IN THE SUPREME COURT OF THE STATE OF NEVADA

WASHOE COUNTY, NEVADA,
Appellant,
vs.
CARSON SMITH, DECEASED,
Respondent.

No. 49543

FILED

MAY 29 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a petition for judicial review in an occupational disease matter. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

In 2003, respondent Carson Smith, who at the time was employed as a deputy sheriff by appellant Washoe County, suffered an acute myocardial infarction and passed away. Thereafter, Smith's spouse, Dana Thompson Smith, filed a claim for death benefits under the occupational disease statutes, which was denied on the basis that Smith had failed to correct predisposing conditions. Thompson Smith administratively appealed.

An appeals officer determined that Smith's failure to correct predisposing conditions, by losing weight and stopping smoking, after being warned to do so in writing after his annual heart/lung exams, excluded him from invoking the NRS 617.457 conclusive presumption that his heart condition was work-related, and that it was otherwise not shown that his heart condition was work-related, in that it arose out of and in the course of employment. See NRS 617.440. As a result, the appeals officer denied benefits, and Thompson Smith petitioned the district court for judicial review.

The district court concluded that Smith was not excluded from NRS 617.457's conclusive presumption for failure to correct predisposing conditions because substantial evidence did not support any finding that his weight and smoking habit caused Smith's heart condition or his death, that he was ordered to lose weight and quit smoking, or that doing so would have been within Smith's ability. The district court also concluded that evidence in the record supported Thompson Smith's assertion that Smith died as a result of his employment, even though a medical expert had testified that his smoking, as well as the emotional and physical stresses of previous combat training, could have contributed to the rupturing of his plaque and it was impossible to determine which had actually done so. In making these conclusions, the district court indicated that NRS 617.457's conclusive presumption shifted the evidentiary burden to the employer to prove that the predisposing conditions of being overweight and smoking had caused Smith's heart attack. The district court further noted that appellant had not presented substantial evidence supporting such a conclusion. Washoe County has appealed.

Like the district court, we review the appeals officer's decision for abuse of discretion. Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491 (2003), overruled on other grounds by Five Star Capitol Corp. v. Ruby, 124 Nev. ____, 194 P.3d 709 (2008). Although the appeals officer's purely legal determinations are independently reviewed, courts must give deference to the appeals officer's fact-based conclusions of law and not disturb them if they are supported by substantial evidence. Id. A court may not substitute its judgment for that of the appeals officer as to the weight of the evidence on a question of fact. Manwill v. Clark County, 123 Nev. 28, ___, 162 P.3d 876, 879 (2007). Substantial evidence is

evidence that a reasonable person could accept as adequately supporting a conclusion, and it can be inferred from a lack of particular evidence. Wright v. State, Dep't of Motor Vehicles, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005). Further, this court's review of the facts is limited to the record before the appeals officer. Horne v. SIIS, 113 Nev. 532, 536, 936 P.2d 839, 842 (1997).

Under NRS 617.457(1), a police officer who has been continuously employed as such for five years or more is entitled to a conclusive presumption that his heart disease is work-related, unless, as set forth in subsection six of that statute, after the police officer's annual medical exam, the examining physician "ordered" him in writing to correct a predisposing condition that was within his ability to correct, and he failed to do so. In Employers Insurance Co. of Nevada v. Daniels, we recognized that smoking and being overweight are predisposing conditions and that the failure to correct those conditions after being warned to do so in writing will preclude the employee from invoking the conclusive presumption. 122 Nev. 1009, 1016, 145 P.3d 1024, 1029 (2006).

Here, we agree with the district court that the appeals officer's finding that Smith had been ordered in writing to correct the conditions predisposing him to heart disease is not supported by substantial evidence and that the appeals officer abused her discretion in denying occupational disease benefits. We base this determination on our review of the record. Most significantly, the documents entitled "public safety officer heart and lung examination recap form," dated February 12, 1999, and January 14, 2003, informs our decision. In these forms, while a number of actions were "recommended" to Smith, such as quitting smoking and adopting an aerobic exercise program, the forms' boxes for actions that "must be taken

to correct the above predisposing condition" were left completely blank. Presumably, those boxes were created to provide "orders" pursuant to NRS 617.457(6). Why these boxes were left blank is ambiguous at best. A reasonable mind could not therefore conclude from this record that Smith had been sufficiently ordered, or even, under Daniels, warned, that failure to correct his predisposing conditions could lead to a termination of occupational disease benefits. See Ayala, 119 Nev. at 235, 71 P.3d at 491-92 (describing substantial evidence as evidence that a reasonable person could accept as adequately supporting a conclusion).

The record also contains yearly letters sent to Smith by the Washoe County Sheriff's Administrative Bureau regarding the annual heart/lung examinations. Because of these letters' general ambiguities concerning any steps that ought to be taken to correct conditions predisposing an employee to heart disease, the letters cannot be reasonably read as satisfying NRS 617.457(6)'s requirements. For instance, the January 29, 2003, Administrative Bureau letter merely states that: "It is recommended that you consult with your personal physician to correct the aforementioned condition. Failure to correct [these conditions] may result in a loss of benefits due you under Nevada Revised Statute 617.457, Occupational Diseases, if they are within your ability to correct them." (Emphasis added).

As the appeals officer abused her discretion in basing her conclusion that NRS 617.457(6) is controlling on a finding that is not supported by substantial evidence, NRS 617.457(6) has not been satisfied, and thus, under NRS 617.547(1), Smith's heart attack is conclusively presumed to have arisen out of and in the course of his employment.

Therefore, we affirm the district court order granting the petition for judicial review.

It is so ORDERED.

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Jerome Polaha, District Judge
Carolyn Worrell, Settlement Judge
McDonald Carano Wilson LLP/Reno
Diaz & Galt, LLC
Washoe District Court Clerk