REBECCA R. MEAD
(Appellee)

v.

FAIRCHILD SEMICONDUCTOR
(Appellant)

and
NEW HAMPSHIRE INSURANCE CO. (AIG)
(Insurer)

Argued: October 21, 2020
Decided: May 13. 2022

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

[¶1] Fairchild Semiconductor appeals from a decision of a Workers' Compensation Board administrative law judge (*Jerome, ALJ*), granting Rebecca Mead's Petition for Payment of Medical and Related Services for psychological treatment. Fairchild Semiconductor contends that the ALJ erred as a matter of law by finding, based on medical evidence not considered by the independent medical examiner, that Ms. Mead has a psychological condition related to her work-related bilateral upper extremity injury. Fairchild Semiconductor also contends that the ALJ erred as a matter of law in finding that Ms. Mead's treatment with a psychologist is compensable despite the IME's finding that she had no diagnosable psychological condition. We disagree with Fairchild Semiconductor's contentions and affirm the

ALJ's decision in all respects.

I. BACKGROUND

[¶2] Rebecca Mead began working for Fairchild Semiconductor in August of 1987. Her job required repetitive use of her upper extremities. By a decree dated September 17, 2012, Ms. Mead was found to have sustained work-related bilateral upper extremity injuries on April 5, 2008, and December 10, 2010.

[¶3] Ms. Mead had an independent medical examination performed by Dr. Barkin, pursuant to 39-A M.R.S.A. § 312 on December 4, 2015. At that time, Dr. Barkin found, in part: "Ms. Mead is not subject to a psychological condition *at present*. She has no *current* mental, emotional or behavioral disturbance." (Emphasis added). At the time, Ms. Mead was treating with Dr. Leonard, a psychologist. In his December 4, 2015, report Dr. Barkin concluded that she may receive some benefits from treatment with Dr. Leonard but questioned whether that treatment was necessary.

[¶4] Dr. Barkin performed a second independent medical examination of Ms. Mead in 2017, in conjunction with Fairchild's Petition to Determine Permanent Impairment.[1]. He authored his report on October 23, 2017. At that time, he found:

> When evaluated by [t]his examiner in 2015, Ms. Mead was not identified as having any mental, emotional, or behavioral diagnoses. Since 2015 through the current assessment, Ms. Mead continues to demonstrate no signs or symptoms consistent with a mental, emotional,

[1] The ALJ dismissed that petition on the grounds that it was unripe. That decision was affirmed by the Appellate Division. *Mead v. Fairchild Semiconductor*, Me. W.C.B. No. 20-27 (App. Div. 2020).

> or behavioral diagnosis. Specifically, Ms. Mead does not meet the diagnostic criteria for depressive, mood, anxiety, thought process, or other related mental health diagnoses or disorder. Though she had an adjustment disorder with depressed mood in the past, signs and symptoms of depression have not reemerged. She specifically does not experience prominent dysphoria or anhedonia.

[¶5] In June of 2019, Ms. Mead filed a Petition for Payment of Medical and Related Services for psychological treatment with Dr. Leonard. The ALJ found that Dr. Barkin's opinion barred compensability of medical bills for psychological treatment to September of 2018 but that Dr. Barkin's opinion was no longer relevant beyond September of 2018 because as of that date, the evidence demonstrated that Ms. Mead was now suffering a major depressive disorder related to her chronic pain from her work-related injuries. Dr. Leonard testified in part:

> My diagnosis changed most recently, approximately one year ago when Becky started having more symptoms of helplessness, hopelessness, and told me she was having some—we actually call it passive suicidal ideation. She did not say 'Okay, I'm going to hang myself.' She didn't have plan, means, etcetera. It's one of the things we do is assess, obviously, but the 'I'd be better off dead' that's what we call passive suicidal ideation and definitely something to be concerned about. And that was very—that was new for her. She had not had this before.

[¶6] The ALJ granted Ms. Mead's Petition for Payment of Medical and Related Services and ordered payment of Dr. Leonard's treatment. Fairchild Semiconductor appealed.

II. DISCUSSION

A. Standard of Review

[¶7] The Appellate Division's role on appeal is "limited to assuring that the

[ALJ'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." *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995). When a party requests and proposes additional findings of fact and conclusions of law, as was done in this case, the Appellate Division reviews "only the factual findings actually made and the legal standards actually applied" by the ALJ. *Daley v. Spinnnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Evidence Not Considered by the IME

[¶8] Fairchild Semiconductor asserts that Dr. Leonard's testimony and medical reports given during the litigation that resulted in the January 21, 2020, decree cannot be considered as clear and convincing evidence to the contrary of the IME's opinion because it had not been given to him for consideration. Title 39-A M.R.S.A. § 312(7) states:

> 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.

(Emphasis added.)

[¶9] Fairchild Semiconductor is correct to the extent that any medical evidence not considered by the IME cannot constitute clear and convincing evidence

to the contrary of the IME's findings. Dr. Barkin's last report reads: "[I]n 2015, Ms. Mead was not identified as having any mental, emotional, or behavioral diagnoses. *Since 2015 through the current assessment,* Ms. Mead continued to demonstrate no signs or symptoms consistent with a mental, emotional, or behavioral diagnosis." (Emphasis added).

[¶10] Dr. Barkin made no findings related to Ms. Mead's mental health condition in 2018.[2] We find that because Dr. Barkin's opinion addressed Ms. Mead's mental health condition from 2015 through 2017, Dr. Leonard's opinion as to her mental health condition from September of 2018 and thereafter is not contrary evidence to the IME's findings.[3] Therefore, section 312(7) is inapplicable to the issue that was before the ALJ that resulted in her January 21, 2020 decree.

[¶11] To the extent that the ALJ's decision suggests Dr. Leonard's report may be considered contrary medical evidence to the IME's report due to the passage of time, such a statement constitutes harmless error, given the fact that we find section 312(7) does not apply. *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

[2] Because it is not an issue presented through appeal or cross appeal, we do not review the ALJ's finding that Dr. Barkin's opinion barred compensability of medical bills for psychological treatment until September of 2018.

[3] Further, the ALJ found that the issue of whether Ms. Mead sustained any compensable psychological effects of her work injury had never been decided by decree.

judgment" (quotation marks omitted)); *see also Cote v. Osteopathic Hosp. of Me., Inc.*, 432 A.2d 1301, 1306-1307 (Me. 1981) (applying harmless error standard in workers' compensation proceedings).

[¶12] Although the ALJ addressed a change in circumstances, we are not convinced such a finding is necessary. A change of circumstances is necessary when a finding has been established by a previous decision. "[T]he petitioning party must first meet its burden to show a "change of circumstances" since the prior determination…." *Grubb v. S.D. Warren Co.,* 2003 ME 139, ¶ 7, 837 A.2d 117, 119-20. Because the issue of whether treatment with Dr. Leonard was compensable had not been addressed by decree, Ms. Mead did not have to show a change in circumstances. And, because neither of Dr. Barkin's opinions in 2015 or 2017 addressed the compensability of psychological treatment in 2018, section 312(7) is inapplicable.

III. CONCLUSION

[¶13] The ALJ's factual findings are supported by competent evidence, and the decision involved no misconception or misapplication of the law.

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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