WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GILBERT ORTIZ, *Applicant*

vs.

CITY OF FULLERTON, permissibly self-insured, administered by ADMINSURE; CALPERS, *Defendants*

Adjudication Number: ADJ7143993
Santa Ana District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 30, 2021

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

GILBERT ORTIZ
ADAMS FERRONE & FERRONE
WALL, MCCORMICK, BAROLDI & DUGAN
CALPERS

PAG/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

This matter was submitted for determination of the Petition For Findings of Fact pursuant to Government Code Sections 21166[1] and 21537 filed by applicant Gilbert Ortiz. The petition was opposed by the City of Fullerton which asserted that the Petitioner's disability retirement from the California Public Employees Retirement System ("CalPERS") is not industrial within the meaning of Government Code Section 20046. The applicant was evaluated by Dr. Paul Grodan, an Independent Medical Evaluator assigned by this Judge. Upon review and analysis of his report, in conjunction with the relevant case law, it was determined that the applicant's condition was industrially caused within the definition of the above noted Government Code sections. It is from this determination that the defendant is aggrieved and has filed a timely and verified Petition for Reconsideration.

California Government Code Section § 21166 governs the Workers' Compensation Appeals Board's authority to make a determination of industrial disability when there is a dispute between the CalPERS board or governing body and the CalPERS member over whether the member's disability is industrial or non-industrial. When such dispute arises, the statute states that the WCAB has jurisdiction to determine, "using the same procedure as in workers' compensation hearings", whether or not the disability is industrial.

In these cases, "the jurisdiction of the Workers' Compensation Appeals Board shall be limited solely to the issue of industrial causation".

Leading Cases

The proper test of causation for a service-connected disability retirement was set forth in the case of *Bowen v. Board of Retirement,* (1986) 51 Cal. Comp. Cases 639.

The petitioner in *Bowen* applied for retirement based upon the stress he experienced as an eligibility worker. Bowen was denied a service connected retirement under Government Code Section 31720 which states "Any member permanently incapacitated for the performance of duty shall be retired for disability regardless of age if, and only if: (a) the member's incapacity is a result of injury or disease arising out of and in the course of the member's employment, and such employment contributes substantially to such incapacity".

In reversing the court below, the Court of Appeal noted that the test for causation (of service-connected disability) under Government Code Section 31720 is that there must be substantial evidence of some connection between the disability and the job.

[1] Petitioner erroneously cited Government Code Section 21116 in his Petition and at trial. We presume this was a clerical error and all references to 21116 have been adjusted accordingly.

The Bowen court noted the legislative history of Section 31720, as amended in 1980:

Following a hearing by the Assembly Committee on Public Employees and Retirement, however, Senate Bill No. 1076 was amended to its present form, including the substantial contribution test for industrial causation. Significantly, the Assembly amendment deleted the requirement that a permanent incapacity be a *principal* result of an employment-caused injury from the bill's final form. In the Assembly Third Reading, the analysis notes that the bill is a response to *Heaton, supra*, 63 Cal.App.3d 421, in which the court stated that "a member is entitled to a service-connected disability if (1) he or she is permanently unable to perform his or her job, and (2) *any* part of the disability is job-connected"

The Court went on to note

"In our examination of the 1980 amendment to section 31720, we are guided by the underlying purpose of pension legislation, which "recognize(s) a public obligation to . . . employees who become incapacitated by age or long service in public employment and its accompanying physical disabilities by making provision for retirement compensation and death benefit as additional elements of compensation for future services . . . ." (§ 31451.) In accordance with this stated purpose, "pension legislation must be liberally construed and applied to the end that the beneficent results of such legislation may be achieved."

In the 1980 amendment to section 31720, the Legislature intended to address prior construction of the causation threshold which indicated that an "infinitesimal contribution" was sufficient to prove causation and to emphasize that an "infinitesimal" or "inconsequential" connection between employment and disability would be insufficient for a service-connected disability retirement. The court concluded that "while the causal connection between the [job] stress and the disability may be a small part of the causal factors, it must nevertheless be *real* and *measurable*. There must be substantial evidence of some connection between the disability and the job." (*Id*., at p. 399, italics added; cf., *Gelman* v. *Board of Retirement* (1978) 85 Cal.App.3d 92, 97 [149 Cal.Rptr. 225] [requiring a "material and traceable" connection between employment and disability].)

