

KAREN SMITH
(Appellant)

v.

MAINE COAST SEA VEGTABLES, INC.
(Appellee)

and

MAINE EMPLOYERS' MUTUAL INSURANCE CO.
(Insurer)

Conference held: December 4, 2019
Decided: January 2, 2020

PANEL MEMBERS: Administrative Law Judges Collier, Chabot and Jerome
BY: Administrative Law Judge Jerome

[¶1] Karen Smith appeals from a decision of a Workers' Compensation Board administrative law judge (*Pelletier, ALJ*) granting her Petitions for Award and for Review in part and awarding her ongoing partial incapacity benefits for a work-related injury to her right knee. Ms. Smith maintains that the ALJ erred when failing to find that she is totally incapacitated due to her work injury, and by allowing certain surveillance evidence to be considered by examining doctors. She also asserts that she was harmed due to ineffective assistance by her WCB Advocate and by the absence of a hearing transcript due to an equipment malfunction. We affirm the decision.

I. BACKGROUND

[¶2] Karen Smith worked as a baker for Maine Coast Sea Vegetables (Maine Coast) for approximately ten years. On January 7, 2013, she sustained a twisting injury to her right knee while handling trays of product. She attempted to continue to work for several months after the injury. After an MRI revealed torn menisci, however, she underwent surgery in July of 2013. She developed chronic right knee pain after the surgery. Maine Coast voluntarily paid Ms. Smith total incapacity benefits until September 2016, when it filed a certificate to reduce benefits. Ms. Smith filed her Petitions for Award and for Review and a Request for Provisional Order. The board (*Hirtle, ALJ*) provisionally restored her benefits at a partial level.

[¶3] The main issue in controversy is whether Ms. Smith is totally or partially incapacitated. Ms. Smith underwent an independent medical examination by Dr. Mazzei pursuant to 39-A M.R.S.A. § 312 (Supp. 2018),¹ and an examination by Dr. Kimball pursuant to 39-A M.R.S.A. § 207 (Supp. 2018). Ms. Smith was represented by WCB Advocate Sandra Osterby. A hearing was held in Machias on November 8, 2017, at which Ms. Smith and her husband testified. Several exhibits were admitted at the hearing and at a conference in March of 2018, including a report and deposition transcript from Dr. Mazzei, a report and updated report from Dr. Kimball, as well as other records from Ms. Smith's treating physicians. The record also

¹ Dr. Mazzei was later deposed and that transcript was admitted to the record.

includes surveillance videos, reports, and photographs; and the deposition transcript of the private investigator who conducted the surveillance.

[¶4] The board (*Pelletier, ALJ*) issued its decree on August 6, 2018, granting the Petitions in part and awarding ongoing partial incapacity benefits based on an imputed full-time earning capacity at less than minimum wage. Advocate Osterby provided notice on August 9, 2018, that she was withdrawing her appearance. Without the assistance of an advocate, Ms. Smith proceeded to file her Motion for Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318 (Supp. 2018), which the ALJ denied. This appeal followed, also filed pro se.

[¶5] Soon thereafter, the Appellate Division was informed by board staff that the recording equipment used at the November 2017 hearing had malfunctioned and the board would be unable to produce a transcript of the hearing testimony. The Appellate Division stayed the appeal and remanded the case to the ALJ for a conference on the issue of whether the parties would provide a statement of the evidence based on recollection, consistent with Me. Rule App. P. 5(d),² or whether a hearing would be held, limited to reconstructing the prior testimony.

² Maine Rule App. P. 5(d) provides:

Unavailable Transcript.

(1) In the event a hearing or trial was not recorded or a transcript of the evidence or proceedings at a hearing or trial cannot be prepared for reasons not attributable to the appellant, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection, for use instead of a reporter's transcript.

[¶6] It was ultimately decided that the parties would draw up a statement of the evidence to serve in lieu of the transcript. At the direction of the Appellate Division, Advocate Osterby was brought back into the case to assist with this process. The record now includes statements prepared by Advocate Osterby, Maine Coast’s counsel, and Ms. Smith. Ms. Smith represents herself in the appeal.

