

DAPHEEN CREASEY
(Appellant)

v.

WALMART ASSOCIATES, INC.
(Appellee)

and

WALMART CLAIMS SERVICES, INC.
(Insurer)

and

ACME MONACO
(Appellee)

and

TRAVELERS INSURANCE COMPANY
(Insurer)

Conference held: July 12, 2023
Decided: October 6, 2023

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

[¶1] Dapheen Creasey appeals from a decision of a Workers' Compensation Board administrative law judge (*Pelletier, ALJ*) granting her Petitions for Award of Compensation and for Payment of Medical and Related Services against ACME Monaco related to a December 27, 2016, right shoulder injury, denying her Petitions for Award of Compensation and for Payment of Medical and Related Services

against Walmart for a March 13, 2019, right shoulder injury,¹ and granting her Petitions for Award of Compensation and for Payment of Medical and Related Services against Walmart for a 2019 gradual hand/wrist injury. Ms. Creasey asserts that the ALJ erred by adopting the medical findings of the Independent Medical Examiner (IME) and by failing to consider and adopt medical opinions of other treating providers instead. *See* 39-A M.R.S.A. § 312. Ms. Creasey also asserts that the ALJ erred by failing to award ongoing partial incapacity benefits. We find no error in the ALJ's adoption of the IME's medical findings, however, we remand this decision to the ALJ to clarify which injury caused Ms. Creasey's current restrictions, determine Ms. Creasey's average weekly wage at Walmart, and determine whether partial incapacity benefits are appropriate based on that wage.

I. BACKGROUND

[¶2] Dapheen Creasey was working for ACME Monaco as a winder on March 13, 2019, when she injured her right shoulder. Her job duties involved repetitively moving wire spools ranging from five to twenty pounds. As a result of that injury, Ms. Creasey underwent two surgeries on her right shoulder, the last of which occurred on February 4, 2021.

¹ The ALJ also denied ACME Monaco's Petition for Apportionment against Walmart. That Petition is not the subject of this appeal.

[¶3] At the end of 2016, Ms. Creasey also began working part-time at a Walmart store in the bakery section. In this position she developed bilateral upper extremity conditions centered on her hands and wrists, including carpal tunnel syndrome, with two dates of injury: March 13, 2019, and February 2, 2020.

[¶4] The parties entered into a consent decree approved by the board on November 16, 2021. The consent decree awarded Ms. Creasey protection of the Act for: (1) a 2017 right wrist injury at ACME Monaco, the effects of which ended in January of 2018; (2) a March 3, 2019, right wrist injury at Walmart; and (3) a February 2, 2020, left wrist injury at Walmart. The consent decree included no findings regarding Ms. Creasey's claimed 2019 right shoulder injury.

[¶5] The ALJ issued a decision on May 3, 2022, finding Walmart exclusively liable for the ongoing bilateral hand/wrist injuries, and ACME Monaco exclusively liable for the gradual right shoulder injury. The ALJ ordered ACME Monaco to pay total incapacity benefits from February 4, 2021, to April 12, 2021, related to the right shoulder surgery. The ALJ also ordered Walmart to pay ongoing total incapacity benefits from October 4, 2021, to the present and continuing.

[¶6] Walmart filed a Motion for Further Findings of Fact and Conclusions of Law. The ALJ granted the motion and issued an amended decree denying Ms. Creasey's lost time claim against Walmart. The ALJ adopted the IME's finding that Ms. Creasey retained a partial work capacity, reasoning that the medical records

indicating no work capacity had not been considered by the IME and thus, under section 312(7), could not be considered clear and convincing evidence contrary to the IME's medical findings.

[¶7] After Ms. Creasey's employment at Walmart ended on July 19, 2021, she began to receive unemployment benefits. At that time, she was under work restrictions from the IME of no repeated pulling, pushing, or overhead activities and no lifting greater than ten pounds with either or both hands. The ALJ found that Ms. Creasey did not perform an adequate search for work within those restrictions and, based on a labor market survey in evidence, determined there is a stable market in her community for suitable work paying \$517.20 per week. However, the ALJ did not make a finding regarding Ms. Creasey's pre-injury average weekly wage at Walmart and did not award ongoing partial incapacity benefits.² This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶8] 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

² In the original decree the ALJ made a finding that Ms. Creasey's average weekly wage at Walmart was \$599.15. However, that finding was stricken in response to the Motion for Findings of Fact and Conclusions of Law.

neither arbitrary nor without rational foundation.” *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted). Because Walmart requested findings of fact and conclusions of law following the decision, the Appellate Division will “review only the factual findings actually made and the legal standards actually applied by the [ALJ].” *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446. The failure to issue findings in support of a decision that are adequate for appellate review may require remand from the Appellate Division. *See Cote v. Town of Millinocket*, 444 A.2d 355, 359 n.5 (Me. 1982) (“The Commissioner’s failure to articulate a basis for his failure to make findings when proposed findings are submitted will in most instances result in a remand of the action to the Commission.”).

