An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0362
Sector:	Insurance
Product / Service:	Payment Protection
Conduct(s) complained of:	Disagreement regarding Medical evidence submitted Rejection of claim - fit to return to work
Outcome:	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The Complainant is a member of a Group Income Protection Scheme. Her Employer is the policyholder and the Provider the insurer, responsible for the underwriting of applications for cover and assessing claims.

The Complainant's Case

The Complainant, who works for her Employer from home as a [specified job title], has been absent from work since [date redacted] **2017**. She completed an income protection claim form to the Provider on **25 July 2017** when she detailed the illnesses that prevented her from working, as follows:

> *"**Describe in detail your illness/condition***
>
> *Hiatus Hernia*
> - *Stomach pain, burning sensation*
> - *Need to eat regularly*
> - *Feeling nauseous*
>
> *Gallbladder Dysfunction*
> - *Pain in abdomen area regardless of type of food taken, constant pain, no relief from pain medication*
> - *Sharp pain in back shoulder blade*
> - *Feeling very tired*
> - *Loss of appetite*

Sporadic Hemiplegic Migraine
- *Visual impairment*
- *Motor function impairment*
- *Loss of feeling in hands*
- *Speech disturbance*
- *Memory loss/confusion*
- *Feeling tired for several weeks/months after attack. Last attack Sunday 2nd of July 2017.*

Stress
- *Anxiety*
- *Loss of appetite*
- *Dizzy/faint*
- *Memory issues*
- *Problems sleeping*

How does your condition prevent you from working?

Gallbladder + hernia
Pain in abdomen and back
Feeling like vomiting
Sometimes the pain is very bad. I need to lie down. Symptoms of all ailments increase with stressful activity i.e. loss of appetite / not sleeping.
Pain is worse when sitting – pain is [alleviated] *while lying down.*
Pain is very sharp and it is very hard to concentrate when having an attack.

What work related activities does your current condition prevent you from performing?

Hemiplegic Migraine
- *Loss of memory / speech / visual loss / motor function loss*
- *Concentration (resolving technical issues within a time limit)*
- *Sitting for long periods of time*
- *With Hemiplegic Migraine (unable to perform any work duties due to the severity of the attack)*

Stress / depression
- *Feeling very anxious daily".*

Following its claim assessment, the Provider was satisfied that the Complainant met the Group Income Protection Scheme policy definition of disability for a period and it made a one-off claim payment in **October 2017** to cover the period from **10 September 2017** (the expiry of the 26 week deferred period) to **30 November 2017**.

The Complainant appealed this decision and on consideration of new evidence, the Provider fully reinstated the claim in **May 2018** and backdated it with a retrospective payment from 1 December 2017.

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This claim remained in payment until **31 March 2019**, from which date, following a claim review, the Provider concluded that the Complainant no longer satisfied the policy definition of disability and was fit to work.

The Complainant appealed this decision and following its review, the Provider made a further claim payment for the period **27 June 2019** to **31 August 2019** to help support a phased return to work for the Complainant.

The Complainant is dissatisfied that the Provider ceased payment of her income protection claim, in circumstances where she and her treating health professionals consider that she remains unfit to work.

In this regard, in the Complaint Form she completed on 17 September 2019, the Complainant sets out her complaint, as follows:

> *"In March 2017, I became very ill. I had been for many tests over the previous years. I had been unwell for over a decade. In March 2017, I found myself no longer able to control my symptoms. I went out on sick leave from work. Soon afterwards on* [date] *2017, I lost my husband suddenly. My symptoms, namely,* [Chronic Fatigue Syndrome]*,* [Irritable Bowel Syndrome] *and chronic pain became a lot worse. I was later diagnosed with Severe Fibromyalgia by* [Consultant Rheumatologist Dr A.].
>
> *I was referred to* [Dr A.] *by a pain specialist…after pain treatments failed to relieve me. As well as having Fibromyalgia, I was also diagnosed with depression by* [Consultant Psychiatrist Dr C.]*. Given I had just lost my husband at the age of* [thirties]*, I was now suffering with depressive moods and also* [Post-Traumatic Stress].
>
> *On advice from my former manager at* [my Employer]*, I completed a long term illness application and sent it to* [the Provider]*.* [The Provider] *declined my claim based on a consultation with a psychiatrist. I appealed this, and had a further consultation with* [Dr D.]*, a Consultant Rheumatologist through* [the Provider]*.* [The Provider] *then accepted my claim and back paid me. Over the year, I continued to have further symptoms. I became suicidal in May 2018 and sought help from* [Service]*. I was still attending my psychiatrist. She later changed my medication by increasing my antidepressants.*
>
> *As the end of* [2018] *approached,* [the Provider] *again assessed me for my claim, this time declining.*
>
> *I am making this complaint as for the following reasons:*
>
> *I am still suffering with Severe Fibromyalgia. I suffer greatly with Chronic Fatigue Syndrome. Also, when immobile for long periods of time, 60 mins +, I become very sore especially in my back, upper back, shoulder blades and also neck. My job requires me to sit on a chair for the majority of my shift i.e. 8+ hours.*

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I have difficulties with everyday tasks. For example, cleaning or any strenuous work. I sleep for 2-3 hours every day. I require assistance from family members to help with tasks incl. driving to appointments etc.

I am attending physiotherapy for my back as this is an ongoing problem. I am still working with my psychiatrist and I have also have a number of psychotherapists over the last two years. I continue to take medication for my mental health and this treatment has started to help.

I wish to make the complaint as my condition, Fibromyalgia, has not improved since first diagnosis. I continue to suffer with the same ailments since March 2017. I understand that Fibromyalgia is chronic and incurable and because I have not had much improvement especially in the area of chronic pain and [Chronic Fatigue Syndrome]*, I am in disagreement with* [the Provider] *to discontinue my claim.*

Also, in year 2018, [the Provider] *sent me to a Consultant Rheumatologist* [Dr D.] *who also diagnosed me with Severe Fibromyalgia. Since,* [the Provider] *have only sent me to consultants in the area of psychiatry and general occupation therapists, neither of which are qualified or experienced in rheumatology. Both rheumatologists, specialists in the area of Fibromyalgia, have both advised against my return to work. However,* [the Provider] *has dismissed the recommendation and have solely looked at evidence provided by Occupational Health therapists and psychiatrists.* [The Provider] *had me take a* [Chronic Pain Abilities Determination] *assessment at home. I passed the assessment however, considering that fibromyalgia does not necessarily affect mobility, I found the test to be unnecessary. I have hyper mobility syndrome* [which] *allows me to over extend my range so, my mobility or my range of motion has never been the issue, it is in fact, the reverse. Being idle or less mobile causes pain, i.e. sitting at desk being in a car, travelling on a plane, sitting on the sofa.*

I feel as a whole that [the Provider] *did not consider that my illness Fibromyalgia has not improved but they have discontinued my claim. I remain unable to return to work"*.

The Complainant has submitted letters from her treating health professionals in support of her complaint. In this regard, in her letter to the Complainant dated 12 February 2019, Consultant Psychiatrist Dr C. states, as follows:

"[The Complainant] *was referred to me and assessed on 18/2/2018. She was referred following the tragic death of her young and fit husband, who died of* [details]*. He was entirely well prior to that and his passing was extremely traumatic for* [the Complainant] *and his family.*

She developed depression following the loss and was referred to me for ongoing treatment. I have been seeing her since and she is on antidepressant medication, namely venlafaxine and mirtazapine. Her symptoms are slow to respond as she had PTSD features, connected with the way in which her husband died and she has flashbacks of the trauma. She is attending a therapist also.

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Up to now, I have been attempting to get [the Complainant] *rehabilitated and mixing with others as she self-isolates. She struggles with ongoing depressed mood and withdrawal. Her sleep is poor.*

She recently was assessed and turned down for income protection. I do feel that a return to work at some stage would be required and rehabilitative. At this point however, I do not believe she is fit to do so".

