



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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August 8, 2017

RETIRED JUDGES

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Re: Stephen J Gurdak v. Commonwealth of Virginia Office of Comptroller, CL-2016-9090

Dear Counsel:

This matter came before the Court on May 31, 2017. At the conclusion of the hearing, the Court took the matter under advisement.

BACKGROUND

This case arises out Va. Code Ann. § 9.1-400, the Line of Duty Act (the "Act"). Stephen Gurdak ("Plaintiff") was an Alexandria Police Officer from 1986 – 2010. On September 1, 2010, Plaintiff retired. On November 13, 2013, Plaintiff was diagnosed with heart disease. On September 2, 2015, the Workers' Compensation Commission entered an order finding that Plaintiff's heart disease was an occupational disease pursuant to Va. Code Ann. §§ 65.2-402(b) and 65.2-406(a)(6). Plaintiff then applied for disability benefits pursuant to the Act and was denied. Subsequently, Plaintiff filed this action, seeking disability benefits under the Act. The Commonwealth, Office of the Comptroller ("Defendant") opposes Plaintiff receiving benefits

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under the Act because Plaintiff was already retired at the time of the diagnosis and therefore is ineligible to receive benefits under the Act.

ARGUMENTS

Plaintiff

Plaintiff argues that under the Act, Va. Code Ann. § 9.1-400, a plain reading of the term “disabled person” Plaintiff qualifies for benefits. Plaintiff argues that he is a disabled person under the Act, who, as a direct and proximate result of the performance of his duty has become physically incapacitated so as to prevent further performance of duty where such incapacity is likely to be permanent. Plaintiff presented evidence that his incapacity is permanent and that is no longer able to work as a police officer. Plaintiff argues that Defendant is reading the definition of “disabled person” too restrictively. Defendant believes that a disabled person must be disabled before separating from his employment as police officer. However, Plaintiff argues that under the Workers’ Compensation Act, Plaintiff had five years from the date of last employment to file a claim for Workers’ Compensation benefits. In Plaintiff’s case, that would mean he had until September 1, 2015 to file such a claim. Plaintiff retired from his employment as a police officer in 2010.

Plaintiff was diagnosed with heart disease on November 13, 2013, so he was within the statute of limitations period under the Workers’ Compensation Act, Va. Code Ann. § 65.2-406, which arises under Va. Code Ann. § 65.2-402. On September 15, 2015, the Workers’ Compensation Commission entered an order finding Plaintiff’s heart disease to be an occupational disease.

Va. Code Ann. § 65.2-402 is specifically referenced in the Act, Va. Code Ann. § 9.1-401(b). Plaintiff argues that under the definition of disabled person, Defendant reads the statute too narrowly to mean that a person is only disabled if their injury prevents them from further performance of duty in their position as a police officer. Plaintiff reads the provision more broadly to read that it should relate to the performance of the person’s current duty – whether that be as a police officer or not. Plaintiff’s interpretation would then apply the Workers’ Compensation claims equally for both instances. Plaintiff argues that the disjunctive nature of the provision shows that the General Assembly intended to cover those in Plaintiff’s position under the Act by affording them health insurance coverage.

Plaintiff had no way of knowing how sick he was prior to the time he retired in 2010. Heart disease arises over a course of a lifetime. Plaintiff became symptomatic within the three years after he retired, which is well within the statute of limitations under Va. Code Ann. § 65.2-406. Plaintiff could have gone to work for a different sheriff’s department or police department after his retirement, but because of his illness, he is now restricted from further performance of duty. Plaintiff argues that the General Assembly intended to cover people exactly in these circumstances.

Plaintiff meets all of the statutory requirements for disability benefits, and through a plain reading of the statutes, he is entitled to disability benefits.

Defendant

Defendant states that the material facts of this case are not in dispute. However, the disagreement arises as to the application of the plain language of two statutory schemes under two different titles of the Code of Virginia. Defendant argues that while Plaintiff was eligible for benefits under the Workers' Compensation Act, he is not eligible for benefits under the Line of Duty Act. The Comptroller is not tied to any decisions the Workers' Compensation Commission makes, and vice versa. The Line of Duty Act provides for benefits in two circumstances: (1) continued healthcare benefits or (2) death benefits in limited cases. *See* §§ Va. Code Ann. 9.1-40, 402.

While Plaintiff is correct that the Workers' Compensation diseases listed in Va. Code Ann. § 65.2-402 are referenced in the Act, there is no mention of a limitations period or look-back period. Defendant argues that under the Act, a disabled person is a person who is incapacitated as to prevent the further performance of duty. Defendant argues that when a person retires, his or her duties cease on that day and there are no further duties to perform. As such, this statute applies only to active employees.

