STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 23-0010
Decision No. 24-03

ROGER K. EMERY
(Appellant)

v.

FEDEX FREIGHT, INC.
(Appellee)

and

SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.
(Administrator)

Argument held: February 7, 2024
Decided: February 9, 2024

PANEL MEMBERS: Administrative Law Judges Elwin, Knopf, and Smith
BY: Administrative Law Judge Knopf

[¶1] Roger Emery appeals from a decision of a Workers' Compensation Board administrative law judge (*Chabot, ALJ*) denying his Petitions for Award and for Payment of Medical and related services related to an alleged June 22, 2021, low back injury. Mr. Emery contends the ALJ erred when determining that he failed to meet his burden to prove he sustained a work-related injury. We affirm the decision.

I. BACKGROUND

[¶2] Mr. Emery began working as a road driver for FedEx Freight in 2019. His job duties involved making deliveries between Portland, Maine and Newburgh, New York. Mr. Emery testified that on June 22, 2021, he injured his low back while moving a heavy dolly. He described hearing a popping sound and experiencing the gradual onset of moderate pain. He was able to complete his delivery route and make

another delivery the following day. Mr. Emery testified that he informed one supervisor of the dolly incident on June 24, 2021, and a second supervisor the following day. Neither supervisor filed a first report of injury, and neither testified at the hearing.

[¶3] Mr. Emery further testified that on Thursday, June 24, 2021, he sought treatment at MMC Urgent Care Plus. The medical records reflect that he reported pain in his low back radiating into his right ankle that began when he got up on Monday, June 21, 2021 (the day before the alleged dolly incident); that he had a history of similar symptoms; and there was "no clear inciting injury" for his present condition. Mr. Emery was advised to follow up with his primary care provider (PCP). He treated with his PCP three times and was referred for an MRI. The PCP's records make no mention of an incident at work as the cause of the back complaints. He was taken out of work on July 16, 2021, and has not returned.

[¶4] Mr. Emery filed for short-term disability on July 21, 2021. The paperwork indicates he was not out of work due to an accident, he had not filed for workers' compensation, and it was unknown whether his condition was work-related. FedEx filed a first report of injury in August 2021.

[¶5] Mr. Emery next treated with Dr. Herzog, who first stated on an M-1 practitioner's report dated August 30, 2021, that Mr. Emery's back injury was work-related. Dr. Herzog performed a series of injections and referred Mr. Emery to

physical therapy. Mr. Emery underwent physical therapy from October 6, 2021, through June 3, 2022. Dr. Herzog also referred Mr. Emery to Dr. John Pier who suggested work-hardening and a return to work driving short distances.

[¶6] Mr. Emery filed his Petitions for Award and for Payment of Medical and Related Services in May 2022. A hearing was held on January 24, 2023. Based on the evidence, the ALJ determined that Mr. Emery did not meet his burden to establish the occurrence of a work injury on a more probable than not basis. Although he noted that the evidence was in conflict, the ALJ credited the contemporaneous medical records, which show that his back pain started before the alleged incident at work and do not reflect that Mr. Emery reported he was injured at work; and the short-term disability application, which indicates the injury was not work-related. Although Mr. Emery testified that he made a report to two different supervisors close in time to the alleged work injury, the ALJ noted there was no first report of injury filed contemporaneously. Moreover, there was no indication in medical records that Mr. Emery reported a work-related incident to any medical provider as the cause of the injury until August 30, 2021—more than two months after the incident and more than one month after he went out of work. The ALJ denied the petitions, and Mr. Emery appeals.

II. DISCUSSION

[¶7] The role of the Appellate Division "is limited to assuring that the [ALJ's] findings are supported by competent evidence, that [the] decision involved no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted).

[¶8] As the petitioning party, Mr. Emery bore the burden of proof to establish all elements of his claim on a more probable than not basis. *Fernald v. Dexter Shoe Co*., 670 A.2d 1382, 1385 (Me. 1996). As such, it was necessary for Mr. Emery to come forward with evidence that would persuade the ALJ that his back condition was related to work in that it arose out of and in the course of his employment with FedEx. *See* 39-A M.R.S.A. § 201.

