STUART F. PENNINGTON
(Appellee)

v.

R.C. MOORE, INC.
(Appellant)

and

MMTA WORKERS' COMPENSATION TRUST
(Insurer)

Argued: September 26, 2018
Decided: September 22, 2020

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

[¶1] R.C. Moore, Inc., appeals from a decision of a Workers' Compensation Board administrative law judge (*Stovall, ALJ*) granting Stuart Pennington's Petitions for Award concerning two work-related low back injuries in 2011 and 2013. R.C. Moore contends that the ALJ erred by appointing a second independent medical examiner to render an opinion regarding the 2013 date of injury, and by rejecting the first independent medical examiner's findings regarding the 2011 date of injury. Finding no reversible error, we affirm the decision.

I. BACKGROUND

[¶2] Stuart Pennington worked as a truck driver from 1987 until July 21, 2013. He suffered a work-related injury to his low back on January 28, 2011, when he slipped on ice while making a delivery. He was out of work from January 29,

2011, until mid-March 2011, and received incapacity benefits paid on a voluntary basis. Mr. Pennington's low back condition worsened over the course of the next couple of years and he left his job at R.C. Moore as of July 21, 2013. Thereafter, he filed a Petition for Award regarding the 2011 work injury. He was represented by the board's Advocate Division. His Advocate requested an independent medical evaluation pursuant to 39-A M.R.S.A. § 312 (Pamph. 2020) regarding that injury. The evaluation was performed by Dr. Donovan and was not favorable to Mr. Pennington. The pending Petition for Award was dismissed without prejudice at his request.

[¶3] Mr. Pennington thereafter hired Nathan Jury, Esq., to represent him with respect to his workers' compensation claims. New Petitions for Award were filed with the board regarding the January 28, 2011, date of injury and a new date of gradual injury on July 21, 2013. R.C. Moore sought leave to submit written questions concerning the new date of injury to Dr. Donovan, who had previously addressed the 2011 date of injury. Mr. Pennington objected and requested that the ALJ appoint a new independent medical examiner and that Dr. Donovan's report be excluded from the record. Alternatively, he requested that he be allowed to depose Dr. Donovan.

[¶4] The ALJ found, and there is no dispute, that Dr. Donovan would not perform evaluations or submit to deposition in cases where the employee was

represented by Attorney Jury's law firm. For this reason, the ALJ denied R.C. Moore's request for additional questions and granted Mr. Pennington's request for a new independent medical evaluation. The ALJ also denied Mr. Pennington's request to exclude Dr. Donovan's report.

[¶5] The ALJ considered Dr. Donovan's report with respect to the 2011 date of injury. However, the ALJ found clear and convincing evidence in the record that contradicted Dr. Donovan's finding that the January 28, 2011, injury was a short-lived aggravation of a preexisting condition. Instead, relying on four other medical opinions in the record, the ALJ found that the effects of the 2011 injury continued and caused an earning incapacity. The ALJ did not rely upon Dr. Bradford's opinion with respect to the 2011 work injury, but did rely upon that opinion in finding that a gradual work-related injury occurred as of July 31, 2013, the effects of which had ended by February 4, 2016.

[¶6] The ALJ left the record open to address the issue of incapacity benefits. Mr. Pennington lost his post-injury employment shortly thereafter. The ALJ held a second hearing at which Mr. Pennington provided further testimony and work search evidence, and R.C. Moore provided labor market evidence.

[¶7] The ALJ awarded 100% partial incapacity benefits based upon Mr. Pennington's good faith work search. This appeal followed.

II. DISCUSSION

[¶8] "A finding of fact by an administrative law judge is not subject to appeal [before the Appellate Division]." 39-A M.R.S.A. § 321-B (Pamph. 2020). Instead, appellate review is "limited to assuring that [the ALJ's] factual findings are supported by competent evidence." *Hall v. State*, 441 A.2d 1019, 1021 (Me. 1982). On issues of law, we assure "that [the ALJ's] decision involves no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Id*.

A. Appointment of a Second Independent Medical Examiner

[¶9] R.C. Moore contends that the ALJ erred by authorizing a second independent medical examination by a different examiner after new counsel was hired. It argues that board rules authorize the appointment of only one examiner per medical issue, that the asserted 2013 gradual injury involves the same medical issue as the 2011 acute injury, and that Dr. Donovan had given a medical opinion on the 2013 injury.