In the case of *Pearl v. WCAB*, 26 Cal 4th 189, the Supreme Court interpreted *California Government Code Section* § 21166 as requiring the application of WCAB procedural, not substantive, rules to the determination of industrial causation in PERS matters. In *Pearl*, the trial judge applied Labor Code Section 3208.3 to determine that the applicant sustained psychiatric injury. The Supreme Court reversed the determination, noting that in determining the substantive question of whether the applicant's injury was industrial, the WCAB had to apply the definition under § 20046[2] of the Government Code, not Section 3208.3 of the Labor Code. The Supreme Court determined that because Pearl applied for retirement disability under the Public Employees' Retirement Law, and since Labor Code § 3208.3 did not expressly apply to public employees' retirement disability claims, the WCAB had to apply § 20046 of the Government Code to determine the substantive question of whether his injury was industrial.

[2] California Government Code § 20046 defines "industrial" in reference to the death or disability of an eligible CalPERS member for whom "special benefits are provided by this part" as a "disability or death as a result of injury or disease arising out of and in the course of his or her employment as such a member".

In DePuy v. Board of Retirement, [(1978)] 87 Cal.App.3d 392, 398-399 [[150 Cal.Rptr. 791]], the court stated that an "infinitesimal" or "inconsequential" connection between employment and disability would be insufficient for a service-connected disability retirement. The court concluded that "while the causal connection between the [job] stress and the disability may be a small part of the causal factors, it must nevertheless be real and measurable. There must be substantial evidence of some connection between the disability and the job."

In Hoffman v. Board of Retirement, the California Supreme Court opined: "As we explained in Bowen the 1980 amendment to section 31720 does not substantively change the test for a service-connected disability retirement. Relying on case law interpreting the preamended statute, we determined that the substantial contribution test of amended section 31720 requires substantial evidence of a real and measurable connection between an employee's disability and his employment in order for the employee to qualify for a service-connected disability retirement." (Hoffman v. Board of Retirement (1986) supra, 42 Cal.3d 590, 593 [229 Cal.Rptr. 825, 724 P.2d 511].)
In 2012, the Fifth District Court of Appeals weighed in on the meaning of "real and measurable" in Valero v. Board Of Retirement Of Tulare County Employees' Assn., 205 Cal.App.4th 960, 141 Cal.Rptr.3d 103 (2012). The Valero court opined: "…Based on this statutory and case authority, a disability applicant's employment must contribute substantially to, or be a real and measurable part of, the employee's permanent disability, in order to qualify for a disability retirement..." Valero v. Board of Retirement, 205 Cal.App.4th 960, 965.

Dr. Grodan's findings and applicant's testimony

The applicant in this case was diagnosed with a cardiomyopathy which he claims to be industrially caused. The question presented is whether there is substantial evidence of a real and measurable connection between the applicant's employment exposure and his disability.

Applicant testified that he last worked as a police officer for the City of Fullerton on November 14, 2009. He was hospitalized the following day. He suffered a stroke and was diagnosed with cardiomyopathy which he stated the doctors felt was viral in cause. (MOH/SOE, 11/3/16, page 3, LINES 7-11).

He testified that his duties as a police officer involved working patrol, making contact with the public, making radio calls, conducting pull-overs and pedestrian checks. He stated he had physical contact with the public, including parolees and probationers. (MOH/SOE, page 3, lines 12-14)

He came into contact with persons with communicable diseases (MOH/SOE, page 3, lines 15-16). He reviewed a document (Exhibit 6) describing the duties of a police officer for the City of Fullerton and acknowledged that the document correctly states that officers are exposed to blood, body fluids and communicable diseases. (MOH/SOE, page 3, lines 21-24).

He felt that he got sick from the constant contact that he had with people as a part of his job. He feels that he "caught something" that ended his career. (MOH/SOE page 4, lines 2-3).

On cross examination, he testified that he has had colds at different times in his life. (MOH/SOE page 4, line 20) and he acknowledged that he also came into contact with the general public outside of his work as a police officer. (MOH/SOE, page 4, lines 22-24).

