IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CITY OF LAS VEGAS,
Appellant,
vs.
GREGG BURNS,
Respondent.

No. 76099-COA

FILED

NOV 13 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

City of Las Vegas appeals from a district court order granting a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Mark B. Bailus, Judge.

In the proceedings below, respondent Gregg Burns, a firefighter for the City of Las Vegas, sought workers' compensation benefits after suffering a heart attack in October 2013. The City denied the claim, concluding that Burns had predisposing conditions that he failed to correct, precluding benefits pursuant to NRS 617.457(11).[1] After several administrative proceedings and a petition for judicial review before the district court, the appeals officer ultimately filed an amended decision and order, concluding that Burns was provided notice in writing of his

[1]We note that NRS 617.457 was amended twice during the proceedings in this matter, in 2015 and again in 2017. *See* 2015 Nev. Stat., ch. 420, § 3, at 2429-31 (adding additional subsections without affecting NRS 617.457(11)), § 3.5, at 2431-33 (renumbering the provision at issue from NRS 617.457(10) to NRS 617.457(11)); 2017 Nev. Stat., ch. 551, § 5, at 3894-96 (adding additional subsections to the statute, without affecting NRS 617.457(11)). However, because neither of these amendments substantively affects the portion of the rule at issue on appeal, we refer to the current version of the rule in this order.

predisposing conditions, that he failed to correct those conditions after being ordered to do so, and that he was able to correct the conditions. Accordingly, the appeals officer concluded that a denial of benefits was warranted. Burns filed a petition for judicial review from the amended decision, which the district court granted, concluding that there was insufficient evidence in the record to support the appeals officer's finding that Burns was ordered to correct his predisposing conditions and that he was able to do so. This appeal followed.

On appeal, the City challenges the district court's grant of Burns' petition, asserting that substantial evidence supported the appeals officer's determinations. Like the district court, we review an administrative agency's decision to determine whether it was affected by an error of law, or was arbitrary or capricious, and thus, an abuse of discretion. NRS 233B.135(3)(d), (f); *State Tax Comm'n v. Am. Home Shield of Nev., Inc.*, 127 Nev. 382, 385-86, 254 P.3d 601, 603 (2011). We review the agency's factual findings for clear error or an abuse of discretion, and will only overturn those findings if they are not supported by substantial evidence. NRS 233B.135(3)(e), (f); *City of N. Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011). Substantial evidence is that "which a reasonable mind might accept as adequate to support a conclusion." NRS 233B.135(4); *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 624, 310 P.3d 560, 564 (2013).

To receive benefits for an occupational disease, an employee typically must establish by a preponderance of the evidence that the disease arose out of and in the course of his employment. *Emp'rs Ins. Co. of Nev. v. Daniels*, 122 Nev. 1009, 1015, 145 P.3d 1024, 1028 (2006). Pursuant to NRS 617.457(1), as relevant here, a firefighter meeting particular requirements

is entitled to a conclusive presumption that his heart disease arose out of and in the course of his employment. *Id.* at 1015-16, 145 P.3d at 1028. The firefighter is not entitled to this presumption, however, if he fails to correct a predisposing condition "which lead[s] to heart disease when so ordered in writing by the examining physician subsequent to a [required] physical examination . . . if the correction is within the ability of the [firefighter]." NRS 617.457(11); *Daniels*, 122 Nev. at 1016, 145 P.3d at 1028.

Here, the parties agree that Burns is a firefighter qualifying for the conclusive presumption pursuant to NRS 617.457(1). The parties disagree as to whether Burns failed to correct a predisposing condition after being ordered to do so and whether any such correction was within his ability, such that he is no longer entitled to the presumption pursuant to NRS 617.457(11). In his amended decision and order, the appeals officer concluded that, following his annual physical examinations, the examining physician notified Burns in writing numerous times since 2009, that he was overweight, had high cholesterol, and had high triglycerides, all of which are predisposing conditions for heart disease. Additionally, the appeals officer found that Burns failed to correct these predisposing conditions, as evidenced by his treating physician's continued recommendations that Burns lose weight and lower his cholesterol, and that these conditions were within his ability to correct. Accordingly, the appeals officer concluded Burns was not entitled to NRS 617.457(1)'s presumption and that he was therefore not entitled to workers' compensation benefits.

As noted above, a firefighter is not entitled to the NRS 617.457(1) presumption if he fails to correct a predisposing condition after being ordered to do so in writing by the examining physician subsequent to the annual required physical examination, if the correction is within the

ability of the firefighter. *See* NRS 617.457(11). Assuming without deciding that Burns was ordered to correct his predisposing conditions and that he failed to do so, based on our review of the record, there is not substantial evidence in the record to support the appeals officer's finding that correcting the predisposing conditions was within Burns' ability.

The appeals officer summarily concluded that Burns was capable of correcting the predisposing conditions as evidenced by the fact that his physicians ordered him to diet and exercise. But nothing in the record, and no authority provided by the City on appeal, supports the conclusion that simply because a physician provides the employee with methods to try to correct a predisposing condition, it is therefore within the employee's ability to correct the predisposing condition. *See* NRS 233B.135(3)(e), (f) (providing that this court reviews the appeals officer's findings for an abuse of discretion and will only overturn those findings if they are not supported by substantial evidence); *Warburton*, 127 Nev. at 686, 262 P.3d at 718 (stating the same); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that Nevada's appellate courts need not consider claims that are not cogently argued or supported by relevant authority).

Moreover, there is not substantial evidence in the record to indicate that Burns was capable of reducing his cholesterol, triglycerides, or weight by dieting and exercising. To the contrary, the record indicates that, following his required annual physicals in 2010, 2011, and 2012, the physicians' assessments and recommendations indicate Burns "continue[s] to do an excellent job maintaining [his] health;" that he should "[k]eep up [his] exercise regimen . . . it's doing great for [him];" and that he was "doing well maintaining [his] health." In 2012, the physician noted that although

his "bad" cholesterol and triglycerides were high, Burns was taking fish oil supplements as previously directed by his private physician and his total cholesterol was fine. Thus, the physicians' reports indicate that Burns was doing what he was instructed to do, he was exercising and taking supplements, and despite that, his predisposing factors did not change, which reflects that he was not capable of correcting his predisposing conditions.

Because there is no evidence in the record to support the conclusion that correcting Burns' predisposing conditions was within his ability, we necessarily hold that the appeals officer's conclusion is not supported by substantial evidence. *See* NRS 233B.135(3)(e), (f); *Warburton*, 127 Nev. at 686, 262 P.3d at 718. Accordingly, we affirm the district court order granting Burns' petition for judicial review.

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Department 18, Eighth Judicial District Court
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Clark & Richards
Eighth District Court Clerk