DRN-4751333

The complaint

Mrs O is unhappy with the way in which Vitality Life Limited handled a claim made for the serious illness benefit under an "essentials plan" which included life and serious illness cover ('the plan'). That includes its decision to retrospectively add an exclusion, which it then relied on to decline the claim.

Although Mrs O is being represented in this complaint, for ease, I've referred to her throughout.

What happened

Mrs O applied for the plan in mid-2020, through a third party intermediatory. When applying for the policy she was asked a number of questions, including about her health and medical history. Vitality Life relied on the answers to those questions, when offering the plan to her. Very sadly, a few months later, Mrs O was diagnosed with breast cancer, and she made a claim on the plan for the serious illness benefit.

Vitality Life decided to decline the claim in June 2021, but it accepts it failed to notify Mrs O of this decision at the time. It wasn't communicated until around 18 months later when a relative of Mrs O contacted Vitality Life to complain about the delay in assessing the claim.

Vitality Life maintained its decision to decline the claim but did offer Mrs O £1,000 compensation. Unhappy, Mrs O asked the Financial Ombudsman Service to look into her concerns.

Our investigator considered what had happened and didn't uphold her complaint.
He didn't think Vitality Life had to do anything more to put things right. Mrs O disagreed so her complaint was passed to me to consider everything afresh and decide.

I issued my provisional decision in March 2024 explaining in more detail why I considered Vitality Life's offer of £1,000 compensation was fair and reasonable.

……..

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. That includes the relevant ABI Code of Practice for managing claims for individual and group life, critical illness and income protection insurance products.

The relevant law in this case is The Consumer Insurance (Disclosure and Representations) Act 2012 ('CIDRA'). This requires consumers to take reasonable care not to make a misrepresentation when taking out a consumer insurance contract. The standard of care is that of a reasonable consumer.

And if a consumer fails to do this, the insurer has certain remedies provided the misrepresentation is - what CIDRA describes as - a qualifying misrepresentation. For it to be a qualifying misrepresentation the insurer (in this case Vitality Life) has to show it would

have offered the policy on different terms or not at all if the consumer hadn't made the misrepresentation.

CIDRA sets out a number of considerations for deciding whether the consumer failed to take reasonable care. And the remedy available to the insurer under CIDRA depends on whether the qualifying misrepresentation was deliberate or reckless, or careless.

Vitality Life says Mrs O didn't fully and accurately disclose her medical history when applying for the plan. Particularly, it says she didn't disclose her history of breast fibroadenomas.
I know Mrs O will be very disappointed and I have a lot of empathy for the situation she finds herself in. But, overall, I intend to find that Vitality Life has acted fairly and reasonably by retrospectively adding the following exclusion to the serious illness cover in the plan, excluding claims for:

> Carcinoma in situ or cancer of the breast, its treatment, any complications thereof and cancer relapse benefit (if included

I'll refer to this as "the exclusion".

I also intend to find that Vitality Life fairly relied on the exclusion to decline the claim. My reasons are set out below.

Adding the exclusion and declining the claim

Amongst other questions, when applying for the plan, Mrs O was asked:

> Apart from any condition you have already told us about, have you had any of the following in the last 5 years:
>
> Lump, cyst, growth or skin lesion of any kind, or a mole or freckle that has bled, become painful, itchy, changed colour, increased in size or that you have been advised to monitor…?
>
> Any gynaecological disorder, including abnormal cervical smears, or breast conditions which have required investigations, referral to a specialist or treatment?

And:

> Apart from anything you have already told us about in this form, within the last 2 years have you been advised to have or undergone any investigation such as blood tests, scans or biopsies?

I'll refer to these as the 'the medical questions'. I'm satisfied that the medical questions are clear and it's reflected that Mrs O answered 'no' to them.

I'm also satisfied that Vitality Life is entitled assume that the answers to the questions on the application submitted on Mrs O's behalf by the intermediatory are accurate and is also entitled to rely on them when deciding to offer the plan to her, and on what terms.
It is Vitality Life's position that Mrs O answered the medical questions incorrectly. And I'm satisfied that was a fair and reasonable conclusion for it to make and the answers should've been 'yes'.

That's because Mrs O's medical records reflect that in August 2019 – so around nine months before applying for the plan – she attended a medical appointment because she had breast lumps. It's reflected:

> Examination of the breasts revealed one small benign lump just above the nipple areolar complex in keeping with a fibroadenoma…She went on to have an ultrasound scan which confirmed features to be a fibroadenoma, and the largest one measuring just over 20cm has been biopsied. I have reassured [Mrs O] that fibroadenomas are entirely benign…

Vitality Life has provided underwriting information – which I'm persuaded by - showing that if Mrs O had answered the medical questions correctly, it would've still offered the plan but with the exclusion added to the serious illness cover. So, I'm satisfied the answer to the medical questions mattered to Vitality Life.

Vitality Life seems to have concluded that Mrs O's misrepresentation was careless as opposed to deliberate and reckless. I think that's fair and reasonable.

I've looked at the actions Vitality can take in line with CIDRA. Under this legislation it's entitled to act as it would've done had the medical question not been answered carelessly.

As I'm satisfied that the plan would've still been offered but with the exclusion, I think it's acted fairly and reasonably in the circumstances of this case by adding the exclusion and then relying on the exclusion to the decline the claim, given the nature of the claim.

When deciding this case, I've taken into account all Mrs O's comments including that she says she did declare the benign breast lump and biopsy to the intermediatory when applying for the plan.

The intermediary's position is that the negative biopsy and breast lump weren't disclosed by Mrs O at the time. Another Ombudsman has already determined a complaint against the intermediatory and has made a finding that the intermediatory wasn't responsible for the incorrect information being provided to Vitality Life.