[¶10] We disagree with these contentions. Me. W.C.B. Rule, ch. 4, § 2(5) states that "[p]arties are limited to one board appointed independent medical examiner per medical issue unless significant medical change can be shown." The issue of whether a gradual injury occurred through the end of Mr. Pennington's

employment was a new medical issue asserted after Dr. Donovan issued his report. Thus, appointment of another examiner was not barred by the rule.[1]

[¶11] R.C. Moore also contends there is no authority for appointing a new examiner on the basis that the first examiner will not deal with new counsel's law firm. It is undisputed that Dr. Donovan would not agree to perform an evaluation for clients of Attorney Jury's law firm, nor would he honor a request for deposition from that firm. Thus, the ALJ was faced with a situation where Dr. Donovan's opinions regarding the 2011 work injury could not be tested by deposition and the issue of whether or not a gradual injury was incurred in 2013 could not be addressed by further evaluation.[2]

[1] It is less clear whether it was appropriate to ask the second independent medical examiner to opine on the 2011 date of injury given Dr. Donovan's examination and conclusion. We find no reversible error, however, because the ALJ did not rely on Dr. Bradford's findings on the 2011 date of injury in concluding that Dr. Donovan's opinion must be rejected. The ALJ expressly stated in the decree that he considered Dr. Donovan's findings only as they related to the 2011 date of injury, and Dr. Bradford's only as they related to the 2013 date of injury.

[2] While R.C. Moore maintains that Dr. Donovan made findings regarding an injury in 2013, we conclude that he did not. No petition was filed concerning a gradual injury in the initial round of litigation, and Dr. Donovan was not asked, nor did he opine on, whether Mr. Pennington had incurred a gradual injury through his last day of work. Dr. Donovan was asked if Mr. Pennington had "sustained a subsequent injury or disease not causally related to the alleged work injury of January 28, 2011." Dr. Donovan responded by repeating the conclusion stated earlier in his report that Mr. Pennington's work-related low back condition had resolved and that symptoms occurring thereafter were a result of his preexisting degenerative lumbar spondylosis. We conclude that neither the question asked, nor the answer given, raised the issue of whether Mr. Pennington's work at R.C. Moore over a period of years had resulted in a gradual work-related injury. R. C. Moore's request to ask Dr. Donovan further questions upon the filing of new petitions and Mr. Pennington's request to depose the doctor could have shed light on new allegation of a gradual injury. The ALJ found as a matter of fact, however, that Dr. Donovan would not further evaluate nor sit for a deposition given representation by Attorney Jury.

[¶12] We review an ALJ's decisions regarding the conduct of proceedings to determine whether, in light of all the circumstances, the ALJ acted beyond the scope of his or her allowable discretion. *See Kuvaja v. Bethel Savings Bank,* 495 A.2d 804, 806 (Me. 1985) (applying abuse of discretion standard of review for administrative body's ruling on a motion to dismiss); *Matthews v. Shaw's Supermarkets*, Me. W.C.B. No. 15-25, ¶ 20 (App. Div. 2015) (applying abuse of discretion standard to ALJ's decision to conduct hearings in a certain manner). We will vacate the ALJ's decision if the proceedings violated due process; that is, if they were fundamentally unfair. *See Kuvaja*, 495 A.2d at 806-07.

[¶13] Mr. Pennington was entitled to request an independent medical evaluation of his claim of gradual injury in 2013 and to inquire into the basis of Dr. Donovan's conclusions regarding the 2011 date of injury. It would have been fundamentally unfair to deprive him of these opportunities by refusing to appoint a new examiner in the circumstances. The ALJ did not act outside the bounds of his discretion in appointing a second independent medical evaluation given these circumstances.

B. Clear and Convincing Evidence

[¶14] Dr. Donovan opined that Mr. Pennington suffered a work injury on January 28, 2011, in the nature of a short-lived aggravation of a preexisting condition. The ALJ rejected this conclusion and found instead that the effects of the

2011 work injury persisted, resulting in ongoing earning incapacity. R.C. Moore contends that the ALJ was bound to accept Dr. Donovan's conclusions and erred in finding clear and convincing evidence to the contrary in the record.

[¶15] 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.

[¶16] When determining whether there is clear and convincing evidence contrary to the independent medical examiner's findings, the Appellate Division 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).

[¶17] The ALJ relied upon medical evidence from four other physicians who disagreed with Dr. Donovan's conclusions that the 2011 work injury was a temporary aggravation or strain. In addition, the ALJ found that Dr. Donovan overstated the nature of problems suffered by Mr. Pennington in 2009. We conclude that these findings were sufficient evidence upon which to conclude that it was highly probable that the record did not support Dr. Donovan's findings.

III. CONCLUSION

[¶18] The ALJ acted within his discretion and neither misconceived nor misapplied the law in deciding to appoint a new independent medical examiner, and did not err in finding clear and convincing contrary evidence with respect to the first independent medical examiner's findings.

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 (Pamph. 2020).

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.

Attorneys for Appellant:
Evan M. Hansen, Esq.
John J. Cronan III, Esq.
PRETI, FLAHERTY, BELIVEAU,
& PACHIOS, LLP
P.O. Box 9546
Portland, ME 04112

Attorneys for Appellee:
James J. MacAdam, Esq.
Nathan A. Jury, Esq.
Donald M. Murphy, Esq.
MacADAM JURY, P.A.
45 Mallet Drive
Freeport, ME 04032