

LAURA USHER  
(Appellee)

v.

AMERICAN RED CROSS  
(Appellant)

and

SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.  
(Insurer)

Conference Held: January 31, 2014  
Decided: February 10, 2014

PANEL MEMBERS: Hearing Officers: Collier, Elwin, and Pelletier  
BY: Hearing Officer Collier

[¶1] The American Red Cross appeals from a decision of a Workers' Compensation Board hearing officer (*Jerome, HO*) granting Laura Usher's Petition for Review and awarding her ongoing total incapacity benefits pursuant to 39-A M.R.S.A. § 212 (Supp. 2013). The hearing officer's decision is based on the medical findings of Dr. Graf, the independent medical examiner (IME), regarding the nature and extent of Ms. Usher's injury and earning incapacity. *See* 39-A M.R.S.A. § 312(7) (Supp. 2013) ("The board shall adopt the medical findings of the independent medical examiner unless there is clear and convincing evidence to the contrary in the record."). The American Red Cross contends that the decision should be vacated because there is clear and convincing evidence in the record that

contradicts the IME's medical findings, including the opinion of Dr. Markellos, who examined Ms. Usher at the employer/insurer's request pursuant to 39-A M.R.S.A. § 207 (Supp. 2013). It also contends that the IME's medical findings are based in part on factual errors.

[¶2] When considering whether clear and convincing medical evidence contrary to the IME's findings is present, we “determine whether the hearing officer could have been reasonably persuaded by the contrary medical evidence that it was highly probable that the record did not support the IME's medical findings.” *Dubois v. Madison Paper Co.*, 2002 ME 1, ¶ 14, 795 A.2d 696; *see also Meade v. Southworth-Milton, Inc.*, Me. W.C.B. No. 13-2, ¶ 2 (App. Div. 2013).

[¶3] Upon review, we conclude that the evidence in the record that contradicts the IME's medical findings does not require us to conclude on a highly probable basis that the record does not support those findings. The hearing officer explicitly found the medical findings of Dr. Markellos unpersuasive because he did not explain to her satisfaction the reasoning for his conclusion that the work injury did not aggravate Ms. Usher's pre-existing medical condition, even though she could no longer perform her work duties after the injury. The hearing officer also noted that Dr. Graf's conclusions were consistent with those of the treating physician, Dr. Flaherty, and that any factual misperceptions underlying Dr. Graf's medical findings were corrected at his deposition and his medical opinion

regarding the cause and extent of Ms. Usher's injury remained unchanged. Finally, the hearing officer observed that Dr. Graf's opinion was "not based on any incorrect facts."<sup>1</sup>

The entry is:

The hearing officer's decision is affirmed.

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Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Supp. 2013).

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<sup>1</sup> Because we affirm the award of ongoing total benefits pursuant to 39-A M.R.S.A. § 212, we do not address the American Red Cross's final contention that the hearing officer improperly disregarded evidence regarding the adequacy of Ms. Usher's work search.