

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSANNE KLENKE,  
Appellant,  
vs.  
CLARK COUNTY,  
Respondent.

No. 55612

**FILED**

**MAR 31 2011**

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

This is an appeal from a district court order denying a petition for judicial review in a workers' compensation action. Eighth Judicial District Court, Clark County; David Wall, Judge.

Appellant Susanne Klenke is a retired fire engineer diagnosed with mild coronary artery disease. She filed a claim under NRS 617.457, which provides that heart disease contracted by a firefighter, employed for five years or more, is conclusively presumed to have arisen out of and in the course of employment. Heart disease subject to this conclusive presumption is compensable pursuant to the provisions of Nevada's Occupational Diseases Act, NRS Chapter 617. Respondent Clark County rejected Klenke's claim because her heart disease was not disabling. The administrative appeals officer affirmed the county's rejection. Klenke petitioned for judicial review and the district court denied her petition.

Klenke now appeals, arguing that the appeals officer's decision was legally erroneous and arbitrary and capricious because: (1) the appeals officer required the heart disease to be disabling to qualify for coverage under the statute even though the statute does not specifically state that requirement and (2) the appeals officer ignored expert opinions that Klenke was temporarily disabled while undergoing medical testing.

For the reasons set forth below, we affirm the district court's denial of Klenke's petition for judicial review. Because the parties are familiar with the facts and procedural history in this case, we do not recount them further except as is necessary for our disposition.

The district court properly denied Klenke's petition for judicial review

Klenke contends that the district court erred by failing to review the administrative appeals officer's decisions that heart disease, pursuant to NRS 617.457, must be disabling for a firefighter to obtain benefits and that Klenke was not temporarily disabled.

Standard of review

This court may set aside, in whole or in part, a final decision of an administrative agency where substantial rights of the petitioner have been prejudiced because the final decision (1) is in violation of statutory provisions; (2) was "[a]ffected by other error of law;" (3) was "[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record;" or (4) was "[a]rbitrary or capricious or characterized by abuse of discretion." NRS 233B.135(3)(a), (d), (e), & (f); City of Las Vegas v. Lawson, 126 Nev. \_\_\_, \_\_\_, \_\_\_, P.3d \_\_\_, \_\_\_ (Adv. Op. No. 52, December 30, 2010) ("When reviewing a district court's order denying a petition for judicial review of an agency's decision, we engage in the same analysis as the district court: we evaluate the agency's decision for clear error or an arbitrary and capricious abuse of discretion." (internal quotation omitted)). "The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid." NRS 233B.135(2).

Substantial evidence is that evidence "which 'a reasonable mind might accept as adequate to support a conclusion.'" Tighe v. Las Vegas Metro. Police Dep't, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994)

(internal quotations omitted). This court affords deference to the agency's consideration of the weight of the evidence and the credibility of the witnesses. Desert Valley Constr. v. Hurley, 120 Nev. 499, 502, 96 P.3d 739, 741 (2004).

NRS 617.457 requires disabling heart disease

Klenke argues that the appeals officer misconstrued NRS 617.457 by adding the requirement that the heart disease be extensive in order to qualify for the conclusive presumption. She contends that because the statute refers to "diseases of the heart," the seriousness of the heart disease is irrelevant.

NRS 617.457(2) states that "diseases of the heart, resulting in either temporary or permanent disability or death, are occupational diseases and compensable as such under the provisions of this chapter . . ." A retired firefighter who is disabled by heart disease after retirement is entitled to occupational disease benefits under Nevada's Occupational Diseases Act. Gallagher v. City of Las Vegas, 114 Nev. 595, 601-602, 959 P.2d 519, 523 (1998). While those benefits do not include lost wages because the firefighter is retired, the benefits do include coverage of medical expenses. Howard v. City of Las Vegas, 121 Nev. 691, 694, 120 P.3d 410, 411 (2005).

NRS 617.060 defines disablement by stating that "[d]isablement' and 'total disablement' are used interchangeably in this chapter and mean the event of becoming physically incapacitated by reason of an occupational disease . . ." Thus, a firefighter must have, amongst other conditions, a disabling heart disease to gain coverage under NRS 617.457.

Klenke is essentially asking this court to give a firefighter the ability to file an anticipatory claim for what may or may not become

disabling heart disease. “An employee is not entitled to compensation ‘from the mere contraction of an occupational disease. Instead, compensation . . . flows from a disablement resulting from such a disease.’” Employers Ins. Co. of Nev. v. Daniels, 122 Nev. 1009, 1014, 145 P.3d 1024, 1027 (2006) (alteration in original) (quoting Prescott v. United States, 523 F. Supp. 918, 927 (D. Nev. 1981)).

Here, both Klenke’s doctor, Dr. James Mock, and the county’s medical expert, Dr. Keith Boman, recognize that Klenke’s mild condition would not incapacitate her. We conclude that the appeals officer’s decision was not clearly erroneous or an abuse of discretion. Accordingly, the district court properly denied Klenke’s petition for judicial review.

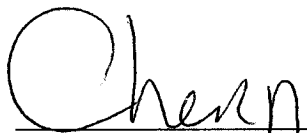
Klenke was not temporarily disabled


Klenke contends that both medical experts recognize that there was a defined period of time in which Klenke was temporarily disabled due to her heart disease and that temporary disability satisfies the statute. Dr. Mock concluded that it would not be unreasonable to have qualified Klenke as temporarily disabled while undergoing testing from April 29, 2008 to June 30, 2008. Dr. Boman concluded that Klenke would have likely been placed on light duty from April 20, 2008 to May 30, 2008, if she had been working. Klenke contends that she only had to be temporarily disabled to qualify for disability coverage because the statute states “resulting in either temporary or permanent disability.” See NRS 617.457(2).


While it is true that a firefighter need only be temporarily disabled to qualify for coverage, substantial evidence supports the appeals officer’s conclusion that Klenke was not temporarily disabled because the medical conclusions were at best ambiguous. Dr. Boman did not specify what “light duty” would have included, which could mean that Klenke

would not have been incapacitated. Further, Dr. Mock only stated that it would not be unreasonable to have considered Klenke temporarily disabled, instead of stating that she was temporarily disabled. Because we conclude that the appeals officer's decision was not clearly erroneous or an abuse of discretion, we further conclude that district court properly denied Klenke's petition for judicial review. Accordingly, we affirm the district court's order denying Klenke's petition.

IT IS SO ORDERED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Pickering

cc: Hon. David Wall, District Judge  
Persi J. Mishel, Settlement Judge  
Hardy & Hardy  
Law Office of Rhonda C. Gross, LLC  
Eighth District Court Clerk