In addition, in his letter to the Complainant dated **22 February 2019**, Consultant Rheumatologist Dr A. states, as follows:

"[The Complainant] *has significant disabling diagnosis including fibromyalgia, depression, hemiplegic migraine and possible autoimmune related disorder incorporating being ANA* [antinuclear antibodies] *positivity. As a result she has generalised body pain and very poor sleep patterns. She finds it difficult to stand or sit for long periods of time and she has chronic fatigue.*

She requires long term medication including Effexor pain relief anti-inflammatories and a Beta Blocker for a fast heartbeat. She has also attended our psychiatry services.

[The Complainant] *has a history of musculoskeletal pain going back about ten years but because of the sudden loss of her husband recently I think this has exacerbated her symptoms.*

I have no doubt that [the Complainant] *has considerable work disability and is unable to return to work at present and certainly for the near future. Trying to ascertain whether she will be fit to return at some stage in the future is very difficult and opinion regarding this would have to be guarded"*.

In his more recent letter to the Complainant dated **27 March 2020**, Consultant Rheumatologist Dr A. states, as follows:

"[The Complainant] *attends…with a diagnosis of Hemiplegic Migraine, Fibromyalgia, ANA Positivity and Chronic Thoracic Back Pain. As a result of these conditions* [the Complainant] *has constant ongoing pain and loss of function related to musculoskeletal disorder. She takes pain killers, anti-inflammatories and despite this had ongoing constant all over body pain and tiredness. She has weekly physiotherapy which helps to some degree but only temporarily and she is undergoing a series of injections of her spine for chronic thoracic disorder.*

This is a chronic medical condition requiring long term medical follow up and medication".

In addition, in her letter dated **1 April 2020**, the Complainant's Physiotherapist, Ms W. states, as follows:

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"[The Complainant] *presented to me on the 16/09/19.* [She] *was complaining of persisting neck and upper back pain which had begun 2 years previously. Her right shoulder blade area was particularly painful. She had tried physiotherapy but her pain had never fully subsided. The MRI scan was unremarkable. Her pain was worse with any sustained posture, sitting, standing, lying. Her pain woke her up most nights.*

On assessment [the Complainant's] *neck range of motion was restricted to 75% of right side flexion and right rotation. Thoracic rotation was limited to 80% bilaterally. There was tenderness on palpation of the thoracic paravertebral muscles with severe tenderness of the right infraspinatus muscle.*

Treatment of mobilisation of the thoracic joints, soft tissue massage to areas of tenderness, passive range of motion exercises and a home exercise program.

Although [the Complainant] *demonstrated some signs of improvement, she remains compromised physically and she will need further intervention to help her improve her physical, postural and overall health"*.

Furthermore, in her email to this Office dated **27 April 2020**, the Complainant submits, *inter alia*, as follows:

"I have found this entire process incredibly stressful. I have been available at each and every appointment [made] *by* [the Provider]*. I have been compliant in this whole process. I have been honest throughout. I have been through one of the most horrible, distressing times of my life and I find some of the comments made a little inhumane given the suffering I've had between losing my husband and being diagnosed with a chronic condition to which there is no cure and no end.*

I have always been a hard worker …

Since March of 2017, life has been a constant battle. As any human can imagine, the death of my husband changed my life. Soon after my husband died, I was diagnosed with a chronic illness Fibromyalgia. I had been suffering with a list [of] *symptoms for a long time. So besides the heartache I was feeling, I was also physically aching in my body and nothing has changed to this day…Though, not all* [of my] *symptoms are constant, the ones that are constant disable me from doing things a healthy person may find easy.*

I have had several meetings with various people organised by [the Provider] *throughout this claims process…I hope one can understand that if I ever seemed vague about any of my symptoms it may be because I have so many symptoms and it's quite embarrassing for me to talk about some of them. Also, within the allotted time of the meeting, it would be very difficult for me to mention every single one of my symptoms for obvious reasons …*

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I, as a person, have never been expressive about my feelings. Even when my husband died, when I met someone outside my family, I tried never to show emotion. This has been something I have done all of my life, on the [advice] *of my own psychiatrist, she advised that I ask my mother to move home in order for me to grieve properly. I feel incredibly uncomfortable becoming emotional in front of people. I feel that I may make them feel uneasy or even upset them. This is something that I've spoken about with all of the psychotherapists and my psychiatrist over the years. I always try to be pleasant and almost jolly to hide my true feelings as a coping mechanism. Grief is a very complicated thing. Sometimes, you feel guilt, sometimes you feel completely numb or angry. Every day you could be feeling any way. I am on a number of medicines to manage my mental health and they help by taking the edge off the pain. Sometimes, I will take something strong if I am very anxious or very low to help me. My personality has completely changed over the last few years. I am working on every element I can to get healthy and able in order to return to work and have a normal life …*

In response to my cardiac status: I suffer from Inappropriate Sinus Tachycardia. Inappropriate meaning that it happens for [no] *apparent reason at any time. It did not present itself within the timeframe I was with* [Specialist in Occupational Heath Dr J.]. *Also, I wish to note that, if for instance I was to* [spend] *time mopping the floor for example, my heart rate could become so high that I become faint. My heart rate has been recorded at over 200bpm without being physically active …*

In response to my physical pain, I have to explain, I have Fibromyalgia. The issue is not generally with movement but the lack of [movement]. *Hence, sitting in a position like at a desk or even standing for a few minutes in one spot causes pain for me. Movement generally helps with my condition. So, for me to sit at a desk for 8 hours a day would and had been and causes me a lot of pain. I have no issues with my flexibility. My muscles when not in use tend to get very tender especially in the areas of my ribcage, my back between my shoulder blades* [and] *my neck. The pain is a sharp burning like pain, Medicine generally does nothing to ease it. I try to apply heat but it's an awkward area to heat and also attend physiotherapy* [which] *helps to ease out the muscles in my back and neck. I have never found a way to fix the pain in my ribs. I suffer with pain every single day in these areas mostly …*

I wish to point out that neither my Rheumatologist, my GP or my physiotherapist have ever heard of the [Chronic Pain Abilities Determination] *test. It seems that someone who specialists in my illness, Fibromyalgia and Chronic Fatigue Syndrome, would have heard of this test if it is something that it either typical or useful.*

I want to make it clear that my flexibility or mobility has never been an issue with my illness. My pain is more announced when I have been in a fixed position for a long period, For instance, sitting at the table typing this…is painful as I am in a position where my motion is limited so, pain is starting to build my muscles.

The [Chronic Pain Abilities Determination] *report also mentions my emotional state. I again want to explain that I don't tend to become emotional and this is a part of my*

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coping mechanisms. I find it unfair that the report mentions that I showed no emotion when speaking about my husband. Though I do not express emotion openly, I certainly feel it but do not share it.

The report mentions that on the second day of the [Chronic Pain Abilities Determination] *that I opened the front door in my pyjamas. This was absolutely the case and I explained that I had to sleep for a while before we started on the day and that I had just woke up. In retrospect, I should have not had a sleep before the assessment but I would have felt unwell when doing the test. I was exhausted on the day between the tests and slept for a lot of the day. I explained this to the examiner …*

Fibromyalgia does not adhere to any type of schedule. The pain can come and go as it pleases…some of the pain I have in my back, ribs, neck and shoulder are a constant pain. They never leave. Other pains may come and go without any known reason. Fibromyalgia is not a predictable illness and neither are symptoms…on day 2 [of my Chronic Pain Abilities Determination assessment] *my pain was less. This was however day 3. There was a rest day in between which…I had rested for the majority of the day so, on day three, yes, my pain would have been less...Again, it's hard to determine or predict the pain of Fibromyalgia. A simple task like folding some clothes can sometimes cause more pain than for instance hoovering because you're in a more rigid position …*

The tests were completed over several hours. Within those hours, I was being stood up. Told to sit. Press things. Move things, walk etc. This is something that will help with the pain experienced in fibromyalgia cause I am moving and not in a rigid position like sitting at [a] *desk for 9 hours a day without much movement so, the comparison between what my job entails and doing the tests seem very insignificant in providing any sort of evidence to show my inability to perform my work, it would have been a more viable test to have me sit in a fixed position at my work desk and observe how this affects my body and how the pain builds …*

