

ETHEL JALBERT
(Appellee)

v.

NORTHERN MAINE MEDICAL CENTER
(Appellant)

and

SYNERNET
(Insurer)

Conference held: May 17, 2017
Decided: September 11, 2018

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

[¶1] Northern Maine Medical Center (NMMC) appeals from a decision of a Workers' Compensation Board Administrative Law Judge (*Hirtle, ALJ*) granting Ethel Jalbert's Petitions for Restoration and to Fix Medical Expenses. NMMC contends that the ALJ erred in determining that Ms. Jalbert had met her burden of proof on the issues of causation and earning incapacity. Finding no error, we affirm the decision.

I. BACKGROUND

[¶2] Ethel Jalbert worked at NMMC as a registered nurse from 1984 until 2014. She was an emergency room nurse until she suffered a work-related low back injury on April 25, 2006. After the injury, she returned to work for NMMC with restrictions and performed light duty work in the nursing home and

psychiatric unit. The board (*Pelletier, HO*) issued a decree in 2013 permitting NMMC to cease payment of partial incapacity benefits on the basis that Ms. Jalbert had consistently earned more than her average weekly wage.

[¶3] In March of 2014, Ms. Jalbert was terminated by NMMC for reasons unrelated to her work injury. She thereafter found work as a visiting nurse, a job that required travel to clients' homes. Initially, she also worked a second job on weekends for Northern Maine General Hospital. Eventually Ms. Jalbert was able to increase her hours as a visiting nurse and worked that job exclusively.

[¶4] In March of 2015, Ms. Jalbert sought care for increased low back symptoms, which she attributed to the long hours of driving required by her visiting nurse work. Ms. Jalbert's treating physician, Dr. Gupta, opined that the source of her ongoing low back symptoms was the April 25, 2006, work injury, aggravated by the prolonged driving required by her employment as a visiting nurse. Dr. Gupta endorsed physical restrictions such as limited lifting and avoidance of prolonged sitting or standing. Dr. Herzog, who performed an exam on behalf of NMMC pursuant to 39-A M.R.S.A. § 207 (Supp. 2017), issued an initial report that expressed that Ms. Jalbert's ongoing symptoms were related to the 2006 work injury and that the aggravations caused by driving were transient and not significant. Although he initially concluded that no physical work restrictions related to the 2006 injury were necessary, Dr. Herzog later issued a supplemental

report changing his opinion on the issue of causation, and relating Ms. Jalbert's problems to her recent driving activities.

[¶5] The ALJ adopted the opinion of Dr. Gupta on the issues of causation and physical work capacity, and found credible Ms. Jalbert's testimony regarding the presence of low back symptoms from the date of injury in 2006 until the present. The ALJ further found that Ms. Jalbert's work-related restrictions prevented her from resuming her former work as an emergency room nurse, and he awarded partial incapacity benefits based upon her post-injury earnings. NMMC has appealed, maintaining that the ALJ erred in awarding any incapacity benefits because Ms. Jalbert failed to meet her burden to demonstrate that her reduction in earnings was related to her work injury, as opposed to her termination. In addition, NMMC maintains that the evidence compels a finding that Ms. Jalbert's low back problems were related to her subsequent employment as a visiting nurse.

II. DISCUSSION

[¶6] 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).

A. Causation of Physical Incapacity

[¶7] We find no error in the ALJ's determination that Ms. Jalbert carried her burden of proof to show that her incapacity was related to her 2006 work injury. It was not error to reject the revised opinion of Dr. Herzog, which found that Ms. Jalbert's subsequent employment was responsible for her low back problems. There was conflicting evidence on this question in the record. An ALJ may choose among conflicting expert opinions on factual questions. *See Bruton v. City of Bath*, 432 A.2d 390, 394 (Me. 1981); *Savage v. Georgia Pacific Corp.*, Me. W.C.B. No. 13-5, ¶ 7 (App. Div. 2013). Moreover, even if it were error to rely on Dr. Herzog's initial evaluation, any error would have been harmless because Dr. Gupta's deposition testimony and the series of M-1 documents in which he indicated that Ms. Jalbert's disability is related to the 2006 work injury are, independently of Dr. Herzog's evaluation, competent evidence to support the ultimate determination that Ms. Jalbert met her burden of proof on the issue of causation of her physical incapacity.

B. Earning Incapacity

[¶8] NMMC argues that Ms. Jalbert has failed to meet her burden of showing that her loss of earning capacity is attributable to a work-related injury—regardless of which one—rather than other factors. Because there is competent evidence supporting the ALJ's contrary determination, we disagree.

[¶9] The ALJ found that Ms. Jalbert’s post-injury work at NMMC was accommodated on account of her 2006 work injury; she has ongoing physical restrictions related to the work injury; she can no longer perform work as an emergency room nurse; and she had reduced earnings during the period at issue despite working two jobs.

[¶10] The evidence supporting these findings includes (1) Ms. Jalbert’s testimony regarding the nature of her post-injury work; (2) Ms. Jalbert’s actual wages, which showed that she had decreased earnings between March 12, 2014, and September 26, 2015; (3) Dr. Gupta’s notes and testimony that Ms. Jalbert had physical incapacity during the same period of time, including physical restrictions that precluded her from performing her pre-injury job duties.¹

[¶11] From the evidence listed above, the ALJ could reasonably have been persuaded that Ms. Jalbert’s earning incapacity during the period at issue was causally related to the ongoing effects of her 2006 work injury.

III. CONCLUSION

[¶12] The ALJ’s determinations that Ms. Jalbert’s physical incapacity is related to her 2006 work injury and that her recent earning incapacity is related to

¹ Although NMMC argues in its brief that an employee’s inability to do the same kind of work as before the injury is not conclusive evidence that the injury caused earning incapacity, *see Theriault v. Walsh Const. Co.*, 389 A.2d 317, 320 (Me. 1978), it is nevertheless evidence of that fact, *see Cross v. LLP Transport, LLC*, Me. W.C.B. No. 15-23, ¶ 12 (App. Div. 2015) (“[T]he inability to perform one’s pre-injury work . . . may establish partial earning incapacity depending upon what the employee is able to earn within the restrictions.”).

that injury are supported by competent evidence and involve no misconception of applicable law. We therefore affirm.

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. 2017).

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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