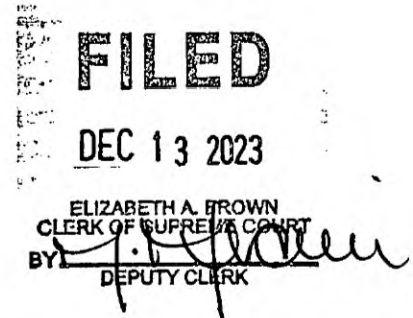


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CANNON COCHRAN MANAGEMENT  
SERVICES, INC.; AND LAS VEGAS  
METROPOLITAN POLICE  
DEPARTMENT,  
Appellants,  
vs.  
DERRICK SAXON,  
Respondent.

No. 84117-COA



*ORDER OF AFFIRMANCE*

Cannon Cochran Management Services, Inc. and Las Vegas Metropolitan Police Department (appellants) appeal from a district court order granting a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Nadia Krall, Judge.

In the proceedings below, respondent Derrick Saxon, a police officer employed by the Las Vegas Metropolitan Police Department (LVMPD), sought workers' compensation benefits after he experienced chest pressure and heart palpitations and he received a diagnosis of left ventricular hypertrophy, a disease of the heart. Cannon Cochran Management Services, Inc. (Cannon), the insurer for LVMPD, denied the claim, concluding that Saxon had predisposing conditions that he failed to correct, precluding benefits pursuant to NRS 617.457(11). Saxon later sought a hearing concerning that decision and the hearing officer affirmed the insurer's decision.

Saxon appealed that decision to an appeals officer. The parties submitted Saxon's relevant medical records and Saxon's affidavit

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concerning his condition. Saxon contended in his affidavit that he had attempted to improve his predisposing conditions by meeting with a dietitian and his primary care physician, and asserted that he performed the activities that he had been instructed to in an attempt to correct his predisposing conditions.

The appeals officer ultimately filed a decision and order concluding that Saxon had a disease of the heart and that he met the prerequisites for the conclusive presumption pursuant to NRS 617.457(1) that his heart disease arose out of and in the course of his employment. However, the appeals officer also concluded Saxon was provided notice in writing of his predisposing conditions, that there was no evidence that Saxon attempted to correct his conditions, and that he was able to correct the conditions. Accordingly, the appeals officer concluded that a denial of benefits was warranted.

Saxon filed a petition for judicial review from that decision, which the district court granted, concluding that there was insufficient evidence in the record to support the appeals officer's finding that Saxon was able to correct his predisposing conditions and that appellants therefore failed to meet their burden to rebut the conclusive presumption that Saxon's disease of the heart arose out of and in the course of his employment. This appeal followed.

On appeal, appellants challenge the district court's grant of Saxon's petition, asserting that substantial evidence supported the appeals officer's determinations. The parties agree that Saxon is a police officer qualifying for the conclusive presumption pursuant to NRS 617.457(1). The parties disagree as to whether Saxon 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 the exception set forth in NRS 617.457(11). And appellants further contend that it was Saxon's burden to prove that any predisposing condition was not within his ability to correct.

Like the district court, this court reviews an appeals officer's decision in workers' compensation matters for clear error or abuse of discretion. NRS 233B.135(3)(e), (f); *Vredenburg v. Sedgwick CMS*, 124 Nev. 553, 557, 188 P.3d 1084, 1087 (2008). Our review is confined to the record before the appeals officer, and on issues of fact and fact-based conclusions of law, we will not disturb the appeals officer's decision if it is supported by substantial evidence. *Vredenburg*, 124 Nev. at 557, 188 P.3d at 1087-88; *Grover C. Dils Med. Ctr. v. Menditto*, 121 Nev. 278, 283-84, 112 P.3d 1093, 1097 (2005). "Substantial evidence is evidence that a reasonable person could accept as adequately supporting a conclusion." *Vredenburg*, 124 Nev. at 557 n.4, 188 P.3d at 1087 n.4 (internal quotation marks omitted).

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 police officer 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 police officer 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 [police officer]." NRS 617.457(11); *Daniels*, 122 Nev. at 1016, 145 P.3d

at 1028. “Because the plain and unambiguous language in NRS 617.457(11) precludes an employee who fails to correct a predisposing condition from relying on the conclusive presumption in NRS 617.457(1), it may operate as an affirmative defense to such a claim.” *Las Vegas Metro. Police Dep’t v. Holland*, 139 Nev., Adv. Op. 10, 527 P.3d 958, 963 (2023). “It is well-established that a party asserting an affirmative defense has the burden of proving each element of that defense.” *Id.*

Because appellants relied on the affirmative defense of NRS 617.457(11) to defend against Saxon’s claim, they bore the burden to prove, by a preponderance of the evidence, that (1) Saxon had a predisposing condition that leads to heart disease, (2) Saxon was ordered in writing by the examining physician to correct the predisposing condition, (3) Saxon failed to correct the predisposing condition, and (4) the correction was within Saxon’s ability to correct. *See id.* “[I]t is not enough to show that [Saxon] failed to correct the predisposing condition leading to heart disease; appellants also had the burden to show . . . that [Saxon] had the ability to correct the condition.” *Id.* at 964.

Here, the evidence before the appeals officer demonstrated that Saxon’s elevated weight, cholesterol levels and triglyceride levels were predisposing conditions, that Saxon was ordered in writing by an examining physician to correct those conditions, and that Saxon failed to sufficiently correct them. Therefore, we conclude that appellants met their burden to establish the first, second, and third elements necessary to maintain their defense under NRS 617.457(11). *See id.* at 963.

However, appellants also had the burden of proof as to the fourth element, that Saxon had the ability to correct the predisposing conditions, and the record below does not contain evidence as to whether



correcting the predisposing conditions was within Saxon's ability. *See id.* The record contains evidence that Saxon took corrective actions as ordered by the examining physician, as his medical records demonstrated that he visited with a dietitian, and he asserted in his affidavit that he also met with his primary care physician and he undertook the corrective actions concerning his predisposing conditions as directed. Because there was evidence indicating that Saxon attempted to improve the predisposing conditions, the appeals officer's finding that there was no evidence that Saxon attempted to correct his conditions is not supported by the record. *See Vredenburg*, 124 Nev. at 557, 188 P.3d at 1087-88.

Moreover, the record does not contain evidence indicating that Saxon was capable of reducing his weight, cholesterol, or triglycerides by dieting and exercising. To the contrary, there is evidence in the record that Saxon had been doing as he had been instructed, and despite that, his predisposing factors did not change, which may indicate that he was not capable of correcting his predisposing conditions. *See Holland*, 139 Nev., Adv. Op. 10, 527 P.3d at 964 (stating "failure to correct the predisposing condition, despite the employee's compliance with the corrective action, may indicate [ ] that the employee did not have the ability to correct the condition").


And, as appellants had the burden to prove that Saxon had the capability to correct his predisposing conditions, *see id.*, because appellants identify no evidence in the record to support the conclusion that correcting the predisposing conditions was within Saxon's ability, we necessarily hold that the appeals officer's conclusion is not supported by substantial evidence. *See NRS 233B.135(3)(e), (f); Vredenburg*, 124 Nev. at 557, 188

P.3d at 1087-88. Accordingly, we affirm the district court order granting Saxon's petition for judicial review.

It is so ORDERED.

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

  
\_\_\_\_\_, J.  
Bulla

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. Nadia Krall, District Judge  
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas  
State of Nevada Department of Administration, Hearings Division  
GGRM Law Firm  
Eighth District Court Clerk