I explained to [Consultant Psychiatrist Dr P.] *that I may often only sleep three to four hours throughout the night. I have no issues with getting to sleep as my body is tired. However, as I explained to* [Dr P.], *I find it very difficult to stay asleep, waking constantly is part of my nightly pattern. I don't get enough of a continuous sleep throughout the night. I explained that this is why my psychiatrist who has been treating me for years prescribed me sleeping tablets in a bid to help me to achieve a full night's sleep and so I wouldn't have to sleep to recoup during the day. A major symptoms of Fibromyalgia is Chronic Fatigue syndrome and I suffer with this ongoing. If for instance, you become tired, it is generally quite sudden and you feel quite nauseous if you don't take a nap. The way I can describe it as I have described it to each assessor is the feeling of jet-lag or being awake far too long. Though, I explained all of this to* [Dr P.], *he argued with me and I felt very uncomfortable.*

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> *I would consider that my psychiatrist was prescribing me with* [what] *I needed in her opinion. Furthermore, it seemed that* [Dr P.] *did not have a good idea of Fibromyalgia and Chronic Fatigue Syndrome…so if my symptoms seemed vague at the time, it may be down to* [Dr P.]*'s lack of understanding of my condition even though, I did explain everything to him".*

As a result, the Complainant *"would like my pay* [that is, the Complainant's income protection claim] *to be reinstated* [by the Provider] *until the time I am fit and able to return to my work"*.

The Provider's Case

Provider records indicate that the Complainant, having been absent from work since [date redacted] 2017, completed an income protection claim form on 25 July 2017 when she advised that the illnesses that prevented her from working were *"Hiatus Hernia … Gallbladder Dysfunction … Sporadic Hemiplegic Migraine … Stress"*.

In order for an income protection claim to be payable, a member of the Group Income Protection Scheme must satisfy the policy definition of disability, as follows:

> *"The member's inability to perform the Material and Substantial Duties of their normal insured occupation as a result of their illness or injury; upon occurrence of which the benefit under the policy becomes payable, after the Deferred Period"*.

As part of its claim assessment, the Provider arranged for the Complainant to attend for an independent medical examination with Consultant Psychiatrist Prof M., who advised in his Report dated 8 September 2017, as follows:

> *"The diagnosis is of a bereavement reaction. Although* [the Complainant] *has some depressive symptoms, these are within expected limits for grief and probably best considered as part of the bereavement process …*
>
> *The symptoms of grief are progressing. Her difficulties do not include major cognitive difficulties, functional impairment or psychosis. The current symptoms will likely improve as she engages further with the process of recovery …*
>
> [The Complainant] *is re-establishing a normal day to day pattern with the support of her family and this has progressed to include driving, using computer-assisted technologies, performing household chores, regular exercise and social interactions. She is working with her father on the management of her house renovations …*
>
> [The Complainant] *engages with a variety of activities, social interactions and functional tasks but remains somewhat reticent about social engagement.*

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> *The current treatment is provided by her GP – she has engaged with bereavement counselling and also commenced mirtazapine 15mg nocte to assist with sleep. She has not been referred to specialist mental health services at any point.*
>
> [The Complainant] *is experiencing a bereavement reaction that is both understandable and proportionate to the tragic loss of her husband. Her prognosis in terms of this grief is positive as it is progressing normally.*
>
> [The Complainant] *has not set any goals for a return to work in the short term but hopes to re-engage thereafter.*
>
> [The Complainant] *is keen to return to her employment but feels that she is not yet sufficiently recovered to return to work. In particular, she is concerned that she may find interactions with clients stressful, however, her status is likely to further improve as she continues to engage with her usual day to day lifestyle and moves towards a full recovery. A return to work will be an important element in this continued journey.*
>
> *… Re-engaging with work will provide an important step in* [the Complainant's] *continued recovery. Ideally, this could occur on a phased basis of half-time (daily hours) for 2-4 weeks progressing to full time thereafter".*

The Provider was thus satisfied that the Complainant met the policy definition of disability for a period and as the policy deferred period is 26 weeks, it made a one off income protection claim payment to the policyholder to cover the period from 10 September 2017 (the expiry of the 26 week deferred period) to 30 November 2017, in the amount of €2,589.52.

In this regard, the Provider advised the Complainant by letter dated 9 October 2017, as follows:

> *"Based on the supporting medical evidence received our decision is to admit this claim with effect from 10/09/2017 which represents the end of the deferred period until the 30/11/2017 as you have been deemed fit to return to work by* [Prof M.]*, Consultant Psychiatrist. Please note you have been deemed fit to return to work as at today's date on an initial phased basis over a period of 2-4 weeks however* [we] *are happy to pay the claim until the 30/11/2017 in order to allow for the appropriate return to work arrangements to be made".*

The Provider says that the Complainant appealed this decision by way of furnishing the Provider with a letter from her treating Consultant Rheumatologist Dr A. dated 13 February 2018, wherein Dr A. advised that she had diagnosed Fibromyalgia and advised that the Complainant was unfit for work.

In order to further consider the matter, the Provider arranged for the Complainant to attend an independent medical examination with Consultant Rheumatologist Dr D. on 22 March 2018, who in his ensuing Report of the same date advised, as follows:

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> *"*[The Complainant] *has evidence of fibromyalgia by history and on examination today.*
>
> *I feel she is currently suffering from significant grief reaction with some symptoms of depression and anxiety but this would be better evaluated by her Psychiatrist.*
>
> [The Complainant's] *current symptoms are one of severe generalised pain, abdominal pain, diarrhoea, episodes of palpitations and weakness, difficulty concentrating and profound fatigue …*
>
> *It is my opinion that* [the Complainant] *is currently not in a position to return to her previous duties. She I think will require further significant psychiatric input. She also needs to undergo a cardiac evaluation but I did discuss with her today that returning to work eventually would probably be beneficial for her and she agreed with this.*
>
> *I suspect that it will take at least another six months for* [the Complainant's] *condition to improve overall and then I would see her being a candidate for returning on a phased basis"*.

Having considered this new evidence, the Provider fully reinstated the income protection claim in May 2018 and backdated it with a retrospective payment from 1 December 2017.

The Provider says that income protection claims are subject to ongoing review to ensure that the policy definition of disability continues to be met. In this regard, the Provider commenced a review of the Complainant's claim in October 2018 and it was furnished with a letter from her treating Consultant Rheumatologist Dr A. dated 6 June 2018 which stated, as follows:

> *"I saw* [the Complainant] *today. She seems to have improved in herself and I* [think] [Consultant Psychiatrist Dr C.] *has been very helpful from a psychiatry perspective".*

The Provider was also furnished with a letter from the Complainant's treating Consultant Cardiologist Prof T. dated 12 July 2018 which stated, as follows:

> *"*[The Complainant]*, who really had inappropriate sinus tachycardia had a nice response to betablocker therapy.*
>
> *Repeat Holter shows heart rate is now down to 81 bpm. Her left ventricular function and valves all look quite reassuring"*.

The Provider notes that both of these letters indicated an overall improvement and positive response to treatment.

As part of its claim review process, the Provider arranged for the Complainant to attend with Specialist in Occupational Health Dr J. on 23 November 2018, who in his ensuing Report of the same date advised, as follows:

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> *"From the physical examination/observation, I did not detect a medical contra-indication for* [the Complainant] *to resume work. She did not seem overly tired. Her mood seemed normal; her cardiac status was stable and while she had tender spots…I did not think she was in such pains that she is unable for sedentary tasks from physical point of view. However apart from the clinical observation, I also considered her reported symptoms including her suicidal thoughts. Therefore, I suggest deferring making a decision on her return to work at present. I recommend* [the Provider] *considers obtaining an up-to-date assessment of her mental health before confirming her fitness to carry out her duties"*.

As a result, the Provider arranged for the Complainant to attend for a psychiatric evaluation with Consultant Psychiatrist Dr M. on 22 January 2019, who advised in his ensuing Report of the same date, as follows:

> *"*[The Complainant] *has had depression and anxiety following the traumatic death of her husband. She…has worked hard on recovery and has largely been successful …*
>
> *She is engaged in appropriate treatment and has responded well …*
>
> *It is my opinion that* [the Complainant] *is currently fit to return to work. She is naturally anxious about a return, having been out for so long"*.

