

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GEORGE YONKER,
Appellant,
vs.
CITY OF RENO,
Respondent.

No. 72044

FILED

JUN 22 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

George Yonker appeals from a district court order granting a petition for judicial review of an administrative decision granting disability benefits. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Yonker worked as a police officer for the City of Reno from 1978 to 2005.¹ On December 5, 1999, he suffered a heart attack. Thereafter, he filed a claim for workers' compensation for his heart condition, and the City's insurer accepted the claim, identifying the condition as heart disease and the date of "injury" as December 5, 1999. The insurer ultimately granted Yonker permanent partial disability benefits, and he returned to work for the Reno Police Department until his retirement in 2005. Thereafter, he worked for multiple civilian contractors and the U.S. government in various law enforcement capacities. Yonker ultimately ceased working permanently—initially because of medical issues unrelated to his heart condition—and no longer earned any wages after July 2011.

Yonker suffered another heart attack on September 16, 2011. On September 30, 2011, he requested reopening of his original heart-disease claim with the City. Yonker then requested temporary total disability ("TTD") benefits effective from the date of his request to reopen the claim.

¹We do not recount the facts except as necessary to our disposition.

He also requested permanent total disability (“PTD”) benefits. The City’s insurer denied the request because Yonker failed to provide a certification of disability from a treating physician. Yonker then requested a hearing before the hearing officer, and prior to the hearing, Dr. Larry Noble concluded that Yonker was permanently disabled and unable to work as of September 30, 2011. The hearing officer ultimately reversed the insurer’s denial and determined that Yonker was entitled to disability benefits.

The City appealed the hearing officer’s decision, and the appeals officer also reversed the insurer’s denial of benefits. In her decision, the appeals officer cited Dr. Noble’s conclusions as entitling Yonker to permanent total disability benefits. She based her decision on NRS 617.457(11) (2009),² which provides that a person who is determined to be partially disabled as a result of an occupational disease pursuant to that statute and incapable of performing work as a police officer is entitled to receive PTD benefits. She did not address TTD benefits in the decision, nor did she explicitly address

²NRS 617.457 was amended multiple times since Yonker’s request to reopen his claim. See 2017 Nev. Stat., ch. 551, § 5, at 3894-96; 2015 Nev. Stat., ch. 420, §§ 3, 3.5, at 2429-33; 2011 Nev. Stat., ch. 124, § 2, at 584-85. The 2011 version of the statute came into effect on October 1, 2011, but Yonker requested reopening of his claim on September 30, 2011, which is also the date of his second disablement. See NRS 218D.330 (“Each law . . . passed by the Legislature becomes effective on October 1 following its passage, unless the law . . . specifically prescribes a different effective date.”); see also *Prescott v. United States*, 523 F. Supp. 918, 926 (D. Nev. 1981) (applying Nevada occupational-disease law and holding that “the law in effect at the date of the occurrence of the disability governs”); *Langman v. Nev. Adm’rs, Inc.*, 114 Nev. 203, 208-09, 955 P.2d 188, 191-92 (1998) (applying the version of a statute governing reopening that was in effect at the time of the claimant’s request for reopening). Thus, here, we apply the 2009 version of the statute. 2009 Nev. Stat., ch. 151, § 6, at 547; 2009 Nev. Stat., ch. 201, §§ 2, 3, at 749-50. We note that the differences between the multiple versions of the statute are generally not relevant to this case.

the applicability of *Howard v. City of Las Vegas*, 121 Nev. 691, 120 P.3d 410 (2005), the primary case the City relied upon in arguing that Yonker was not entitled to disability benefits.

The City petitioned the district court for judicial review of the appeals officer's decision. It argued that the appeals officer erred as a matter of law by failing to apply the rule announced by the Nevada Supreme Court in *Howard*. The City asserts that *Howard* requires that a police officer seeking disability benefits must have been earning wages on the date of disability to obtain the benefits, and because Yonker was not earning wages on the date Dr. Noble certified him as permanently disabled, he is not entitled to disability benefits. The district court agreed and granted the petition for judicial review, holding that *Howard* precluded Yonker from receiving disability benefits.

On appeal, Yonker argues that: 1) the district court applied the wrong standard of review, failing to give the appropriate deference to the appeals officer's findings; 2) the appeals officer's decision is supported by substantial evidence and contains no errors of law or abuse of discretion; and 3) the district court erred as a matter of law, misapplying *Howard* and incorrectly determining the date of Yonker's disability. However, the only disputed issue in this appeal is the proper application of NRS 617.457 and *Howard* to the facts of this case, so we need consider only that issue.³

"On appeal from orders deciding petitions for judicial review, this court reviews the administrative decision in the same manner as the district

³Yonker's arguments regarding the standard of review and substantial evidence are, in substance, a defense of the appeals officer's legal reasoning and application of NRS 617.457 (as well as her disregard of the *Howard* decision). The City does not dispute the appeals officer's basic factual findings, and, whether *Howard* precludes Yonker from receiving disability benefits is a question of law reviewed de novo.

court.” *Nassiri v. Chiropractic Physicians’ Bd.*, 130 Nev. 245, 248, 327 P.3d 487, 489 (2014); *see also Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006) (“[T]his court affords no deference to the district court’s ruling in judicial review matters.”). Moreover, whether an individual is entitled to receive disability benefits under a statute—including determination of “the proper period from which to calculate disability benefits in the event of an occupational disease”—is a question of law that this court is free to address without deference to an agency decision. *Mirage Casino-Hotel v. Nev. Dep’t of Admin.*, 110 Nev. 257, 259, 871 P.2d 317, 318 (1994); *see Howard*, 121 Nev. at 693-95, 120 P.3d at 411-12.