So, I remain satisfied that Mrs O didn't answer the medical question correctly when applying for the plan.

However, I have also considered whether Vitality gave Mrs O a fair and reasonable opportunity to consider and review the answers to the questions asked of her when applying for the policy.

Vitality Life says that it uploaded the confirmation schedule to its member zone which set out the questions asked of Mrs O along with the answers she provided when applying for the plan. The covering letter (which wasn't posted to Mrs O but I'm satisfied on the evidence provided to me by Vitality was uploaded to the member zone, accessible online) says:

> Your plan has been set up using the details shown on the attached confirmation schedule…this reflects the information sent to us electronically by your financial adviser.
>
> The confirmation schedule forms part of the basis of the agreement between you Vitality Life…so you must check this document for accuracy and completeness… If you're happy that the information in the confirmation schedule is complete and correct you do not need to do anything further.

It then directs Mrs O what to do if the information is incorrect.

Mrs O says she wasn't given an opportunity to check whether the information on the

confirmation schedule was correct. She says, if she had been she would've contacted Vitality Life to tell it about the benign breast lump and biopsy not being included.

Vitality Life accepts that none of the documents it sent to Mrs O by post or email – including the welcome letter – directed Mrs O to the confirmation schedule. And although she was asked to set up her member zone account, the welcome letter says this is to "store and check your plan documents", "set health goals" and "get ready for rewards".

I can understand why Mrs O says she wouldn't know to set up and check the member zone for the confirmation schedule which was an important document – and as Vitality Life says was the basis on which the plan terms were offered.

However, even if the information in the confirmation schedule should've been made more easily available to Mrs O by Vitality Life, I've considered what's likely to have happened if she had been asked to consider it.

I'm satisfied that there are a number of possibilities:

- Mrs O wouldn't have queried and corrected the answer to the medical question; as she hadn't disclosed the benign breast lump to the intermediatory initially. So, the terms of the plan would've remained the same until Vitality Life had considered her medical records after the claim had been made. And the claim would've been declined as it has been by Vitality Life.

- Mrs O corrected the answer to the medical question and disclosed the benign breast lump. In this case, I'm satisfied that it's most likely that Vitality Life would've added the exclusion to serious illness cover at that stage. Mrs O would've then either accepted the exclusion or would've declined to accept the plan on those terms.

- If she accepted the plan with the added exclusion, the plan would've continued. This being the case, the claim would've still been declined by Vitality Life relying on the exclusion.

- If she'd declined to accept the plan with the exclusion, and looked elsewhere for life and serious illness cover as she says she would've, I've seen nothing which convinces me that she would've been able to have found a similar policy without a similar exclusion for serious illness cover in the circumstances. Mrs O hasn't provided any evidence that such a policy would've been available at the time given her recent medical history of a benign breast lump. And in my experience, it's common for life and critical/serious illness insurance providers to add a term similar to the exclusion in such situations or even decline or postpone cover. So, I'm not satisfied that she would've been able to find a similar policy which would've covered critical illness for breast cancer at the time and I think it's likely she would've still opted to continue with the plan with the exclusion added.

Delays

In addition to an obligation not to unreasonably decline an insurance claim, Vitality Life also has an obligation to handle claims fairly and promptly.

It took around 18 months for Vitality Life to provide Mrs O with an outcome to her claim once it had been made the decision to decline. It accepts that it hadn't sent her the letter declining

the claim, even though it had been drafted.

I accept having to wait this long for an outcome would've been upsetting for Mrs O, particularly given what else she was going through at the time and this would've unnecessarily caused her further distress and worry.

In its final response letter, Vitality Life offered Mrs O £1,000 compensation to acknowledge this. I think this fairly represents the impact of Vitality Life's error in the circumstances. Although Mrs O would've received the outcome to the claim much sooner, ultimately that wouldn't have avoided the disappointment of the decision taken by Vitality Life to decline her claim (a decision which I'm satisfied was fair and reasonable).

……..

I invited both parties to provide any further information they wanted me to consider in response to my provisional decision.

Vitality Life accepted my provisional decision. Mrs O asked whether she would be able to provide evidence from an Actuary/Underwriter and Oncologist consultant to demonstrate that she'd be able to get critical illness cover from another insurance provider without the exclusion. Mrs O asked for an extension of two months for this information to be provided as her oncologist is very busy.

I didn't think an extension of two months was fair and reasonable, but I did provide an extension of two weeks for Mrs O to provide any further evidence she wanted me to consider.

Further, I didn't think the information Mrs O said she could get from her oncologist, despite experience with insurance, was likely to be relevant. Documentary evidence directly from an insurance broker or insurer showing that a similar policy would've been available at the time without the exclusion and for a similar price would've been more relevant.

I received no substantive information by that extended deadline.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having received no substantive information in response to my provisional decision, I'm satisfied that there's no convincing reason for me to depart from my provisional findings.

So, for the reasons set out in my provisional decision (an extract of which is set out above and forms part of my final decision), I think the compensation offered to Mrs O by Vitality Life in its final response letter dated January 2023 is fair and reasonable.

Putting things right

As it's already agreed to do in its final response letter (and if it hasn't already done so), I direct Vitality Life to pay Mrs O compensation in the sum of £1,000 for distress and inconvenience.

My final decision

Vitality Life Limited has already made an offer to settle the complaint, as set out above. I

think that's fair in all the circumstances.

Vitality Life Limited should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs O to accept or reject my decision before 17 May 2024.

David Curtis-Johnson
Ombudsman