Having considered this new evidence, the Provider wrote to the Complainant on **8 February 2019** to advise, as follows:

> *"We have now received* [Consultant Psychiatrist Dr M.'s] *report following the recent assessment.*
>
> [Dr M.] *has advised you are fit to resume work. When assessed by* [Occupational Health Physician Dr J.]*, he was…also of the opinion you were fit for work. Payments on the claim will therefore cease.* [We] *are happy pay the claim to the 31 March 2019, but no further payments will be issued following this. This payment will be issued on 25 February 2019.*
>
> *We would therefore encourage you to meet with* [your Employer] *and agree a return to work".*

The income protection claim thus remained in payment until 31 March 2019 (with payments made of circa. €15,400), from which date the Provider concluded that the Complainant no longer satisfied the policy definition of disability and was fit to work.

The Provider says that the Complainant appealed this decision by furnishing the Provider with a letter from her treating Consultant Psychiatrist Dr C. dated 12 February 2019, which concluded, as follows:

> *"I do feel that a return to work at some stage would be required and rehabilitative. At this point however, I do not believe she is fit to do so".*

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In addition, the Provider was also furnished with a letter from the Complainant's treating Consultant Rheumatologist Dr A. dated 22 February 2019, which concluded, as follows:

> *"I have no doubt that* [the Complainant] *has considerable work disability and is unable to return to work at present and certainly for the near future. Trying to ascertain whether she will be fit to return at some stage in the future is very difficult and opinion regarding this would have to be guarded"*.

The Provider says that despite extensive independent medical evidence advising that she was fit to undertake her pre-disability sedentary role from a physical and mental perspective, in order to review the claim once again and to assess the complex nature of her complaints, the Provider arranged for the Complainant to attend for a further psychiatric assessment and a further occupational health assessment, as well as for her to undergo a Chronic Pain Abilities Determination.

In this regard, the Provider arranged for the Complainant to attend for an independent medical examination with Consultant Psychiatrist Dr P. on **2 April 2019**, who in his Report of the same date advised, as follows:

> *"*[The Complainant's] *mood was euthymic and her affect was reactive. Her account of some symptoms seemed vague and overstated at times …*
>
> [The Complainant] *was not clinically depressed or anxious. Her mood was not pervasively depressed …*
>
> *From a mental health point of view,* [the Complainant] *is fit to carry out normal occupation"*.

The Complainant next undertook a two day Chronic Pain Abilities Determination assessment over a 2½ hour period on 20 May 2019 and a 1½ period on 22 May 2019. In her ensuing Report, Senior Occupational Therapist Ms S. advised, as follows:

> *"*[The Complainant] *was provided an opportunity to demonstrate her limitations and restrictions during the two days of* [Chronic Pain Abilities Determination]*, and despite the…inconsistencies and discrepancies during physical testing, the results indicate that they are a true representation of her capabilities to safely perform work-day activities over a normal working day.*
>
> *According to the* [Chronic Pain Abilities Determination] *results on day 2,* [the Complainant] *demonstrated the following safe work-day tolerances:*
>
> - *She is able to constantly (over 67% of the working day) sit, stand, walk, perform bi-manual fine dexterity, perform bi-manual handling tasks and reach out, all with regular breaks*

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- [The Complainant] *demonstrated normal cervical ranges of movement in all planes during formal testing*

- [The Complainant] *demonstrated normal shoulder ranges of movement in all planes during formal testing*

- *Normal power (5/5) was demonstrated in both upper limbs*

- *Normal gripping abilities were demonstrated in both hands*

- [The Complainant] *demonstrated normal strengths in the bilateral key, tip and palmar pinch tests*

- [The Complainant]*'s pain levels did not increase and in fact decreased from the start of day 1 to the conclusion of day 2*

- *Her abilities on day 2 compared to day 1 increased in the left and right key and tip pinches, left and right five-point grip test, bilateral reaching out, and bi-manual fine dexterity and handling tests.*

Therefore, the results on day 2 of [Chronic Pain Abilities Determination] *when compared to the demands of her role clearly confirm that from a physical perspective* [the Complainant] *is fit to resume her normal role on a full-time basis …*

With regards to the battery of cognitive tests undertaken during the [Chronic Pain Abilities Determination] *assessment, the MMSE (Mini-Mental State Examination) is designed to examine a number of factors including orientation, immediate and short-term memory as well as language functioning. In addition, the result of the test are also able to determine consistency and sincerity of effort. Scores in the MMSE test of 24-30 indicate no cognitive impairment, 18-23 mild cognitive impairment, and 0-17 severe cognitive impairment.* [The Complainant] *scored 26 on day 1 and 29 on day 2 of* [Chronic Pain Abilities Determination] *in the test. Therefore, she did not demonstrate any level of cognitive impairment during the test on either day …*

The results of the CNSVS [CNS Vital Signs] *tests therefore should be viewed as the minimum she is able to perform, and the scores indicate that there are no cognitive barriers preventing her from returning to work as an At Home [occupation redacted] on a full-time basis"*.

The Provider says in this regard, that the Chronic Pain Abilities Determination (CPAD) was designed to specifically assess functional disorders such as fibromyalgia, chronic fatigue and chronic pain syndromes and it provides objective measurements for current work capacity from both a physical and cognitive perspective. The CPAD protocol was devised by a group of professionals who are experts in the field, including an Irish Rheumatologist, Neuro-psychiatrist and Physician.

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The Provider notes that it was published in the Irish Medical Journal in 2008 and has been in widespread use throughout the UK and Ireland for many years, and its usage and protocols are accepted by the Irish High Court.

In addition, the Provider also arranged for the Complainant to attend with Specialist in Occupational Health Dr H. on 27 June 2019, who advised in his ensuing Report dated 8 July 2019, as follows:

> *"In my considered opinion, based on the information available, I am unable to declare* [the Complainant] *as totally unfit for the material and substantial nature of her occupation as an at home [occupation redacted]. A phased return to work, such as half her normal hours, over 2-3 weeks may facilitate* [the Complainant] *in returning to work"*.

The Provider says that having further considered the matter with extensive assessments of both her physical, mental health and function, it remained its opinion that the Complainant was medically fit to resume work. As the Specialist in Occupational Health Dr H. had indicated that phasing the Complainant's return to work over 2-3 weeks would be helpful, which is understandable given the amount of time she had been absent from work, the Provider says that it made a further payment on the claim in July 2019 for the period from 27 June 2019 to 31 August 2019 in the amount of €2,146.77, to support a phased return to work.

The Provider is satisfied that it carried out a thorough review of the income protection claim, following which it remained of the opinion that the Complainant no longer satisfied the policy definition of disability. In this regard, during 2018 and 2019, the Complainant was assessed by three different Consultant Psychiatrists and two Occupational Health Physicians and she also undertook an extensive two day test of her physical and cognitive functions. The outcome of these assessments indicated that the Complainant had the physical, mental and cognitive capacity to perform her work duties. The Provider furnished each of these independent medical examiners with the medical reports furnished by and on behalf of the Complainant and it has no doubt that these were reviewed and considered; however these examiners, as medical professionals specialising in assessing work disability, are entitled to form their own opinion as to the Complainant's fitness for work

The Provider says that the nature of income protection insurance is to provide partial income replacement in the event of disability. For a claim to be paid, the Provider must be satisfied that a claimant meets the policy definition of disability. A common misconception from claimants is that they sometimes consider that the diagnosis and ongoing treatment of a medical condition is sufficient to qualify for benefit. However, the diagnosis of a condition does not automatically equate to work disability and the Provider has to assess whether work disability is present in each individual case.

The Provider is not contesting that the Complainant has Fibromyalgia, a recognised functional psychosomatic disorder characterised by chronic widespread musculoskeletal pain and tenderness at multiple specific points, associated with abnormal pain processing,

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sleep disturbances, fatigue, stiffness, and psychological distress such as anxiety and depression.
The Provider does, however, submit that the diagnosis or presence of this illness does not automatically equate to work disability as many people with fibromyalgia continue to work, and the general medical consensus is that working is important for overall health and wellbeing and should be encouraged.

