

DISABILITY LAW UPDATE

**SACRS Fall Conference
Attorney Breakout Session
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COVID-19 PRESUMPTION

Gov't Code § 7523.1:

- (a) For purposes of a member who retires for disability on the basis, in whole or in part, of a COVID-19-related illness, it shall be presumed that the disability arose out of, or in the course of, the member's employment.
- (b) The presumption described in subdivision (a) may be rebutted by evidence to the contrary, but unless controverted, the applicable governing board of a public retirement system shall be bound to find in accordance with the presumption.

Gov't Code § 7523.2:

- This article shall remain in effect only until January 1, 2023, and as of that date is repealed.

AB 551

- Amends §7523.2 to extend date of repeal to January 1, 2024

The Cancer Presumption: A Case Study

Gov't Code § 31720.6:

(a) If a safety member, a firefighter, or a member in active law enforcement who has completed five years or more of service under a pension system established pursuant to Chapter 4 (commencing with Section 31900) or under a pension system established pursuant to Chapter 5 (commencing with Section 32200) or both or under this retirement system or under the Public Employees' Retirement System or under a retirement system established under this chapter in another county, and develops cancer, the cancer so developing or manifesting itself in those cases shall be presumed to arise out of and in the course of employment. The cancer so developing or manifesting itself in those cases shall in no case be attributed to any disease existing prior to that development or manifestation.

Cont'd

- (b) Notwithstanding the existence of nonindustrial predisposing or contributing factors, any safety member, firefighter member, or member active in law enforcement described in subdivision (a) permanently incapacitated for the performance of duty as a result of cancer shall receive a service-connected disability retirement if the member demonstrates that he or she was exposed to a known carcinogen as a result of performance of job duties.
- “Known carcinogen” for purposes of this section means those carcinogenic agents recognized by the International Agency for Research on Cancer, or the Director of the Department of Industrial Relations.

Cont'd

- (c) The presumption is disputable and may be controverted by evidence, that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer, provided that the primary site of the cancer has been established. Unless so controverted, the board is bound to find in accordance with the presumption. This presumption shall be extended to a member following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

PREREQUISITES

To trigger the presumption, an Applicant must establish the following:

- Active fire suppression or law enforcement;
- Five years of service;
- Develops cancer;
- Cancer causes permanent incapacity;
- Exposure to known carcinogen while performing job duties; AND
- Timeliness (limited extension for post-retirement period)

Rebuttal

To rebut the presumption, Respondent must establish the following:

- Primary site of cancer;
- No reasonable link between the demonstrated carcinogenic exposure and the disabling cancer;
- Cannot be attributed to any disease existing prior to that development or manifestation

Case Study: Facts

- Applicant was a Sheriff's Deputy with more than 5 years of service.
- In his first year of duty, he developed lymphoma, which was treated with chemotherapy and radiation.
- He eventually recovered and returned to full duty without restrictions. The lymphoma remained in full remission with no evidence of recurrence.
- Eight years later, he was diagnosed with a form of leukemia, separate and distinct from the earlier lymphoma. Following a bone marrow transplant, he eventually recovered, but was left with permanent work restrictions which could not be accommodated by the department. His lymphoma is still in remission.

Case Study: Facts (2)

- Applicant claimed work-related exposures to vehicle exhaust (benzene) and cigarette smoke
- Applicant's and Respondent's medical experts agreed that the primary site of the leukemia was the lymphatic system
- The parties did not dispute that benzene is a carcinogen.
- Respondent's expert opined that the Applicant's particular form of leukemia was caused by ionizing radiation and other chemicals used to treat the previous lymphoma. These agents are positively linked (per IARC) to the Applicant's leukemia.

Anti-Attribution Clause: Pre-existing Disease?

- 31720.6(a): The cancer so developing or manifesting itself in those cases shall in no case be attributed to any disease existing prior to that development or manifestation.
 - Applicant argued that any attribution to the chemo/radiation treatment for the previous cancer violated the ant-attribution clause. No caselaw relating to treatment vs. disease was cited.
 - Respondent argued that the cause of the Applicant's leukemia was the treatment for a pre-existing disease *NOT* the disease itself. The Applicant's pre-existing lymphoma was in remission, there was no recurrence of the disease, and the Applicant was not incapacitated from the previous disease.

Anti-Attribution Clause: Contributing Factors?

- 31720.6(b): Notwithstanding the existence of nonindustrial predisposing or contributing factors, any safety member, firefighter member, or member active in law enforcement described in subdivision (a) permanently incapacitated for the performance of duty as a result of cancer shall receive a service-connected disability retirement if the member demonstrates that he or she was exposed to a known carcinogen as a result of performance of job duties.
- Applicant argued that any attribution to the chemo/radiation treatment for the previous cancer violated the ant-attribution clause because the treatment was “nonindustrial contributing factor.” No caselaw was cited.

Anti-Attribution Clause: Contributing Factors?

Response:

- The cancer “shall in no case” be attributed to pre-existing disease. 31720.6(a). There is NO such blanket prohibition for nonindustrial predisposing/contributing factors.
- Excluding all nonindustrial causes of a given cancer would render the rebuttal language meaningless.
- A better construction is that the existence of such factors do not disqualify a member from claiming the presumption by showing an exposure to a known carcinogen.
- The court in Sameyah v. LACERA did not exclude nonindustrial viral infection as a factor in its rebuttal determination.

QUESTIONS/DISCUSSION