II. DISCUSSION

A. Standard of Review

[¶7] The Appellate Division’s role on appeal is “limited to assuring that the Commissioner’s factual 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.” *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted). Because Ms. Smith requested findings of fact and conclusions of law following the decision, the Appellate Division may “review only the factual findings actually made

(2) The appellant’s statement shall be filed with the trial court and served on the appellee within 21 days after entry of judgment, or 14 days after the filing of the notice of appeal, whichever occurs first. The appellee may file and serve objections or propose amendments thereto within 7 days after service.

(3) After the filing of any statement of the evidence or proceedings and any objections, the statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and, as settled and approved, shall be included in the record on appeal.

and the legal standards actually applied by the [ALJ].” *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446.

B. Competent Evidence

[¶8] Ms. Smith contends the record lacks competent evidence to support the ALJ’s finding that she is partially rather than fully incapacitated. She contends that the evidence, including reports from her treating physicians, requires a finding that she is unable to work. We disagree.

[¶9] The ALJ based his findings mainly on the medical opinion of Dr. Mazzei, the independent medical examiner. Pursuant to 39-A M.R.S.A. § 312(7) (Supp. 2018), the ALJ was required to adopt Dr. Mazzei’s findings absent clear and convincing evidence to the contrary. Dr. Mazzei found that Ms. Smith continues to suffer disability from a preexisting degenerative knee condition that was significantly aggravated by the work-related right knee injury, and that conservative management of the condition is preferred over more surgery at this time. Although he stated in his initial report that Ms. Smith did not have any significant work capacity, he modified that assessment in his later deposition. He clarified at deposition that he had attributed much of her incapacity to nonwork-related conditions such as arthritis in her neck and back, and an anxiety disorder. He stated that he was not qualified to give an opinion regarding any psychological component of her injury. From a physical standpoint alone, he expressed the view that Ms. Smith

could work full time at a sedentary job that doesn't require a lot of walking or standing, and that she is restricted from doing any work that would require climbing, kneeling, squatting, or heavy lifting. The ALJ also based his finding of partial incapacity on reports of Dr. Kimball, the section 207 examiner; Dr. Shubert, her orthopedist; and Dr. Gardner, her primary care provider, which are consistent with Dr. Mazzei's findings. This evidence is competent and sufficient to support a finding of partial incapacity.

[¶10] Ms. Smith contends the ALJ should have based his decision on Dr. Mazzei's initial report rather than his deposition testimony, and on the designation in Dr. Gardner's M-1 practitioner's report that she has no work capacity, rather than on other notes in the medical records. She also contends that it was error to consider Dr. Kimball's supplemental report, in which, after viewing the surveillance evidence, the doctor opined that Ms. Smith had a greater work capacity than he found in his initial report.

[¶11] When confronted with potentially ambiguous language in a report from a medical expert, or when there is ambiguity and/or a conflict between an expert's report and deposition testimony, "it is incumbent on the [ALJ] to consider the larger context in which those statements are offered to construe the intent of the examining physician." *Oriol v. Portland Housing Auth.*, Me. W.C.B. No. 14-35, ¶ 12 (App. Div. 2014). The ALJ's reliance on the independent medical examiner's deposition

testimony, Dr. Gardner's records, and Dr. Kimball's supplemental report regarding level of work capacity was accompanied by a thorough analysis of all the medical evidence in the larger context, including medical records from Ms. Smith's treating orthopedists. The ultimate finding that Ms. Smith retains some work capacity is amply supported by competent evidence and therefore will not be disturbed on appeal.