The Provider notes that the Complainant has not made any real serious or concerted effort to resume work since her absence commenced in March 2017. The Complainant is a young woman now in her mid-30s with her whole life ahead of her and there is no doubt that working will provide her with health, therapeutic and financial rewards. The choice whether she resumes work is clearly hers to make but unfortunately the Provider is satisfied that she does not have a valid income protection claim under the terms of the Group Income Protection Scheme that she is a member of.

The Provider says that the essence of the Group Income Protection Scheme insurance policy is to assess whether a claimant is disabled from working due to illness or injury. The Provider takes the view that it has carefully considered this matter and that the weight of objective medical evidence before it clearly indicated that the Complainant was no longer disabled from working, despite her diagnosis. As the Complainant no longer met the policy definition of disability, the Provider is satisfied that it ceased payment of the income protection claim, in accordance with the terms and conditions of the Group Income Protection Scheme that she is a member of.

The Complaint for Adjudication

The complaint is that the Provider wrongly or unfairly ceased payment of the Complainant's income protection claim, in circumstances where she and her treating health professionals consider that she remains unfit to work.

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

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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 **24 September 2020**, 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.

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

The complaint at hand is that the Provider wrongly or unfairly ceased payment of the Complainant's income protection claim, in circumstances where she and her treating health professionals consider that she remains unfit to work. In this regard, the Complainant is a member of a Group Income Protection Scheme. Her Employer is the policyholder and the Provider the insurer, responsible for assessing claims.

I note that the Complainant, who works for her Employer from home, as a [specified job title], has been absent from work since [date redacted] **2017**. She completed an income protection claim form to the Provider on 25 July 2017 detailing the illnesses that prevented her from working, as outlined at pages 1-2 of this decision.

In addition, I note that the Complainant's GP Dr H. completed a Practitioner Report on **26 July 2017** stating that the Complainant had been absent from work since [date redacted] 2017 and advising, as follows:

> ***"What is the exact nature and cause of disability?***
> *1) Hiatus Hernia & Abdominal pain*
> *2) Cholecystitis – gall bladder pain*
> *3) Hemiplegic Migraine*
> *4) Stress*
>
> ***Describe the symptoms which prevent the claimant from working.***
> *Severe upper abdominal pain*
> *Clinical Dx. Biliary Colic*
> *? underlying gallstones*
> *Being investigated* [hospital] *…*
>
> ***If the condition is not improving, please confirm why this is.***
> *Persisting right upper abdominal pain.*
>
> ***What is your prognosis for the claimant?***
> *Await further investigation results …*
> *Abdominal scan*
> *? exploratory surgery …*

/Cont'd…

> ***When is the claimant likely to be able to resume full time work?***
> *Undetermined*
> *? possibly 2-3 months"*.

I am satisfied that the Group Income Protection Scheme that the Complainant is a member of, like all insurance policies, does 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.

Section 5, 'Claims', of the applicable Group Income Protection Policy Conditions provides, *inter alia*, at pg. 8:

> *"The benefit shall be payable to the Policyholder at the end of the Deferred Period once we are satisfied that the member meets the definition of Disability"*.

As a result, in order for an income protection claim to be payable, a claimant must satisfy the policy definition of disability. In this regard, the '**Glossary of Terms'** appendix of these Policy Conditions defines **disability** at pg. 19, as follows:

> *"The member's inability to perform the Material and Substantial Duties of their normal insured occupation as a result of their illness or injury; upon occurrence of which the benefit under the policy becomes payable, after the Deferred Period.*
>
> *The member must not be engaged in any other occupation"*.

Following its assessment, the Provider was satisfied that the Complainant met the Group Income Protection Scheme policy definition of disability for a period and it made a one-off claim payment in **October 2017** to cover the period from 10 September 2017, the expiry of the 26 week policy deferred period, to 30 November 2017. The Complainant appealed this decision and on consideration of new evidence, the Provider fully reinstated the claim in **May 2018**, backdating it with a retrospective payment from 1 December 2017.

Income protection claims are subject to ongoing review to ensure that the policy definition of disability continues to be met. In this regard, **Section 5, 'Claims'**, of the Policy Conditions provides, *inter alia*, at pg. 11:

> *"**Claim Review***
>
> *Payment of benefit is conditional on the Claiming Member continuing to satisfy the definition of Disability and we will conduct a periodic assessment of the member's ability to carry out the Material and Substantial Duties of their Normal Occupation. The frequency of these reviews will be determined by the medical evidence received …*

/Cont'd…

As part of the process we will request updated medical evidence from the Claiming Member's treating Physician. We may also request a medical examination by a specialist chosen by us, or other types of medical evidence as necessary."

As part of one such claim review, I note that the Provider arranged for the Complainant to attend with Specialist in Occupational Health Dr J. on 23 November 2018, who in his ensuing Report of the same date advised, as follows:

*"**Current medical complaints:***
Pains – [the Complainant] *reported having on-going pains including hip pains, neck/upper back pains, rib cage pains, back pains and also pains in her hands she said she wears a splint in her hands at night. She said the severity of her pains varies but she stated that she has pains daily.*

Mood – [the Complainant] *said she has on-going low mood and loss of interest. She had suicidal thoughts which she said improved after the Suicide Counselling but she said these thoughts had recurred in the last few weeks. She said she resumed private counselling 3 weeks ago.*

[The Complainant] *had episodic chest pains / palpitations and she is apparently awaiting further assessment in Dublin …*

***Clinical Examination:** …*

[The Complainant] *walked / moved / sat normally and with ease. She did not seem in pain but she did report she has pains over her upper and lower back.*

Cervical & arms: normal range of movements over neck and upper limbs; tenderness over supra-scapular and inter-scapular areas; tenderness over right shoulder and left wrist. Hands – no arthropathy.

Low back: tenderness reported over L4/5; normal resistance and normal range of movements.

Hips and knees: normal.

Bilateral ankles: reported hypersensitivity; no swelling. Toe-stand and squat: normal.

Affect: [The Complainant] *was engaging and smiley / friendly although she seemed sad & slightly anxious at times; she interacted normally and maintained normal eye contact. She was alert and coherent.*

CVS / Resp: normal …

***Opinion:** …*

/Cont'd…

From the physical examination/observation, I did not detect a medical contra-indication for [the Complainant] *to resume work. She did not seem overly tired. Her mood seemed normal; her cardiac status was stable and while she had tender spots…I did not think she was in such pains that she is unable for sedentary tasks from physical point of view.*
However apart from the clinical observation, I also considered her reported symptoms including her suicidal thoughts. Therefore, I suggest deferring making a decision on her return to work at present. I recommend [the Provider] *considers obtaining an up-to-date assessment of her mental health before confirming her fitness to carry out her duties"*.

As a result, I note that the Provider arranged for the Complainant to attend for a psychiatric evaluation with Consultant Psychiatrist Dr M. on **22 January 2019**, who advised in his ensuing Report of the same date, as follows:

*"**History Leading to Absence:***

[The Complainant] *works as a…technical advisor, working from home. She has worked with* [her Employer] *since 2015 and her current position since June 2016. Her first date of absence was the 12th March 2017. She had been working alternate days, dur to medical problems and her supervisor suggested she take sick leave, which she did in March 2017. Her problems included hiatus hernia, gall bladder dysfunction, hemiplegic migraine and stress. Two months after she went on sick leave, her husband died suddenly … it was traumatic for her.*
….

