

The complaint

Mrs D complains that AXA PPP Healthcare Limited has turned down a disability compensation claim she made on an International Health Plan.

What happened

The background to this complaint is well-known to both parties. So I've simply set out a summary of what I think are the key events.

Unfortunately, in 2019, Mrs D had an accident and sustained severe injuries to her foot. After treatment hadn't worked, she made a claim under the disability compensation cover provided by the plan.

AXA turned down Mrs D's claim because it didn't think the available medical evidence showed that she met the policy terms. That's because it didn't consider Mrs D had shown she'd totally lost the use of her foot.

Mrs D made a complaint to our service about AXA's decision. Ultimately, another ombudsman issued a final decision on Mrs D's complaint in October 2022. That ombudsman concluded that Mrs D's complaint should be upheld. They directed AXA to appoint and pay for an Independent Medical Examiner (IME) to assess Mrs D and to be bound by the findings of that IME's report. Mrs D accepted the ombudsman's decision.

AXA looked into arranging an IME for Mrs D, who lives abroad, in a rural location. Ultimately, there were practical difficulties in arranging an appropriate IME for Mrs D. And Mrs D said that due to the healthcare system in her country of residence, if she was required to obtain a referral to a new specialist, she'd no longer be able to see her local consultant.

On that basis, AXA agreed that it would contact Mrs D's treating consultant to request further information. But Mrs D's consultant had passed away in the meantime, so she was under the care of a new consultant who I'll call Dr E. So AXA wrote to Dr E to ask him to provide Mrs D's clinical records and/or the answers to specific questions. In brief, Dr E responded to say that Mrs D had suffered a permanent and total loss of the use of her foot.

AXA maintained its decision to not to pay Mrs D's claim. It said that Dr E hadn't provided enough detail about Mrs D's condition and that the evidence still didn't confirm that Mrs D had suffered the loss of use of her foot.

Remaining unhappy with AXA's handling of her claim, Mrs D asked us to look into a new complaint about its further decision not to pay the claim.

Our investigator recommended that Mrs D's complaint should be upheld. She considered AXA had made reasonable attempts to arrange an IME and that given the challenges it had faced; it had been fair to ask Dr E for information. She assessed the evidence Dr E had provided and while she didn't think it answered all of AXA's questions, she felt it was sufficient to show Mrs D's claim met the policy definition of the loss of a use of limb. Therefore, she concluded that Mrs D had shown she had a valid disability compensation

claim on the policy and that AXA should pay the claim together with interest.

AXA disagreed and I've summarised its response. It said that having reviewed all of the information, it still didn't think there was enough evidence to confirm, beyond all doubt, that Mrs D has suffered the total loss of use of her left foot. It considered Dr E's report lacked detail and was contradictory. It said that Dr E hadn't set out detailed examination findings which it would expect to see – such as Mrs D's functional ability; muscle atrophy and range of motion. It stated there had been a reluctance from Mrs D's medical team to provide it with information and that if Mrs D was to see a new specialist, it would invalidate her care through Dr E. It said it was open to reconsidering the claim upon the provision of new medical evidence.

The complaint's been passed to me to decide.

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 done so, I don't think AXA has treated Mrs D fairly and I'll explain why.

First, I must make the parameters of this decision clear. As I set out above, another ombudsman considered AXA's original decision to turn down this claim and issued their final decision in October 2022. That ombudsman considered all of the medical evidence which was available at that time when reaching their decision. Therefore, it would not be appropriate for me to comment on any events or evidence which my colleague took into account. My decision is limited to considering whether I think it was fair and reasonable for AXA to maintain its decision to turn down the claim, following its assessment of Dr E's new evidence dated June 2023.

The relevant regulator's rules say that insurers must handle claims promptly and fairly. And that they mustn't turn down claims unreasonably. I've taken those rules into account, along with other relevant considerations, such as industry guidance and principles, when deciding whether I think AXA has treated Mrs D fairly.

I've first considered the policy terms and conditions, as these form the basis of Mrs D's contract with AXA. The disability compensation cover says that AXA will pay up to £25,000 for the loss of one limb. AXA has defined the loss of limb as follows:

'loss by physical separation of a hand at or above the wrist or of a foot at or above the ankle or total and irreversible loss of use of hand, foot, arm or leg.' (My emphasis added).

This means that in order for AXA to pay Mrs D disability compensation, it must be satisfied that she has suffered the loss of a limb, in line with the policy definition. AXA doesn't think the medical evidence Dr E has provided shows that Mrs D's claim meets the policy terms. So I've carefully considered what Dr E has said in order to decide whether I think this was a fair conclusion for AXA to draw.