C. Surveillance Evidence

[¶12] Ms. Smith contends that the ALJ erred when considering the surveillance evidence offered by Maine Coast, and by relying on Dr. Kimball's opinion that is based in part on the surveillance evidence. She contends the videos were prejudicial because they were heavily edited to cut out times that she was resting during the three hours of filming. She also contends it was error to give the surveillance evidence to the doctors after they had provided their initial reports.³

[¶13] Matters regarding the sequence and conduct of hearings, and the admission or exclusion of evidence, are reviewable for abuse of discretion. *See Kuvaja v. Bethel Savings Bank*, 495 A.2d 804, 806 (Me. 1985) (applying an abuse of discretion standard of review to administrative body's decision based on its own

³ Contrary to Ms. Smith's assertion, Dr. Mazzei, the independent medical examiner, did not consider the video or surveillance reports. Dr. Mazzei was offered the opportunity to review the surveillance evidence. He declined to do so, stating in his deposition: "I'd rather not go through the surveillance things if it's not essential. I mean, if they were presented to me at the time of the report, but to look at something that's a few years ago and make a comment on it, doesn't appeal to me."

rules); *Weiss v. Maine Soapstone Co., Inc.*, Me. W.C.B. No. 19-4, ¶ 6 (App. Div. 2019) (determining that the ALJ acted within the bounds of discretion when allowing late-filed independent medical examiner's report into evidence).

[¶14] In cases where there is surveillance evidence, it is not unusual for that evidence to be presented to the examining physician after an initial written opinion has issued, thus allowing the physician to formulate an opinion based solely on the medical evidence and examination of the employee. For this reason, we find that the ALJ acted within his discretion when allowing the surveillance evidence to be provided to the examining physicians after the initial reports were issued.

[¶15] Moreover, the ALJ did not err in allowing the doctors to consider the surveillance video on the basis that it was edited to exclude times that Ms. Smith was not visible. She contends it gave the mistaken impression that she was on her feet for an entire three-hour period, when she asserts that she was resting during the times not depicted in the video. We find no error.

[¶16] The ALJ noted that Dr. Kimball merely stated that over the three-hour period that filming took place, he did not observe the limp that Ms. Smith presented with during his examination. Dr. Kimball does not indicate that he thought Ms. Smith was on her feet during the entire time she was being surveilled. Accordingly, it was within the ALJ's discretion to admit the surveillance video and to allow it to be presented to the doctors. Further, as stated above, the ALJ did not err when

considering Dr. Kimball's revised findings regarding work capacity in the context of the entire evidentiary record.

D. Assistance of the Advocate

[¶17] Ms. Smith was represented by a Workers' Compensation Board advocate at the hearing in this matter and maintains that assistance was ineffective. However, ineffective assistance of counsel does not constitute a basis for reversal in civil matters, except in certain circumstances when the claimant's liberty is at risk. *See, e.g., 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). In addition, the Appellate Division's authority is limited by statute to the review of decisions made by an ALJ. *See* 39-A M.R.S.A. §§ 321(A)(2) and 318 (Supp. 2018). The issue of the effectiveness of advocacy is beyond the scope of the Appellate Division's mandate.

[¶18] Moreover, in this particular case, we find that after the advocate's withdrawal, Ms. Smith prepared and submitted her Motion for Findings of Fact and Conclusions of Law and proposed findings that very thoroughly marshalled the evidence in support of her contentions. Under these circumstances, it is highly probable that any alleged deficiency on the advocate's part did not affect the outcome of her case. *See Cote v. Osteopathic Hosp. of Me., Inc.*, 432 A.2d 1301,

1307 (Me. 1981) (applying harmless error standard in workers' compensation context).

E. Transcript

[¶19] With respect to the unavailable transcript, this was an unusual situation that is not contemplated by board rules. The ALJ appropriately followed the procedure set forth in the Maine Rules of Appellate Procedure, M. R. App. P. 5(d), and ordered each of the parties to complete a statement of the evidence, rather than hold a hearing to reconstruct the evidence. In the absence of a procedure provided in board rules, the ALJ did not abuse his discretion when following the procedures employed by Maine Courts.

III. CONCLUSION

[¶20] We conclude that there is competent evidence in the record that supports the ALJ's factual findings, and the ALJ neither misapplied nor misconstrued the law when determining that Ms. Smith retains some work capacity. Moreover, the ALJ acted within his discretion on all evidentiary issues and when ordering that a statement of the evidence be prepared in the absence of a transcript.

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 (Supp. 2018).

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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