Current Psychiatric Symptoms:

[The Complainant] *said things have improved since August and September 2018, she is no longer suicidal. She is now working on improving her health by having her heart attended to and trying to get herself as well as she can. She said she has had a life of pain since third year in school.*

She doesn't describe currently depressed mood but says she does get down at times particularly if she is at a social occasion and she feels lonely at those. She is able to take interest and enjoyment in her activities, she loves reading and has three books on the go at the moment. Her sleep is problematic, she gets about four hours sleep at night-time but she also sleeps in the afternoon, at which time she goes to bed for 3-4 hours. Her appetite is poor. She eats twice a day but her weight is steady. She has to be very careful about her diet as it affects her bowel. She says she does get stress at times, about little things. She has no obsessional checking, she had no obsessional thoughts. She does have recurrent thoughts about her husband's death. … She says in general she tends to over think things and had to distract herself in order to get her mind away from worrying thoughts. Examples of distraction include painting by numbers which works well, as does reading …

Past Psychiatric History:

/Cont'd…

She is attending [Dr C.]*, Consultant Psychiatrist who has told her that she suffers from post-traumatic stress disorder. In 2018, she attended* [Service] *for 12 weeks as she suicidal thoughts which have largely resolved since August/September 2018.*

Past Medical History:

[The Complainant] *has had a hiatus hernia and digestive problems since the age of 16. She has had sporadic hemiplegia since 2014, which presented with visual and speech impairment with weakness of the arms and hands and extreme fatigue for weeks after the episode. Her last episode was July 2018. She had a history of rib cage pains and upper back pains for eight years which are worse since October 2016. She had episodic short term absences but eventually took long term sick from April 2017 due to pains. She has a history of fibromyalgia and has attended a pain specialist, injection therapy has had a short lasting effect. She had attended a rheumatologist,* [Dr A.] *and she has a history of tachycardia and is being treated by a cardiologist for this. She is due to have electrophysiological investigations in Dublin, in the next couple of weeks and may need an ablation, she is being treated by cardiologist,* [Prof T.] *and is on Nebilet.*

Treatment:

Her current treatment is Venlafaxine 150mg daily. She is also attending a counsellor weekly at the moment.

She is on Nebilit, Diazepam which she takes rarely for panic, Stilnoct 5-10mg at night-time, Buscopan and Solpadol. She has come off the Zispin and the Topamax …

Patient's Perception of what is stopping her from working:

[The Complainant] *said it is more tiredness than anything else. She said she has very little energy. She said that talking to people would make her anxious and she could be on a call for up to four hours and people sometimes ask personal questions. She said also the pain would prevent her from working. When she was working she had to use a lot of hot water bottles for her back pain, she said she also has pain, which is horrendous in the mornings and it takes 45 minutes for her to get going. She said she also has massive problems with her stomach and if she eats the wrong food, she gets diarrhoea and has to go to the toilet a lot and there is only eight minutes per day allowed for going to the toilet. She said this affects her, for example, it stops her travelling. However, she has travelled to [European county] last year for a weekend and also to [European Capital] with a friend, for the weekend …*

Mental State Examination:

[The Complainant] *looked well, she was very friendly and outgoing. She was cheerful and upbeat in her manner. Her speech was normal in rate, tone and volume. She was*

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distressed and tearful when talking about her husband and some of her medical difficulties but most of the time, her mood was cheerful. Her attention, concentration and memory were good and she had good insight …

[The Complainant] *has had depression and anxiety following the traumatic death of her husband. She…has worked hard on recovery and has largely been successful …*

She is engaged in appropriate treatment and has responded well …

It is my opinion that [the Complainant] *is currently fit to return to work. She is naturally anxious about a return, having been out for so long"*.

Having considered this new evidence, I note that the Provider wrote to the Complainant on **8 February 2019** to advise, as follows:

"We have now received [Consultant Psychiatrist Dr M.'s] *report following the recent assessment.*

[Dr M.] *has advised you are fit to resume work. When assessed by* [Occupational Health Physician Dr J.]*, he was…also of the opinion you were fit for work. Payments on the claim will therefore cease.* [The Provider] *are happy pay the claim to the 31 March 2019, but no further payments will be issued following this. This payment will be issued on 25 February 2019.*

We would therefore encourage you to meet with [your Employer] *and agree a return to work".*

I note in this regard, that the Provider ceased payment of the income protection claim on 31 March 2019, from which date it concluded that the Complainant no longer satisfied the policy definition of disability and was fit to work.

I note that the Complainant appealed this decision and submitted a letter from her treating Consultant Psychiatrist Dr C. dated 12 February 2019 which stated, as follows:

"[The Complainant] *was referred to me and assessed on 18/2/2018. She was referred following the tragic death of her young and fit husband, who died of* [details]. *He was entirely well prior to that and his passing was extremely traumatic for* [the Complainant] *and his family.*

She developed depression following the loss and was referred to me for ongoing treatment. I have been seeing her since and she is on antidepressant medication, namely venlafaxine and mirtazapine. Her symptoms are slow to respond as she had PTSD features, connected with the way in which her husband died and she has flashbacks of the trauma. She is attending a therapist also.

/Cont'd…

Up to now, I have been attempting to get [the Complainant] *rehabilitated and mixing with others as she self-isolates. She struggles with ongoing depressed mood and withdrawal. Her sleep is poor.*

She recently was assessed and turned down for income protection. I do feel that a return to work at some stage would be required and rehabilitative. At this point however, I do not believe she is fit to do so".

In addition, the Complainant also submitted as part of her appeal a letter from her treating Consultant Rheumatologist Dr A. dated **22 February 2019** which stated, as follows:

"[The Complainant] *has significant disabling diagnosis including fibromyalgia, depression, hemiplegic migraine and possible autoimmune related disorder incorporating being ANA* [antinuclear antibodies] *positivity.*
As a result she has generalised body pain and very poor sleep patterns. She finds it difficult to stand or sit for long periods of time and she has chronic fatigue.

She requires long term medication including Effexor pain relief anti-inflammatories and a Beta Blocker for a fast heartbeat. She has also attended our psychiatry services.

[The Complainant] *has a history of musculoskeletal pain going back about ten years but because of the sudden loss of her husband recently I think this has exacerbated her symptoms.*

I have no doubt that [the Complainant] *has considerable work disability and is unable to return to work at present and certainly for the near future. Trying to ascertain whether she will be fit to return at some stage in the future is very difficult and opinion regarding this would have to be guarded"*.

As part of its appeal process, I note that the Provider arranged for the Complainant to attend for an independent medical examination with Consultant Psychiatrist Dr P. on 2 April 2019, who in his Report of the same date advised, as follows:

*"**Details of* [the Complainant's] *Sick Leave***

[The Complainant] *took sick leave in March 2017 due to various physical health problems. She has a history of migraine, hiatus hernia, fibromyalgia and irritable bowel syndrome.*

While of sick leave, her husband died suddenly and unexpectedly in May 2017. By all accounts, he was a fit, active and seemingly healthy man, but suffered a sudden death…

[The Complainant] *entered state of grief following his death and she has remained off work since.*

Treatment

/Cont'd…

[The Complainant] *attended her GP shortly after her husband died. She was prescribed the sedative antidepressant medication Mirtazapine 15mg at night.*

[The Complainant] *completed a course of counselling through* [Service] *in 2018. She reported suicidal thoughts to her friend at that time. She completed a course of Bereavement Therapy in February 2019.*

[The Complainant] *was referred to* [Dr C.] *(Consultant Psychiatrist) approximately one year ago,* [She] *felt drowsy on medication (Mirtazapine) and stopped it on November 2018. She has since been commenced on the antidepressant Venlafaxine XL 150mg daily. She also takes the sleeping tablet Zolpidem 10 mg at night. She attends* [Dr C.] *every three months or so.*

Current Symptoms

[The Complainant] *said her moods vary. She is not pervasively depressed. Some days she feels activated and energetic. Other days she feels low.*

She recently had renovation work done at home. While the builders were working, she enjoyed the project and activity in her house. However, she said she felt "down…lost" after the building work ended.

Her mother moved in with her until January 2019 to help with house work and cooking. [The Complainant] *said she cannot do anything strenuous due to her cardiac and physical health problems, she used to be more active and swimming, cycling and jogging. She has not exercised to this level of exercise for over a year now.*

[The Complainant] *said she prefers not to leave her home. She does not like noise or crowds and avoids social settings. She said she is sensitive to many food types and worries about being too far from a bathroom in case she feels nauseous.*

In terms of her grief, that has lessened to a degree. She has kept all [of her] *husband's clothes and possessions. She is able to speak about him, but experiences "setbacks" from time-to-time when discussing him. She visits his grave once a month and finds this difficult …*

Work Issues

[The Complainant] *works as a …dealing with customer queries and problems. She works from home and found this difficult in that she missed not having colleagues around. She said there was very little time between calls and dealing with difficult customers was challenging. She worked 10 hour days, four days a week …*

At present, she does not know when or if she will return to work. She disliked the conditions at work, but the thoughts of changing career also cause her anxiety. She did not like working on her own for up [to] *10 hours a day. She said now she sleeps a*

/Cont'd…

lot and has recurrent physical problems including chronic pain, which limit her ability to do her job …

Mental State Examination

[The Complainant] *travelled to today's interview accompanied by a friend. She was in no obvious pain or discomfort during the assessment. Towards the end however, she reported generalised pain but this did not restrict her movements.*

Her mood was euthymic and her affect was reactive. Her account of some symptoms seemed vague and overstated at times. She spoke about her profound tiredness and hypersomnia yet at the same time said she takes a sleeping tablet prescribed by her psychiatrist. Her reporting of the amount she sleeps during the day seemed excessive.

