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4 March 2025

Let's Get Technical: Superannuation
What happens to IP after a TPD claim?

A few weeks ago, one of our wonderful BDMs (by the way, they are all wonderful) called me to say that an adviser from a successful insurance advice practice had contacted him to say they were told by a reliable source that super fund trustees had discretion to stop paying income protection (**IP**) benefits following a successful Total and Permanent Disability (**TPD**) claim.

This prompted me to cast my mind back over 10 years ago, when certain Stronger Super legislative changes took effect on 1 July 2014. These changes prohibited superannuation trustees from providing 'insured benefits' other than those consistent with the conditions of release in Schedule 1 to the Superannuation Industry (**Supervision**) Regulations 1994 (Cth) (SIS Regulations) which included for death, terminal medical condition, permanent incapacity and temporary incapacity. These changes are of course still in effect today.

At the time, a number of retail insurers with risk-only super funds and associated fund trustees expressed differing views on the ability to pay income protection benefits inside super following a successful TPD super claim payment.

These changes also raised a few interesting issues with respect to the wording relating to some of the other insurance benefits, such as the fact that death is not defined under either the SIS Act or the SIS Regulations, leading to some doubt over a situation where a person becomes clinically dead (i.e., during surgery) but later recovers. The answer was that in most cases, the policy terms and conditions of the life insurance contract held by the super fund trustees cover this gap in the SIS legislation.

With respect to the release of an income protection (also known as a salary continuance or temporary total disability) benefit inside super – beyond satisfying the insurer's definition of total or partial disability and other product parameters – it also needs to satisfy a SIS condition of release, which is generally that of temporary incapacity (and needs to follow the governing rules of the particular super fund).

Temporary incapacity is defined in 6.01(2) of the SIS Regulations as follows:

> *'in relation to a member who has ceased to be gainfully employed (including a member who has ceased temporarily to receive any gain or reward under a continuing arrangement for the member to be gainfully employed), means ill-health (whether physical or mental) that caused the member to cease to be gainfully employed but does not constitute permanent incapacity.'*

As regards cashing restrictions, the amount of super released under temporary incapacity must be taken as an income stream (with specific restrictions) cashed from the regulated super fund for:

- the purpose of continuing (in whole or part) the gain or reward which the member was receiving before the temporary incapacity, and
- a period not exceeding the period of incapacity from employment of the kind engaged in immediately before the temporary incapacity.

The first bullet point above means that some members who are not employed immediately before becoming temporarily incapacitated (e.g., someone who is between jobs as a result of redundancy) may be unable to claim on their income protection policy inside super.

Based on the wording of the legislation, the question arises: Does the phrase 'but does not constitute permanent incapacity' preclude a super fund trustee paying an income protection benefit to a member who has been paid a TPD benefit and who is therefore permanently incapacitated? In other words, are the temporary incapacity and permanent incapacity SIS conditions of release mutually exclusive?

No from a legislative perspective, preserved benefits can be accessed by an insured member so long as they satisfy one of the conditions of release in Schedule 1 of the SIS Regulations. In the case of a client who has received a TPD benefit under ClearView ClearChoice Super, this would likely be the permanent incapacity condition of release. Furthermore, permanent incapacity has a nil cashing restriction, which means the trustee would not be bound by the restrictions for paying a temporary incapacity benefit. In practice, however, the trustee would still be bound by the product terms and conditions with respect to ClearChoice Super Income Protection, so the member would continue to receive the appropriate income protection insured monthly benefit, less pay as you go (**PAYG**) tax.

Regardless of the interpretation of temporary incapacity, some industry super funds and some state government super schemes will discontinue salary continuance payments after a successful TPD (permanent incapacity) claim because the policy terms and conditions specifically state that benefit payments will cease under these circumstances.

Summary

ClearView's clients who hold their income protection through ClearChoice Super can continue to hold their policy following a successful TPD claim. Advisers who have clients with industry fund salary continuance policies inside super should look at the wording of these to ensure that their policies will not be cancelled following a TPD payment. There also may be some retail insurance policies which also terminate income protection following a TPD claims. In addition, bear in mind that industry super insurance policies, unlike retail insurance policies, are not guaranteed renewable. The terms and conditions of these policies are prepared by agreement between super fund trustees and their insurers when those contracts are put out to tender every couple of years or so, and any changes affect the super fund's existing as well as new members.

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CVE 0431 03/25 V1