SHERRY A. HALEY
(Appellee)

v.

RSU 78
(Appellant)

and

MAINE MUNICIPAL ASSOCIATION
(Insurer)

Conference held: September 26, 2024
Decided: December 30, 2024

PANEL MEMBERS: Administrative Law Judges Rooks, Hirtle, and Chabot
BY: Administrative Law Judge Chabot

[¶1] The employer, RSU 78, appeals a decision of a Workers' Compensation Board administrative law judge (*Sands, ALJ*), granting Sherry Haley's Petitions for Restoration and for Payment of Medical and Related Services. The ALJ determined that Ms. Haley's work-related right knee injury was a causal factor in her need for total knee replacement surgery. RSU 78 contends (1) that the ALJ erred in finding that there was clear and convincing evidence contrary[1] to the independent medical

[1] 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.

examiner's (IME's) opinion, and (2) that causation was not established. We affirm the decision.

I. BACKGROUND

[¶2] Ms. Haley sustained a work-related right knee injury on February 9, 2021. This injury was established by a Consent Decree dated March 21, 2022. Ms. Haley underwent a total knee replacement surgery on May 30, 2023, performed by Dr. Adam Rana. RSU 78 denied coverage for the total knee replacement and the petitions followed. At issue in litigation was whether the work injury aggravated her preexisting osteoarthritis in a manner consistent with 39-A M.R.S.A. § 201(4).[2]

[¶3] Dr. W. Kevin Olehnik performed an independent medical examination pursuant to section 312 on July 11, 2023. Dr. Olehnik concluded on a more likely than not basis that the work-related knee injury resulted in a right knee lateral meniscus tear, but did not result in either the development or progression of Ms. Haley's right knee osteoarthritis.

[¶4] On August 23, 2023, Dr. Rana issued a letter stating, "it is my opinion that Ms. Haley's underlying arthritis was exacerbated as a result of the work injury and subsequent arthroscopy[.]"

[2] Title 39-A M.R.S.A. § 201(4) provides:

> **Preexisting condition.** If a work-related injury aggravates, accelerates, or combines with a preexisting physical condition, any resulting disability is compensable only if contributed to by the employment in a significant manner.

[¶5] Dr. Olehnik was deposed on October 3, 2023, and maintained his causation opinion.

[¶6] After a hearing on the petitions, the ALJ found "the interpretation of diagnostic evidence and conclusions rendered by Dr. Rana, in conjunction with the credible testimony of Ms. Haley and the uniform M-1 notations indicating work-related by all treating physicians, constitute clear and convincing contrary evidence that does not support the medical findings of Dr. Olehnik." Thus, the ALJ granted Ms. Haley's Petitions in part but found medical treatment to other body parts was not causally related to Ms. Haley's right knee condition.

[¶7] RSU 78 filed a motion for further findings of facts and conclusion of law pursuant to 39-A M.R.S. § 318. In that motion, RSU 78 argued that "[t]he Board's reliance upon the referenced evidence is erroneous" but did not assert that Dr. Rana's opinion should have been shared with Dr. Olehnik. The ALJ denied the motion, and 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

neither arbitrary nor without rational foundation." *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995) (quotation marks omitted).

B. Waiver of the Objection to Dr. Rana's Opinion

[¶9] RSU 78 first argues that the ALJ erred by finding that Dr. Rana's medical opinion in his letter dated August 23, 2023, could be considered clear and convincing evidence contrary to the IME's medical findings because it was not considered by the IME. Ms. Hussey contends that RSU 78 failed to preserve this issue for appellate review.

[¶10] Title 39-A M.R.S.A. § 312(7) provides in relevant part, "Contrary evidence does not include medical evidence not considered by the independent medical examiner." Dr. Rana's letter was received after the IME conducted the independent medical examination; therefore, it could not have been considered by Dr. Olehnik when preparing his report. There are no findings in the ALJ's decree that discuss the extent to which Dr. Olehnik may have considered Dr. Rana's report at his deposition. RSU 78 did not object to the admission or timing of Dr. Rana's report at the hearing, and made no argument that it could not be considered as contrary to the IME's findings on the basis that it was not provided to the IME in the position papers or proposed findings.

[¶11] We review a determination regarding whether an issue has been raised and preserved by evaluating whether "there was a sufficient basis in the record to

alert the court and any opposing party to the existence of that issue." *Verizon New England v. PUC*, 2005 ME 16, ¶ 15, 866 A.2d 844 (quotation marks omitted). An argument may be waived if it is not raised in a manner that provides opposing counsel with fair notice of the issue, and a full and fair opportunity to create a factual predicate sufficient for the ALJ to fairly decide the issue. *See Waters v. S.D. Warren Co.*, Me. W.C.B. No. 14-26, ¶ 18 (App. Div. 2014). Issues raised for the first time on appeal are considered waived. *See Henderson v. Town of Winslow*, Me. W.C.B. No. 17-46, ¶ 8 (App. Div. 2017).

[¶12] RSU 78 failed to preserve the issue of the whether Dr. Rana's letter was timely provided to Dr. Olehnik pursuant to 39-A M.R.S.A. § 312(7) by failing to raise it at the hearing level. Because the issue was raised for the first time on appeal, we conclude that it has been waived.

C. Clear and Convincing Evidence to the Contrary

[¶13] RSU 78 next contends the evidence was of insufficient weight to contradict the IME's medical findings. When determining whether there is clear and convincing evidence sufficient to contradict the IME's medical findings, the Appellate Division panel looks to whether the ALJ "could reasonably have been persuaded that the required factual finding was or was not proved to be highly probable." *Dubois v. Madison Paper Co.*, 2002 ME 1, ¶ 14, 795 A.2d 696 (quotation marks omitted). Giving due deference to the ALJ's findings on

credibility and factual medical issues, the panel must determine whether "the [ALJ] 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." *Id.*; *see also Bean v. Charles A. Dean Mem'l Hosp.*, Me. W.C.B. No. 13-6, ¶ 14 (App. Div. 2013). When an IME's opinion is rejected, the ALJ must explain the reasons for that rejection in writing. 39-A M.R.S.A. § 312(7).

[¶14] In determining that the record contained clear and convincing contrary evidence that does not support the medical findings of Dr. Olehnik, the ALJ specifically cited the interpretation of diagnostic evidence and conclusions rendered by Dr. Rana, Ms. Haley's credible testimony, and her treating physicians' uniform M-1 notations indicating that her condition is work-related. The reasons given by the ALJ demonstrate that she 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. *See Dubois*, 2002 ME 1, ¶ 14; *Bean*, No. 13-6, ¶ 20.

III. CONCLUSION

[¶15] RSU 78 waived its argument that Dr. Rana's medical opinion was not considered by the IME and thus cannot constitute clear and convincing contrary evidence pursuant to section 312(7). Further, based on the evidence, the ALJ could have reasonably been persuaded that it was highly probable that the record did not

support the IME's conclusion that the work-related knee injury was not causally related to her need for a total knee replacement.

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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