[The Complainant] *was not clinically depressed or anxious. Her mood was not pervasively depressed. Traits of dependency on…others, especially family, were evident. Her cognition was intact and she was not suicidal. Formal testing of her cognition was not indicated. I note from* [Consultant Psychiatrist Dr M.]*'s report* [dated 8 September 2017] *that her scoring on the SIMS was within normal limits and was not repeated today.*

Conclusion *…*

[The Complainant] *experienced a Bereavement Reaction to the sudden and unexpected death of her husband. She endorsed depressive symptoms in the past, but is not currently displaying features of a major psychiatric illness …*

Her symptoms are somewhat vague and non-specific. Her reporting of some symptoms seemed excessive, especially sleep …

[The Complainant] *attends* [Dr C.] *(Consultant Psychiatrist) on a three monthly basis. She is prescribed antidepressant medication and has completed bereavement therapy and a course of psychotherapy through* [Service]. *She also has multiple physical health problems and I feel there is a psychosomatic component to some of her reported symptoms. She has become somewhat dependent on others to help her manage on a day-to-day basis …*

[The Complainant] *has improved from when she tragically lost her husband two years ago. Her mood is not pervasively depressed and her grief is less intense. Her prognosis is good …*

[The Complainant] *has no goals regarding return to work. She cites medical more than psychiatric reasons as a cause for her not being able to return. She also referred to difficult work conditions which is a factor in her continued sick leave …*

/Cont'd…

> [The Complainant] *said the conditions at work and ongoing physical health problems are the main reason why she has not returned to work …*
>
> *From a mental health point of view,* [the Complainant] *is fit to carry out normal occupation"*.

I note that the Provider next arranged for the Complainant to undergo a two day Chronic Pain Abilities Determination assessment, which was carried out over a 2½ hour period on **20 May 2019** and a 1½ period on **22 May 2019**.

In her ensuing Report, I note that Senior Occupational Therapist Ms S. advised, as follows:

> *"*[The Complainant] *reports that she last worked in March 2017 and has regular contact with work via email and Occupational Health.*
>
> [The Complainant] *states that the barriers preventing a return to work are the pain she experiences on a daily basis, severe fatigue, poor concentration and her inability to sit or stand for long periods.*
>
> *She feels she could do the job for a very short time but not for the time required …*
>
> *It is possible to gain an understanding of sincerity of effort within each test performed during the assessments by the results obtained, in addition to comparison against verbal and non-verbal information provided by* [the Complainant] *during the assessment …*
>
> *Where the individual has provided consistent and reliable effort during the assessment, the demonstrated work-day tolerances represent a true reflection of the physical and cognitive capabilities, and the results on day 2 of CPAD can be used to determine through work-focused extrapolated peer-reviewed and published standards, the individual's fitness to return to the essential and material demands of their normal role.*
>
> *Conversely, in a situation where an individual has provided poor reliability of effort and there is evidence of symptom exaggeration, it is not possible to comment on their fitness to work, as the true capabilities have not been performed, unless the minimum function demonstrated in the assessment already meets or exceeds the physical and cognitive demands of the job.*
>
> *A review of the CPAD results indicate that the functional abilities demonstrated by* [the Complainant] *during physical testing on both days, are a true representation of her capabilities to safety perform over a normal working day. This conclusion is based on the number of consistencies demonstrated by her over the two day assessment.*
>
> *The consistencies during physical testing are listed as follows:*
>
> - [The Complainant]*'s pain reports and behaviour were appropriate during testing.*

/Cont'd…

- *There was evidence of consistent correlation between her ratings of perceived exertion and the corresponding heart rates measured following each individual test.*

- *Her demonstrated upper limb power on formal testing did not increase on distraction indicating reliable results in these tests.*

- [The Complainant's] *key, tip and palmar pinches did not increase on distraction testing, again indicating reliable results in these tests.*

- [The Complainant's] *grip strength did not increase on distraction testing, again indicating reliable results in these tests.*

- *Normal pinch and grip strength displayed in both hands.*

- *Her measured ranges of movement in the cervical spine and shoulders during formal testing did not increase on distraction indicating reliable test results.*

- [The Complainant's] *abilities to undertake the work-specific MTM endurance tests did not improve during distraction tests, again representing reliable test results, and therefore one can rely on the results of these tests to represent a true reflection of her abilities to undertake these activities over the extrapolated frequencies.*

Whilst it is noted that [the Complainant] *provided good reliability of effort over both days of physical testing, there were some areas of concern which are highlighted as follows:*

- *Evidence of inappropriate pain reporting on the pre and post-test VAS on both days.* [The Complainant's] *post-test VAS on day 2 was lower than her pre-test VAS on day 1, which is an inappropriate response, as one would expect a higher level of pain based on the battery of physical tests undertaken over the two-day period.*

- *Where there is sincerity of effort (maximum voluntary effort) within the tests undertaken, one would expect that repetitive trials within a brief span of time will be stable, A statistical measurement of stability is automatically calculated (the coefficient of variation). The coefficients of variation (CV) should in normal circumstances be within 15%. However, the CVs; left and right key pinch and right palmar pinch tests on day 1, were all far greater than expected, indicating that she performed with submaximal effort and an attempt to simulate weakness in these numerous formal tests.*

- *The REG forces should in normal circumstances be lower than the corresponding 5-position grip strength forces. This was however not the case in the left and right hands on day 1 and again indicates that she performed with submaximal effort and an attempt to simulate weakness during the 5-position grip strength tests.*

/Cont'd…

The results of these tests should therefore be viewed as invalid. 5-position grip strength testing is designed to examine grip strength, but the results of these tests are also able to determine consistency and sincerity of effort.

- *In normal circumstances where there is a sincerity of effort, one would expect to see a bell-shaped graph during 5-posiiton grip strength testing. However, in* [the Complainant's] *case, the graphs were non-bell shaped in both hands on day 1 and 2. This indicates that she performed with submaximal effort and an attempt to simulate weakness. The results of the 5-position grip strength tests should therefore be viewed as invalid and is indicative of her ability to function to a greater extent than she was prepared to demonstrate on direct testing.*

- *Despite* [the Complainant's] *very high scores in the CFS questionnaire and reported increased fatigue on day 2 of CPAD she displayed increased abilities to perform. On day 2 of CPAD she displayed increased abilities to perform. On day 2 of CPAD her performance increased in the reaching out, grip test, pinch tests, bimanual handling, fine dexterity and walk tests. This is further evidence of symptom exaggeration …*

[The Complainant] *was provided an opportunity to demonstrate her limitations and restrictions during the two days of* [Chronic Pain Abilities Determination]*, and despite the…inconsistencies and discrepancies during physical testing, the results indicate that they are a true representation of her capabilities to safely perform work-day activities over a normal working day.*

According to the [Chronic Pain Abilities Determination] *results on day 2,* [the Complainant] *demonstrated the following safe work-day tolerances:*

- *She is able to constantly (over 67% of the working day) sit, stand, walk, perform bi-manual fine dexterity, perform bi-manual handling tasks and reach out, all with regular breaks*

- [The Complainant] *demonstrated normal cervical ranges of movement in all planes during formal testing*

- [The Complainant] *demonstrated normal shoulder ranges of movement in all planes during formal testing*

- *Normal power (5/5) was demonstrated in both upper limbs*

- *Normal gripping abilities were demonstrated in both hands*

- [The Complainant] *demonstrated normal strengths in the bilateral key, tip and palmar pinch tests*