B. Adoption of the IME’s Opinion

[¶9] Ms. Creasey asserts that the medical records stating that she has no work capacity were supplemental and should not have been considered medical evidence offered to contradict the IME’s medical findings. Instead, Ms. Creasey argues, they should be considered as updates of her work capacity subsequent to the IME’s opinion, and that these later records prove total incapacity.

[¶10] Title 39-A M.R.S.A. § 312(7) provides:

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 that does not support the medical findings. Contrary evidence does not include medical evidence not considered by the

independent medical examiner. The board shall state in writing the reasons for not accepting the medical findings of the independent medical examiner.

[¶11] Opinions of an IME appointed pursuant to 39-A M.R.S.A. § 312 are entitled to increased weight in claims before the board and must be adopted absent “clear and convincing evidence to the contrary.” The Law Court has interpreted the clear and convincing evidence to the contrary standard of section 312(7) to require a showing “that it was highly probable that the record did not support the [independent medical examiner’s] medical findings.” *Dubois v. Madison Paper, Co.*, 2002 ME 1, ¶ 14, 795 A.2d 696.

[¶12] Ms. Creasey introduced medical opinions indicating that she had no work capacity due to her wrists. However, because those opinions were not submitted to the IME for consideration, they cannot be considered as medical evidence contrary to the IME’s findings pursuant to section 312(7). Further, Ms. Creasey testified that she would be able to work within the restrictions set forth by the IME. Thus, the ALJ determined there was no clear and convincing evidence to contradict the IME’s findings and adopted the finding that she retained a partial work capacity. Further, labeling medical evidence as “supplemental” ignores the plain language of section 312 and would frustrate its purpose, which is “to prevent ‘doctor shopping’ and to reduce litigation,” *Lydon v. Sprinkler Services.*, 2004 ME 16, ¶ 9,

841 A.2d 793, 795, and to avoid “a battle of the experts,” *Dubois v. Madison Paper Co.*, 2002 ME 1, ¶ 12 n.1, 795 A.2d 696, 699.

[¶13] Where, as here, an ALJ adopts the findings of the IME, the ALJ’s decision may only be reversed on appeal if the IME’s findings are not supported by any competent evidence, or the record discloses no reasonable basis to support the decision. *See Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983); *Dillingham v. Great N. Paper*, Me. W.C.B. No. 15-7, ¶ 3 (App. Div. 2015). Because there is competent evidence in the record to support both the IME’s medical opinion and the ALJ’s adoption of that opinion, we find no error.

C. Entitlement to Ongoing Partial Incapacity Benefits

[¶14] Ms. Creasey asserts that the ALJ erred by failing to award ongoing partial incapacity benefits based on the difference between her average weekly wage at Walmart and her lower, current earning capacity.

[¶15] The determination of partial incapacity requires a calculation based on the difference between the employee’s pre-injury wage and what the employee is “able to earn” after the injury. 39-A M.R.S.A. § 213; *Hogan v. Great N. Paper, Inc.*, 2001 ME 162, ¶ 9, 784 A.2d 1083, 1085. Post-injury earning capacity is based on the employee’s physical capacity to earn wages and the availability of work within the employee’s restrictions. *Id.* (citing *Dumond v. Aroostook Van Lines*, 670 A.2d 939, 941 (Me. 1996)). While the ALJ established Ms. Creasey’s average weekly

wage at ACME Monaco was \$459.40, he did not establish an average weekly wage for the Walmart injuries. It is not clear from the decision which injury or injuries caused the recommended work restrictions. Because the ALJ did not make clear findings that are adequate for appellate review regarding Ms. Creasey's average weekly wage or which injury caused her incapacity, if any, we vacate the decision and remand with instructions to determine these issues, and whether she is entitled to ongoing partial incapacity benefits. *See Cote*, 444 A.2d at 359, n.5.

III. CONCLUSION

[¶16] The ALJ did not err in failing to consider and adopt medical opinions that were not considered by the IME. However, we remand the decision for a determination of Ms. Creasey's pre-injury average weekly wage at Walmart, clarification of which injury or injuries caused her incapacity (if any), and whether she is entitled to ongoing partial incapacity benefits.

The entry is:

The administrative law judge's decision is affirmed with respect to the adoption of the IME's findings but remanded to the ALJ to determine Ms. Creasey's pre-injury average weekly wage at Walmart, clarify the cause of her incapacity (if any), and determine whether she is entitled to partial incapacity benefits.

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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