AXA has stated that it doesn't think there was enough evidence to confirm beyond all doubt that Mrs D has suffered total loss of the use of her foot. I must make clear that I won't be considering whether Mrs D has shown beyond doubt that she has suffered the loss of a limb. I have considered the available evidence to decide whether, *on the balance of probabilities*, the medical evidence indicates Mrs D's claim is valid.

It's clear that AXA did make reasonable attempts to try and arrange an IME for Mrs D in line

with my colleague's direction. Both parties acknowledge there were practical constraints in it doing so, which would have caused Mrs D real inconvenience and potentially, the transfer of care from her local treating team. So I think, in the circumstances, it was reasonable for both parties to agree to AXA obtaining evidence from Mrs D's treating consultant directly. And I think too that AXA took fair steps to try and assist Mrs D at this point.

AXA therefore contacted Dr E, Mrs D's treating consultant and a specialist in orthopaedic and traumatological surgery, to ask for further information. It asked:

*'I appreciate you have a busy schedule, but we (and Mrs D would appreciate it if you could forward us a copy of her clinical notes, relating to her injury sustained in 2019 and/or answering the following questions relating to her injury sustained in 2019 **and/or answering the following questions***

- *What is the current % loss of function in the left foot?*
- *Has there been any improvement?*
- *Does Mrs D have mobility in her left foot?*
- *Is there any evidence of sensory or motor deficit in her left foot?*
- *Are there any other areas of the body with loss of function?*

If so details of body areas and % loss associated with these?

- *Is Mrs D able to weight bear on the left foot?*
- *Does she require waking aids e.g. frame/walking stick?*
- *Is Mrs D able to go up and downstairs?*
- *Are there any other activities which are impacted by the residual deficit in her left foot?'* (Emphasis added).

Dr E's report said:

'The clinical examination today notes ongoing limited joint mobility. She still presents allodynia and sensory disturbances. Walking on the left foot is impossible, requiring the use of two crutches or a wheelchair. Going up and down stairs is nearly impossible.

Mrs. D is unable to perform her daily activities, including household chores and her professional work.

*In total, consolidation has been achieved with sequelae **resulting in a total and permanent loss of use of her left foot.**'* (My emphasis added).

It's important I make it clear that I'm not a medical specialist. It isn't my role to make clinical findings or to substitute medical opinion with my own. I accept that Dr E didn't answer all of AXA's questions and I've carefully considered the concerns it's raised about the level of assessment Dr E undertook when examining Mrs D. I'm mindful too that Dr E didn't send AXA Mrs D's clinical notes.

However, having considered AXA's request, I can see that it asked Dr E for Mrs D's clinical notes *and/or* answers to its questions. Therefore, I don't think there was a definite request for the notes which Dr E has failed to act upon. Nor do I think AXA's information request sets out the type of assessment it expected Dr E to undertake – for example, Mrs D's overall functional capacity. It might have been helpful if it had done so.

And in my view, Dr E's report does provide answers to what I consider to be key questions.

Dr E confirmed that it's impossible for Mrs D to walk on her foot and that she requires the use of sticks or a wheelchair. He's confirmed that she can't perform daily activities. Most importantly, he has made an unequivocal finding that Mrs D has suffered a total and permanent use of her foot. As such then, I think Dr E's evidence indicates, on balance, that Mrs D *has* suffered the loss of a limb in line with the policy terms.

I can appreciate why AXA might have preferred for Mrs D to be examined by an IME it appointed. But in the circumstances, broadly five years after Mrs D's accident and taking into account Dr E's – an expert in their field - definitive finding of total and permanent loss of use of her foot, I don't think it would be fair or reasonable for me to require Mrs D to provide any further medical evidence. Nor do I think AXA has acted fairly in maintaining its decision to turn down this claim.

Putting things right

So I find that the fair and reasonable outcome to this complaint is for AXA to now accept and settle Mrs D's disability compensation claim. And I find that it must add interest to the settlement at an annual rate of 8% simple from four weeks after the date it received Dr E's report until the date of settlement.*

My final decision

For the reasons I've given above, my final decision is that I uphold this complaint.

I direct AXA PPP Healthcare Limited to put things right in the way I've set out above.

* If AXA considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs D how much it's taken off. It should also give Mrs D a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 13 August 2024.

Lisa Barham
Ombudsman