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- [The Complainant]*'s pain levels did not increase and in fact decreased from the start of day 1 to the conclusion of day 2*

- *Her abilities on day 2 compared to day 1 increased in the left and right key and tip pinches, left and right five-point grip test, bilateral reaching out, and bi-manual fine dexterity and handling tests.*

Therefore, the results on day 2 of [Chronic Pain Abilities Determination] *when compared to the demands of her role clearly confirm that from a physical perspective* [the Complainant] *is fit to resume her normal role on a full-time basis.*

Whilst not essential, [the Complainant] *may benefit from an Ergonomic Assessment (EA) at her workstation to ensure that she is provided with the most appropriate chair according to her anthropomorphic measurements … With regards to the battery of cognitive tests undertaken during the* [Chronic Pain Abilities Determination] *assessment, the MMSE (Mini-Mental State Examination) is designed to examine a number of factors including orientation, immediate and short-term memory as well as language functioning. In addition, the result of the test are also able to determine consistency and sincerity of effort. Scores in the MMSE test of 24-30 indicate no cognitive impairment, 18-23 mild cognitive impairment, and 0-17 severe cognitive impairment.* [The Complainant] *scored 26 on day 1 and 29 on day 2 of* [Chronic Pain Abilities Determination] *in the test. Therefore, she did not demonstrate any level of cognitive impairment during the test on either day.*

A review of the CNSVS [CNS Vital Signs] *cognitive test results indicate that* [the Complainant] *performed overall without symptoms exaggeration on both days of testing. However there are some areas of concern on review of the results, which are as follows:*

An in-depth review of the CNSVS test on day 1 indicate the following inconsistencies:

- [The Complainant] *scored higher in the more difficult delayed sections rather than the easier immediate sections in the VIM* [Visual Memory] *and VBM* [Verbal Memory] *tests*

- [The Complainant] *scored in the Very Low section for Verbal Memory and Processing Speed, which is an inappropriate result. These scores are comparable to patients suffering from severe brain injury, mental retardation and early dementia and not with those suffering from FM or other types of pain. Individuals within this score range would typically require support to perform everyday self-care and routine functions and cognitive function challenges are often clearly evidence within general communications and interaction with such individuals.*

- *She scored higher in the most cognitively difficult SAT* [Shifting Attention Test] *than in the less complex CPT* [Continuous Performance Test] *and SDC* [Symbol Digit Coding] *tests.*

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An in-depth review of the CNSVS test on day 2 indicate the following inconsistencies:

- [The Complainant's] *results were much improved on her results compared to day 1 despite reporting increased fatigue. Six of the domain scores were in the Average percentile as opposed to two on day 1.*

The results of the CNSVS [CNS Vital Signs] *tests therefore should be viewed as the minimum she is able to perform, and the scores indicate that there are no cognitive barriers preventing her from returning to work as an At Home [occupation redacted] on a full-time basis"*.

I note that the Provider also arranged for the Complainant to attend with Specialist in Occupational Health Dr H. on 27 June 2019, who advised in his ensuing Report dated 8 July 2019, as follows:

*"**CURRENT SYMPTOMS:***

Tachycardia; heart rates measured on her watch can go from 60 up to 200 for no reason. It was running at 100 this morning when she was asleep. It happens every day. [The Complainant] *states that her blood pressure was always perfect.*

[The Complainant] *would feel tired. She states that she would collapse regularly the last time was in* [Retail Outlet] *in January 2019 where she states she lost consciousness. She states she felt weak on recovery. She was accompanied by her friend. She did not go to the hospital as these collapses were happening all of the time and her friend would know what to do and what to expect. She may have an episode every 2-3 months. She was prescribed Nebilet in May 2018 to address the issue.*

Pain of the wrists, neck, in between the shoulder blades, lower rib cage on the right and lower limbs can be sensitive to the touch. She rates the pain as 5-6/10 constant in nature. She states that sometimes she has to crouch forward when she has been sitting for long periods and it is affecting her posture. [The Complainant's] *wrist on the right gets swollen in the morning and tends to improve throughout the day …*

CONCLUSIONS AND RECOMMENDATIONS:

History and assessment are in keeping with fibromyalgia and inappropriate sinus tachycardia. [The Complainant] *has ongoing cardiology reviews and had previous frequent fainting attacks.* [She] *also has ongoing symptoms in keeping with fibromyalgia.*

In my considered opinion, based on the information available, I am unable to declare [the Complainant] *as totally unfit for the material and substantial nature of her*

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occupation as an at home [occupation redacted]. A phased return to work, such as half her normal hours, over 2-3 weeks may facilitate [the Complainant] *in returning to work"*.

Following its appeal review, I note that the Provider wrote to the Complainant on **19 July 2019** to advise, as follows:

"Extensive assessments of both your physical, mental health and function have been undertaken and it is [the Provider's] *opinion you are medically fit to resume work. Most recently* [Specialist in Occupational Health Dr H.] *has indicated that phasing your return to work over 2-3 weeks will be helpful.*

[The Provider] *are happy to pay a further claim from 27 June 2019 to 31 August 2019 in this regard. We will be issuing a payment for €2,146.77 to* [your Employer] *on 25 July.* [Your Employer] *will process this payment and pass to you.*
[The Provider] *believe that a return to occupational functioning is of great benefit to an individual's overall health and wellbeing and we encourage you to meet with* [your Employer] *and make the necessary return to work arrangements. It may also be useful to discuss this with your GP.*

Should you resume work and this is not successfully please let us know and we may be able to re-evaluate further".

I note that the Complainant did not make arrangements to return to work at that time, or since.

As part of this complaint process, I note that the Complainant submitted a letter from her Consultant Rheumatologist Dr A. dated **27 March 2020** and one from her Physiotherapist Ms W. dated **1 April 2020**, neither of which specify that the Complainant was at that time unfit for work. In any event, as these medical records postdate the decision of the Provider in February 2019 to cease payment of the income protection claim and its decision in July 2019 to affirm this cessation upon appeal, the contents were not available to the Provider when it made the decision which is the subject of this complaint to the FSPO and therefore it is not appropriate for this office to take this material into account in arriving at a decision.

In order for an income protection claim to remain in payment, a claimant must continue to satisfy on an ongoing basis, the policy definition of disability.

In this regard, the '**Glossary of Terms'** appendix of the applicable Group Income Protection Policy Conditions defines **disability** at pg. 19, as follows:

*"**Disability***

The member's inability to perform the Material and Substantial Duties of their normal insured occupation as a result of their illness or injury; upon occurrence of which the benefit under the policy becomes payable, after the Deferred Period.

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The member must not be engaged in any other occupation".

The purpose of income protection is to support employees who demonstrate work disability supported by the objective medical evidence. Income protection insurance decisions are based on the objective medical evidence and the job demands of the occupation, to ascertain whether the claimant meets the policy definitions for a valid claim.

In this regard, I accept the Provider's position that the diagnosis and treatment of a medical condition, be it chronic or otherwise, is not, in and of itself, sufficient to validate a claim, nor does it automatically equate to work disability. Rather the weight of the objective medical evidence must clearly indicate that the claimant is unfit to perform the material and substantial duties of his or her normal occupation (in this case, of an at home [specified job title]) as a direct result of that diagnosis and/or treatment.

Having considered the evidence available at length, which I have cited from above, which includes reports from the Complainant's own treating doctors, I am of the opinion that it was reasonable for the Provider to conclude in 2019, that the Complainant no longer satisfied the policy definition of disability. As a result, I accept that the Provider ceased payment of the Complainant's income protection claim in accordance with the terms and conditions of the Group Income Protection Scheme, of which she is a member.

I am satisfied that in assessing her claim, the Provider took steps to objectively assess the Complainant's capabilities and I note that it made benefit payments to her throughout that period between 2017 and 2019, at which point it then determined that she no longer met the policy criteria. I accept in that respect that the Provider acted reasonably and in my opinion, for the reasons outlined above, it is not appropriate to uphold this complaint.

Conclusion

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

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

MARYROSE MCGOVERN
DEPUTY FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

16 October 2020

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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.