[¶9] Mr. Emery challenges the ALJ's determination that he did not establish that a work-related incident caused his back condition. Mr. Emery contends the ALJ erred in crediting the application for short-term disability that was filled out by a FedEx employee—not by Mr. Emery—with information given over the phone. He asserts his condition was not characterized as an accident on the application because "it was not an accident it was an injury," and was not described as work-related at the terminal manager's suggestion. He indicated that he had not filed for workers' compensation because when he was filing for short-term disability he had not yet

done so. He also asserts that the MCC Urgent Care Plus records reflect a mistake as to when he told the doctor the injury occurred, and that his managers' failure to timely file a first report of injury should not be held against him.[1]

[¶10] The ALJ evaluated all the evidence and placed more weight on the medical records created close in time to the alleged incident and the information contained in the application for short-term disability than on Mr. Emery's testimony. This type of judgment regarding the significance to attach to pieces of evidence is within the ALJ's authority, and we defer to that judgment. *See McLaughlin v. Community Living Assoc*., Me. W.C.B. No. 19-15, ¶ 11 (App. Div. 2019); *see also* Donald G. Alexander, *Maine Appellate Practice* at 257 (4th ed. 2013).

[¶11] The ALJ acknowledged there is some evidence in the record that supports Mr. Emery's position. However, there is also competent evidence in the record that supports a finding that no work-related injury occurred. The ALJ, as the fact-finder and sole judge of the credibility of witnesses, was within his authority to choose between conflicting versions of the facts. *See Mailman's Case,* 118 Me. 172,

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[1] Some of Mr. Emery's factual assertions on appeal are not supported by evidence in the record.

Mr. Emery further alleges that the ALJ erred when stating his age as 59 when at the time he was 58 years old. To the extent this was error, it is harmless as a matter of law, in that it is highly probable that it had no impact on the outcome of the case. *See Midland Fiberglass v. L.M. Smith Corp*., 581 A.2d 402, 403-04 (Me. 1990) (holding that alleged "error should be treated as harmless if the appellate [body] believes it highly probable that the error did not affect the judgment" (quotation marks omitted)); *see also Cote v. Osteopathic Hosp. of Me., Inc.,* 432 A.2d 1301, 1307 (Me. 1981) (applying harmless error standard in workers' compensation proceedings).

177, 106 A. 606, 608 (1919) ("If there is direct testimony which, standing alone and uncontradicted, would justify the decree there is [sufficient] evidence, notwithstanding its contradiction by other evidence of much greater weight.").

[¶12] Moreover, the ALJ heard from the witnesses firsthand, including Mr. Emery, and was therefore in a better position than this panel to judge the credibility of the witnesses and weigh competing factual evidence. *See Boober v. Great N. Paper Co.*, 398 A.2d 371, 375 (Me. 1979) (stating that when conflicting evidence and credibility are at issue, it is for the [ALJ], who "had the opportunity to hear the witnesses and judge their credibility . . . to resolve the evidentiary conflicts in the case.") (quoting *Lovejoy v. Beech Hill Dry Wall Co., Inc.*, 361 A.2d 252, 254 (Me. 1976)). Accordingly, we find no reversible error in the ALJ's decision to credit the early medical records and short-term disability application in this case.

[¶13] Finally, Mr. Emery contends that the attorney from the board's advocate division, who represented him at the hearing, failed to call certain witnesses he had identified whom he claims he told about the injury shortly after it happened. Essentially, he contends the advocate did not provide effective legal assistance. However, ineffective assistance of counsel is not a basis for reversal in civil matters, except in certain circumstances when the claimant's liberty is at risk. *See McLaughlin*, Me. W.C.B. No. 19-15, ¶ 15; *see also Nelson v. Boeing Co.*, 446 F.3d 1118, 1121 (10th Cir. 2006) (holding that the statutory right to request assistance of

counsel under Title VII does not create corresponding right to effective assistance of counsel). Based on the record before the ALJ, we cannot say he misconceived or misapplied the law in determining that the Mr. Emery failed to establish a work-related injury.

The entry is:

The administrative law judge's decision is affirmed.

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.

Pursuant to board Rule, chapter 12, § 19, all evidence and transcripts in this matter may be destroyed by the board 60 days after the expiration of the time for appeal set forth in 39-A M.R.S.A. § 322 unless (1) the board receives written notification that one or both parties wish to have their exhibits returned to them, or (2) a petition for appellate review is filed with the law court. Evidence and transcripts in cases that are appealed to the law court may be destroyed 60 days after the law court denies appellate review or issues an opinion.

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