CR270

Non-disclosure – complainant unaware of his condition – his doctor having failed to inform him thereof, and having further failed to disclose it in the medical certificate accompanying the proposal form – misrepresentation was therefore by independent third party, not applicant for insurance.

BACKGROUND

In 2003 the complainant had signed a proposal for cover *inter alia* for severe illness benefits. The form provided that, in answering the section containing health questions, the complainant warranted the correctness of his answers. One question asked whether the complainant had ever had high blood pressure, disease of the blood vessels or a circulatory disorder, and another whether he had ever had to consult a doctor. In both the form he signed and the accompanying medical form his doctor filled in and signed, it was disclosed that since 1997 the complainant had suffered from hypertension, that medicines had been prescribed, and that the complainant had been symptom free since.

The complainant suffered a heart attack in 2007 and lodged a claim. It was then disclosed that when in 1998 he had consulted his doctor for the hypertension, he had diagnosed, not simply the hypertension, but also that it had given rise to a transient ischaemic attack. Because this had not been disclosed in the application the insurer repudiated liability.

DISCUSSION

The complainant lodged a complaint with the office, and upon enquiry he explained that he had not been aware of having suffered a transient ischaemic attack, that he did not understand medical terms, and that all the doctor had told him in 1998 was that he had suffered no more than hypertension. When approached the doctor confirmed that he had never explained to the complainant that he had suffered a transient ischaemic attack, and admitted that he himself had failed to disclose, in the medical certificate that accompanied the complainant's proposal in 2003, that he had suffered such an attack.

Section 59 (1) (a) of the Long-term Insurance Act provides of course that a non-disclosure will not affect the obligations of an insurer unless it is such as to be likely to have "materially" affected the assessment of the risk. And section 59 (1) (b) stipulates that for such purpose a non-disclosure will be regarded as "*material*" if "*a reasonable prudent person*" would consider that it should be disclosed so that the insurer could form its own view on the assessment of the risk.

The office pointed out to the insurer that, for the purposes of materiality, the "*reasonable, prudent person*" referred to in section 59(1)(b) is neither the

insured not the insurer, but a hypothetical person standing in the shoes of the applicant for insurance, with the knowledge and appreciation that a lay person would possess of the features an insurer would take into account in assessing the risk. The office went on to say:

> "*It would appear that (the complainant) was unaware, at the time of the incident in January 1998, that he had suffered from TIA. …it appears that he experienced the episode as one of dizziness. He was told by his doctor that his blood pressure was too high and he was put on medication to control this. He has remained on chronic hypertension medication ever since and disclosed this on the application form. It would seem that a reasonable prudent person in the circumstances of (the complainant) would not have considered the episode of dizziness, which he was told was due to high blood pressure, and which occurred some 5 years earlier, to have been material information that should have been disclosed, especially in view of the fact that he did disclose his ongoing hypertension and treatment*…"

As to the question whether the doctor's failure to disclose the TIA on the medical form could be seen as non-disclosure by an agent of the insured, the insurer advised the office that it viewed the doctor as neither the insured nor the insurer's agent, but as an independent third party. In these circumstances the doctor's failure to disclose could not amount to misrepresentation by the applicant.

CONCLUSION

The insurer agreed and undertook to assess the claim. Having done so it contended that the condition claimed for was not one covered by the policy, because it did not in particular fit the definition in the policy of a heart attack, heart transplant or open heart surgery. The office made a provisional determination upholding the contention and the complainant conceded that it was correct.

SM
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