Medical reporting and testimony of IME Grodan

The applicant was evaluated by Dr. Paul Grodan as an Independent Medical Evaluator, at the request of the undersigned. In his report dated 7/27/2018 (Exhibit Y), he noted that he understood that his role was to address whether there was a causal connection between the disability and his employment with the city of Fullerton and whether that connection is "real and measurable" (report page 8)**.**

He noted that "it is impossible to prove a negative, it is impossible to prove that the cardiotrophic virus was acquired at home versus at work" (page 9). He stated that the "reasonable probability is that it was at work".

To directly prove via "real and measurable" is impossible, he noted, unless one can find the specific suspect Mr. Ortiz encountered and then measure viral titers in both—Mr. Ortiz and the suspect—to identify the same strain of virus that post facto cannot be accomplished". (page 9).

Grodan continued that "even if one would ignore the presumption in the Labor Code, the reasonable medical probability of Mr. Ortiz being exposed to viral organisms during his employment is substantially probable". (page 11).

In his analysis, Dr. Grodan reflects the applicant's statement that Ortiz: "…was hired in July 2006, but previously was a sworn jail deputy with County of Riverside as of 2004…In the jail he was exposed to violence and infectious diseases and he did that work till July 2006 and with Fullerton was till November 2009…" Grodan Report July 27, 2018, Page 9. The doctor further notes: "…the risk of infectious exposure by a police officer is substantial and real…" Grodan Report July 27, 2018, page 11. He goes on to note: "…I do agree that Mr. Ortiz had industrially related exposure resulting in viral cardiomyopathy/myocarditis associated with a mural LV thrombus that caused the stroke which fortunately resolved ue to prompt autolysis of the clot, thus he did not sustain substantial residual damage…" Grodan Report July 27, 2018, page 12. Dr. Grodan adds: "…the reasonable medical probability is present, and this is the foundation of rulings by WCAB…"

He later concluded that "the measurable standard cannot be met" since "sequencing was not available at the time Mr. Ortiz had his problems. Therefore we could not measure the viral exposure at work".

Given the lack of clarity in his reporting, the matter was remanded for further clarification of Dr. Grodan's opinion.

Following remand of this matter for further development of the medical evidence, Dr. Grodan issued a subsequent report dated November 10, 2019 (Exhibit Y2) . He conceded that he misunderstood the application of the term "measurability" in his earlier report (Y1) as his view was medical/scientific, not legal. He went on to state that "There is no question that it is medically reasonably probable that a viral exposure of a police officer at work will be substantially greater

compared to home or outside of employment based on the numbers of encounters with the public". Page 9

He indicated that 'based on the case law and the decisions discussed in the submissions I reviewed (including *Bowen*) causal nexus was established by the medical records I reviewed. There was ample evidence for viral cardiomyopathy, even though direct transmission is impossible to establish, but exposure at work was substantially more probable than not.' Page 9.

Dr. Grodan was cross examined by telephone on April 30, 2020. (Exhibit Y3). After prolonged discussion regarding his July report and revisiting his earlier understanding of measurability from a scientific, versus legal, standpoint, he was asked "So would it be fair, if I summarize what you're saying, is that basically, he got the virus somewhere, which caused the problem, which caused the cardiomyopathy. You can't say based on real and measurable evidence where he got it, but the probability is that he was exposed to the virus at work because of coming into contact with people in the—more people in the course of his employment than away from work?" he responded "Actually, the probability is higher, greater than not, that it was contracted at work". (Y3, page 19, lines 8-20)

The 'real and measurable' standard does not equate to a 'beyond a shadow of a doubt' medical determination. The case law states that the employment must contribute substantially to, or be a real and measurable part of, the employee's permanent disability. Dr. Grodan has articulated the fact that there is a greater than likely chance that the applicant's employment contributed to his disability. Though this has been stated differently at different times during his deposition, it is clear that Dr. Grodan's opinion is that Mr. Ortiz' work contributed substantially to his disability and though the exact genesis of the applicant's condition cannot be determined for reasons that are inherent to the condition, Dr. Grodan has made clear that there is significantly more than an 'inconsequential' connection between the applicant's work and his illness. The undersigned is persuaded, therefore, that substantial evidence exists to determine that the applicant's condition is work related.

Recommendation

It is recommended that the Petition for Reconsideration be denied.

DATE: October 29, 2021

Pamela Pulley
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE