IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GREGORY ZIEL,
Appellant,
vs.
LAS VEGAS METROPOLITAN POLICE DEPARTMENT; AND CCMSI,
Respondents.

No. 84902-COA

FILED

JAN 19 2024

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Gregory Ziel appeals from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Bita Yeager, Judge.

In the proceedings below, Gregory Ziel, a retired police officer that formerly was employed by the Las Vegas Metropolitan Police Department (LVMPD), experienced chest pain and visited a hospital. He was subsequently diagnosed with mild obstructive coronary artery disease, endothelial dysfunction, and microvascular dysfunction, all of which are diseases of the heart. Ziel sought workers' compensation benefits but Cannon Cochran Management Services, Inc. (CCMSI), insurer for LVMPD, denied the claim. Ziel later sought a hearing concerning that decision and the hearing officer reversed CCMSI's decision, finding that Ziel had a disease of the heart and he suffered a compensable occupational disease pursuant to NRS 617.457.

LVMPD and CCMSI (respondents) appealed that decision to an appeals officer. The parties submitted Ziel's relevant medical records to the appeals officer and those records demonstrated that Ziel had previously been warned by a physician that his total cholesterol and LDL levels were

too high. Ziel was further instructed to adopt a low-fat diet, improve his cardiovascular fitness, and to visit his primary care physician concerning the test results. The records also demonstrated that Ziel's cholesterol levels had fluctuated over time and he had periods where those levels had been reduced. Ziel contended that he had attempted to improve his predisposing conditions, as evidenced by the fluctuating cholesterol levels, but that he was nevertheless unable to fully correct that condition.

The appeals officer ultimately filed a decision and order concluding that Ziel 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 concluded Ziel was provided notice in writing of his predisposing conditions and that there was no evidence that Ziel attempted to correct his conditions. The appeals officer did not make specific findings as to whether Ziel had the ability to correct the predisposing conditions but instead found that Ziel's failure to correct the predisposing conditions resulted in the loss of the conclusive presumption of NRS 617.457(1). And the appeals officer otherwise found that Ziel did not meet his burden to demonstrate he was entitled to workers' compensation benefits, and accordingly concluded that a denial of benefits was warranted.

Ziel subsequently filed a petition for judicial review, which the district court denied following a hearing. This appealed followed.

On appeal, Ziel challenges the district court's denial of his petition, asserting that it was respondents' burden to demonstrate that he had the ability to correct his predisposing conditions. The parties agree that Ziel was a police officer and qualified for the conclusive presumption

pursuant to NRS 617.457(1). The parties disagree as to whether Ziel 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 respondents further contend that it was Ziel'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 (discussing same but citing former version of NRS 617.457). "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.*

We note that the appeals officer and the district court did not have the benefit of the Nevada Supreme Court's decision in *Holland*, which explicitly explains that an insurer that relies upon the affirmative defense of NRS 617.457(11) carries the burden of proof as to that defense. *See id.* at 965 ("NRS 617.457(11) is an affirmative defense, and the burden of proof necessarily rests with the employer raising the defense to prove it by a preponderance of the evidence."). Because respondents relied on the affirmative defense of NRS 617.457(11) to defend against Ziel's claim, they bore the burden to prove, by a preponderance of the evidence, that (1) Ziel had a predisposing condition that leads to heart disease, (2) Ziel was ordered in writing by the examining physician to correct the predisposing condition, (3) Ziel failed to correct the predisposing condition, and (4) the condition was within Ziel's ability to correct. *See id.* at 963. "[I]t is not enough to show that [Ziel] failed to correct the predisposing condition leading to heart disease; appellants also had the burden to show . . . that [Ziel] had the ability to correct the condition." *Id.* at 964.

Here, the evidence before the appeals officer demonstrated that Ziel's elevated total cholesterol and LDL levels were predisposing conditions, that Ziel was ordered in writing by an examining physician to correct those conditions, and that Ziel failed to sufficiently correct them. Therefore, we conclude that respondents 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, respondents also had the burden of proof as to the fourth element, that Ziel 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 Ziel's ability. *See id.* The record contains some evidence that Ziel took corrective actions as ordered by the examining physician, as his medical records demonstrated he had periods of lower total cholesterol and LDL levels. Because there was evidence indicating that Ziel attempted to improve the predisposing conditions, the appeals officer's finding that there was no evidence that Ziel 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 Ziel was capable of fully reducing his total cholesterol and LDL levels. To the contrary, there is evidence in the record that Ziel attempted to reduce those levels, and despite those attempts, his predisposing factors did not fully improve, 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 respondents had the burden to prove that Ziel had the capability to correct his predisposing conditions, *see id.* at 963, because respondents identify no evidence in the record to support the conclusion that correcting the predisposing conditions was within Ziel's ability, we necessarily hold that the appeals officer's decision to reject Ziel's claim is not supported by substantial evidence. *See* NRS 233B.135(3)(e), (f); *Vredenburg*, 124 Nev. at 557, 188 P.3d at 1087-88. Therefore, we conclude that the district court abused its discretion by denying Ziel's petition for judicial review. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter with instructions that the district court, in turn, remand the matter to the appeals officer for further proceedings consistent with this order.

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Bita Yeager, District Judge
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The State of Nevada Department of Administration, Hearings Division
Eighth District Court Clerk