant A outlines the effectiveness of the surgery in the 'Discharge Summary' report it also states that:

*"[The treatment] is a subject where evidence and science is currently lacking. It is performed only by a few surgeons and dissemination of knowledge currently tends to be by personal communication and sharing of knowledge between surgeons who know each other."*

Furthermore, I note from the Prior Approval Form filled out by Consultant A under Section 12:

*"Although the long-term results are awaited, [the treatment] is a promising alternative to instrumental fusion for adolescent idiopathic scoliosis in selected group of patient."*

and under **section 8**:

*"Complications and the requirement for further surgical intervention are reported in the literature, and this review thus suggests that further research is needed regarding this intervention.*

*Published articles suggest 70% curve correction rates that is maintained over 2 to 5 years. Longer follow-up is currently not available. There is also a learning curve for this as for all innovative procedures and a portion of the reported complications can be attributed to this learning curve...*

*Currently this procedure is not covered by NHS in the UK or HSE in Ireland"*

[my emphasis]

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Furthermore, I must take into account the submissions from the Provider that the treatment was not in widespread use, and that even in the number of countries where it was being performed its adoption was not universal.

Overall, I accept the Provider's position that the procedure was a new form of treatment and the subject of ongoing trials and there was no consensus amongst experts regarding the procedure that further studies or clinical trials were not necessary to determine its safety and effectiveness, as compared to the treatment already available. Accordingly, I accept that the Provider arrived at its decision to decline the Complainant's claim for treatment abroad, in a reasonable and just manner and that it was entitled, under the terms and conditions of the policy, to refuse to admit the claim for the cost of the treatment received in [European Country].

The Complainant also says that the Provider "*led me to believe there was a chance*" that cover would be provided, given its agreement to allow the treating consultant from abroad to fill out the prior approval form.

I have carefully considered the audio evidence of the telephone call from the **5 June 2019**. I note the following from this audio recording:

Agent: "*I was talking to my team leader again regarding the consultant em OK so they are advising that there are an awful lot of criteria around the treatment abroad em process and so but we can possibly do, but can't guarantee anything is if you can get your consultant abroad to complete the form and send us in as much information as possible on the treatment, any research that's been done on it to include that as well. Now we are going to get everything in and review it then ..."*

[my emphasis]

I note that by the time the Complainant submitted the approval form, completed by the Consultant abroad, the cost of the treatment abroad had already been incurred and there was no prejudice whatsoever to the Complainant seeking to have the claim admitted by the Provider, based on the form being submitted at that point, completed by the foreign consultant.

I am also satisfied on the basis of the audio evidence made available that it was made clear to the Complainant at that time that there was no guarantee whatsoever, that the claim would be admitted, but that the Provider would instead review the matter afresh, on the basis of the information made available by the consultant abroad.

Finally, the Provider has acknowledged an error on its part in incorrectly referring to the form not being filled out by an Irish Consultant, as representing one of the reasons why the claim was declined. I note that the Provider has made a goodwill gesture offer of €250.00 in recognition of its error in that regard, an offer which the Complainant has declined.

In my opinion, the Provider's offer in that regard falls short of the appropriate recognition of the inconvenience caused to the Complainant by this error. I note that this error was first made by the Provider in its letter of **7 February 2020**.

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It is disappointing that when the Provider examined the Complainant's situation again for the purpose of issuing its Final Response letter to her on **25 February 2020**, it failed at that time in the context of its consideration of the complaint, to note this error and instead it was repeated in the Final Response letter then issued to her.

In those circumstances, I consider it appropriate to partially uphold this complaint and I intend to direct the Provider to make a compensatory payment to the Complainant in the sum of €500 (five hundred euros) to compensate her for that error on the Provider's part.

Insofar as the substantive complaint is concerned however, I am satisfied for the reasons outlined above, that the Provider was entitled to decline the Complainant's claim for the cost of treatment undertaken abroad by Ms. M. and accordingly this more significant element of the complaint cannot be upheld.

### **Conclusion**

- My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is partially upheld, on the grounds prescribed in **Section 60(2)(g)**.
- Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider make a compensatory payment to the Complainant in the sum of €500, 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.**



**MARYROSE MCGOVERN**  
**Deputy Financial Services and Pensions Ombudsman**

22 November 2021

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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.