Under the version of NRS 617.457 applicable to this case,

[D]iseases of the heart of a person who, for 5 years or more, has been employed in a full-time continuous, uninterrupted and salaried occupation as a firefighter, arson investigator or police officer in this State before the date of disablement are conclusively presumed to have arisen out of and in the course of the employment.

NRS 617.457(1). The supreme court has interpreted this statute to mean that “[p]olice officers] with heart diseases are entitled to occupational disease benefits as a matter of law,” including medical benefits. *Howard*, 121 Nev. at 693, 120 P.3d at 411 (internal quotation marks omitted).⁴ However, the *Howard* court also held that an individual “not earning an actual wage at the time of his disability, from which a lost wage may be calculated, . . . is not entitled to disability compensation in the form of lost wages.” *Id.* at 695, 120

⁴The parties do not dispute that Yonker’s heart disease qualifies under this conclusive presumption as an occupational disease for purposes of NRS Chapter 617; rather, the City disputes only Yonker’s entitlement to disability benefits.

P.3d at 412. The court explained that NRS 617.420, as it read at the time that case was decided,⁵ required that disability compensation be calculated from the date of disability, and thus a claimant is not entitled to disability benefits if he is not earning any wages on that date. *Id.* at 693-94, 120 P.3d at 411. The court specifically noted that “[the claimant’s] heart disease first manifested itself in the form of a heart attack eight years after he retired from his employment as a firefighter,” and on the date he became disabled, he was earning no wages from which to calculate disability benefits. *Id.* at 695, 120 P.3d at 412.

Here, Yonker was not earning wages as of the date his doctor certified and the appeals officer concluded he was permanently disabled. However, the circumstances of this case differ from *Howard* in several key respects. First, the claimant in *Howard* did not file an occupational-disease claim for his heart disease until after he had retired, *id.* at 692, 120 P.3d at 410, whereas Yonker originally filed his claim while he was still employed by the City, and he only sought TTD and PTD benefits after reopening that original claim. Second, the claimant in *Howard* had not been previously deemed disabled in any way, *id.* at 692-95, 120 P.3d at 410-12, whereas Yonker had been previously deemed permanently partially disabled as a result of his heart disease while he was still earning wages. His previous

⁵Prior to its amendment in 2017, NRS 617.420 provided that “[n]o compensation may be paid under this chapter for disability which does not incapacitate the employee for at least 5 cumulative days within a 20-day period from earning full wages, but if the incapacity extends for 5 or more days within a 20-day period, the compensation must then be computed from the date of disability.” *See* 2017 Nev. Stat., ch. 551, § 2, at 3891. The version of the statute that applies to this case became effective in 1987, 1987 Nev. Stat., ch. 397, § 7, at 923, and is cited herein.

disability led the appeals officer to conclude that he was entitled to PTD benefits under NRS 617.457(11), which states:

A person who is determined to be:

- (a) Partially disabled from an occupational disease pursuant to the provisions of this section; and
- (b) Incapable of performing, with or without remuneration, work as a . . . police officer,

may elect to receive the benefits provided under NRS 616C.440 for a permanent total disability.

Under the plain meaning of this statute, Yonker satisfied both prongs of the requisite determination, and thus he was entitled to elect to receive the PTD benefits provided under NRS 616C.440.⁶ However, since NRS 616C.440 determines disability compensation with reference to “the average monthly wage,” we must consider whether Yonker was earning a wage on the date of his disability such that the rule of *Howard* would not preclude him from receiving benefits. Consequently, we must determine whether the amount of Yonker’s compensation should be computed from the date of his later disablement, as the City argues, or from the date of his original disablement, as Yonker argues.

The City relies primarily on the analysis set forth in *Mirage Casino-Hotel v. Nev. Dep’t of Admin.*, 110 Nev. 257, 871 P.2d 317 (1994). In that case, the supreme court applied NRS 617.060 and NRS 617.420 in holding that disability compensation must be computed from the date of disability. *Id.* at 260, 871 P.2d at 319. Specifically, the court reasoned that because NRS 617.060 defines disablement as “the event of becoming


⁶NRS 616C.440 provides that employees who are “injured by accident arising out of and in the course of employment . . . [are] entitled to receive the following compensation for permanent total disability: (a) In cases of total disability adjudged to be permanent, compensation per month of 66 2/3 percent of the average monthly wage.”

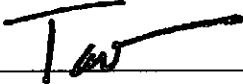
physically incapacitated by reason of an occupational disease arising out of and in the course of employment," the claimant in that case did not become disabled until the day she was no longer able to work. *Id.* (quoting NRS 617.060). However, neither that case nor any of the other cases the City cites addresses the scenario at issue here—namely, where an individual previously determined to be partially disabled seeks PTD benefits for the same occupational disease to be computed from wages earned as of the date of the initial disablement.


Because NRS 617.420 requires that compensation "be computed from the date of disability," and because Yonker is seeking PTD benefits to compensate him for his second disablement, any compensation to which he is entitled would need to be computed from the second date of disability. Thus, because Yonker was not earning wages on the date of his second disability, we conclude that he is precluded from receiving disability benefits under *Howard*.

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Elliott A. Sattler, District Judge
Laurie A. Yott, Settlement Judge
Hutchison & Steffen, LLC/Reno
McDonald Carano LLP/Reno
Washoe District Court Clerk