In response to Plaintiff's argument that Defendant could have gotten a different law enforcement job, Defendant argues that he did not; and if he had, he would have had pass a pre-employment examination to be cleared of any preexisting condition that creates incapacity. As such, Plaintiff's argument does not change the meaning of the provision at issue.

While the Act incorporates Va. Code Ann. § 65.2-402, it does not incorporate § Va. Code Ann. 65.2-406, which includes the five year look-back period. However, the Act does provide for a look-back period specifically for death benefits. *See* Va. Code Ann. § 9.1-402(c). Defendant argues that this is controlling and shows the General Assembly's intent. There is no similar look-back period for continued healthcare benefits under § 401. This must be deemed to have been intentional by the General Assembly; in the fact that they mention one thing in one part of the statute and omit it in another part. They could have incorporated the look-back provision in Va. Code Ann. § 65.2-406 if they intended to do so.

ANALYSIS

The issue in this case is one of law. The parties agree on the facts of the case but disagree over the interpretation of the Line of Duty Act. Va. Code Ann. § 9.1-400 defines "disabled person" for the entire Act. It states,

"Disabled person" means any individual who, as the direct or proximate result of the performance of his duty in any position listed in the definition of deceased person in this section, has become mentally or physically

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incapacitated so as to prevent the further performance of duty where such incapacity is likely to be permanent.

Va. Code Ann. § 9.1-400. Next, Va. Code Ann. § 9.1-401 addresses continued health insurance coverage for disabled persons under the Act. The relevant provision in this code section is Va. Code Ann. § 9.1-400(B), which states,

If the disabled person's disability (i) occurred while in the line of duty as the direct or proximate result of the performance of his duty or (ii) was subject to the provisions of §§ 27-40.1, 27-40.2, 51.1-813, or § 65.2-402, and arose out of and in the course of his employment, the disabled person...shall be afforded continued health insurance coverage...

Va. Code Ann. § 9.1-401(B). The parties agree that Plaintiff's condition qualifies as an occupational disease under Va. Code Ann. § 65.2-402, and thus could qualify under the Act. The parties disagree though that he is in fact covered based on the fact that he retired on September 1, 2010; and is now seeking benefits years after retirement.

The dispute lies in the language of Va. Code Ann. § 9.1-400, which defines a disabled person as one incapacitated so as to prevent the "further performance of duty." Plaintiff argues that this means the performance of the person's current duty or job, not the specific role of police officer, and as such, can apply to a retired police officer. Defendant reads the provision more narrowly and argues that "further" performance of duty means the person's role as police officer can no longer be performed. If the person is retired, there is no further duty to perform, and as such, the benefits do not apply.

The Court agrees with Defendant's interpretation of the code provision. The Act requires that a disabled person be one who is prevented from further performance of duty. The addition of the word "further" in the definition implies that it is the performance of duty that qualifies them under the Line of Duty Act in the first place – that of a police officer. Under standard statutory interpretation rules, the Court finds that the General Assembly would not use any word superfluously; and that each word is intentional and holds meaning. The inclusion of the word "further" implies that the disabled person must still be police officer with active duties they can no longer perform.

Plaintiff argues that because Va. Code Ann. § 65.2-402 is included in Va. Code Ann. § 9.1-401(B); that then the five year look-back period in Va. Code Ann. § 65.2-406 is also incorporated. However, the Court does not find this argument persuasive. Va. Code Ann. § 65.2-402 was expressly incorporated in the Act, with a list of other expressly incorporated code provisions. Va. Code Ann. § 65.2-406 is not a part of that list; and as such, the Court finds it telling that the General Assembly did not include it. Because a look-back period is expressly noted in Va. Code Ann. § 9.1-402(C), the General Assembly was aware that a look-back period applied in certain circumstances under the Act, and chose not to apply it to the provision that is applicable to the Plaintiff.

Although the Workers' Compensation Commission found Plaintiff's heart disease to be an occupational disease, Plaintiff was retired at the time of the diagnosis and petition for benefits. Plaintiff does not meet the definition of a disabled person under the Act because he has no further duty to perform, and is therefore ineligible for benefits. In these circumstances, a non-fatal post retirement disease and disability is not compensable under this Act.

CONCLUSION

For the reasons stated above, Plaintiff's petition is denied.

An Order will be prepared by Defense Counsel, and after review and endorsement by Plaintiff's Counsel, submitted in Chambers.

Very truly,

A large black rectangular redaction box covering the signature of the author.

Bruce D. White