JOSEPH J. BREUNIG III
(Appellant)

v.

FIRST PROTECTION SERVICES, INC.
(Appellee)

and

SENTINEL INSURANCE COMPANY, LTD.
(Insurer)

Conference held: October 22, 2020
Decided: December 31, 2020

PANEL MEMBERS: Administrative Law Judges Knopf, Elwin, and Pelletier
BY: Administrative Law Judge Elwin

[¶1] Joseph Breunig appeals from a decision of a Workers' Compensation Board administrative law judge (*Collier, ALJ*) granting in part his Petition for Award, granting his Petition for Payment of Medical and Related Services, and denying his Petition to Remedy Discrimination. The decision awarded Mr. Breunig a closed-end period of 100% partial incapacity benefits for a work-related injury to his feet and legs, and ordered payment of outstanding medical expenses for treatment of this injury. Mr. Breunig contends that the ALJ erred by (1) failing to consider certain evidence; (2) finding that Mr. Breunig is not entitled to ongoing incapacity benefits; (3) failing to order payment for future medical treatment; and (4) declining to find that his employer, First Protection Services, Inc. (FPS), discriminated against

him by terminating him after his work injury. Mr. Breunig also asserts that he was harmed due to ineffective assistance by his WCB advocate. We affirm the decision.

I. BACKGROUND

[¶2] Joseph Breunig III was hired by FPS on September 9, 2016, as an unarmed security guard. Beginning September 15, 2016, he was assigned to perform rounds at The Breakwater, a residential condominium complex. Mr. Breunig estimated that he walked five miles per shift wearing dress shoes. Over the course of his first two weeks, he developed blisters on both feet. His last shift was September 25-26, 2016.

[¶3] On September 28, 2016, Mr. Breunig sought medical care at the Goodall Hospital walk-in clinic for a red and swollen left leg. He was diagnosed with cellulitis and given a prescription for antibiotics. Two days later, FPS sent Mr. Breunig to Concentra where they reached the same diagnosis, gave Mr. Breunig an injection and a prescription for prednisone, and restricted him to seated-only work. After a follow-up appointment on October 3, 2016, Mr. Breunig was sent to the emergency room, where he was admitted to the hospital and treated with intravenous antibiotics. He was discharged with oral antibiotics on October 6, 2016, and told to engage in activities "as tolerated." Mr. Breunig had received no further medical treatment as of the date of the May 24, 2019, hearing.

[¶4] FPS terminated Mr. Breunig by letter dated October 5, 2016, citing complaints by co-workers and a client, as well as Mr. Breunig's inability to perform the functions required in his position.

[¶5] Mr. Breunig filed Petitions for Award and for Payment of Medical and Related Services, seeking to establish that he suffered a work injury to both legs due to his work as a security guard for FPS. Mr. Breunig also filed a Petition to Remedy Discrimination, claiming that his termination was due to his assertion of a work injury.[1] The ALJ granted the Petitions for Award and for Payment of Medical and Related Services, but limited Mr. Breunig's incapacity benefits to a four-month period of 100% partial benefits ending February 5, 2017. The ALJ denied the Petition to Remedy Discrimination. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶6] The Appellate Division's role on appeal "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). Here, the ALJ

[1] These Petitions were filed by Mr. Breunig's Employee Advocate, who represented Mr. Breunig until April 6, 2018, when he withdrew his representation following disapproval (by a different ALJ) of a lump sum settlement of this matter on March 19, 2018. Mr. Breunig represented himself at the hearing and during the course of this appeal.

declined to issue further findings of fact and conclusions of law in response to Mr. Breunig's motion. When a party requests and proposes additional findings of fact and conclusions of law, "we review only the factual findings actually made and the legal standards actually applied" by the ALJ. *Daley v. Spinnaker Indus.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Competent Evidence

[¶7] Mr. Breunig contends the record lacks competent evidence to support the ALJ's findings, and that the ALJ failed to consider a number of documents that support his claims. Specifically, Mr. Breunig suggests that both the Notice of Controversy and First Report of Injury filed by FPS were omitted from the record. This contention is incorrect. The ALJ took administrative notice of all documents in the board's file, including both the Notice of Controversy and First Report of Injury. Mr. Breunig notes that he submitted numerous documents, but the decree only cited two employee exhibits. While the decision specifically references only Employee's Exhibits 1 and 2, Employee's Exhibit 1 is a multi-page exhibit containing a number of separately labeled documents, described on the ALJ's exhibit list as a "very large batch" of e-mails and letters.

[¶8] Mr. Breunig also asserts that the ALJ erred by failing to compel FPS to provide certain documents, including certain medical records, and a portion of the employee handbook outlining footwear requirements.

[¶9] We disagree with these contentions. Matters regarding the admission or exclusion of evidence and the conduct of hearings are reviewed for abuse of discretion. *See, e.g., Weiss v. Me. 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 making decision regarding admission of evidence). Mr. Breunig has not demonstrated that the evidentiary decisions fell outside the bounds of the ALJ's discretion. Moreover, judgment regarding the significance to attach to particular evidence or exhibits is within the ALJ's purview, and we defer to that judgment. *Cf.* Donald G. Alexander, *Maine Appellate Practice* at 257 (4th ed. 2013). The ALJ is not required to catalog every piece of evidence considered when making a decision. *See id.*

[¶10] Furthermore, such documents would not have affected the outcome of the ALJ's determination of whether Mr. Breunig's injury was caused by his work for FPS. The ALJ found in Mr. Breunig's favor on this issue, even without documentation that the company required him to wear dress shoes, and without the medical records Mr. Breunig claims FPS failed to provide. *See Cote v. Osteopathic Hosp. of Me.*, 432 A.2d 1301, 1307 (Me. 1981) (determining that an error that does not affect the outcome of a case constitutes harmless error and is not reversible).

C. Earning Capacity

[¶11] The ALJ found that Mr. Breunig suffered no ongoing earning incapacity as a result of his injury. Mr. Breunig contends that this finding is erroneous, and that he is entitled to ongoing incapacity benefits. We disagree.

[¶12] The ALJ based his findings regarding Mr. Breunig's earning capacity on the opinion of Dr. Bamberger, the independent medical examiner. Pursuant to 39-A M.R.S.A. § 312(7) (Pamph. 2020), the ALJ was required to adopt Dr. Bamberger's findings absent clear and convincing evidence to the contrary. Dr. Bamberger found that, while unable to perform the walking required in the security guard position, Mr. Breunig had a full-time sedentary work capacity as of November 8, 2017, the date of Dr. Bamberger's exam.

[¶13] The basic purpose of the Workers' Compensation Act is "to provide compensation for loss of earning capacity from actual or legally presumed incapacity to work arising from [the work injury]. … [t]he only injuries compensated for are those which produce disability and thereby presumably affect earning power." *Levesque v. Shorey* 286 A.2d 606, 609 (Me. 1972) (quotation marks omitted). The Act does not authorize compensation for pain and suffering, *Perry v. Hartford Accident & Indem. Co.*, 481 A.2d 133, 137 (Me. 1984), or for the loss of ability to perform the specific work performed at the time of the work injury, *Gordon v. Aetna Cas. & Sur. Co.*, 406 A.2d 617, 619 (Me. 1979). Because the evidence supports the

finding that Mr. Breunig retains the ability to earn, and he did not establish that sedentary work is unavailable to him, the ALJ did not err when awarding Mr. Breunig incapacity benefits for a closed-end period, rather than on an ongoing basis.

D. Future Medical Treatment

[¶14] The ALJ granted Mr. Breunig's Petition for Payment of Medical and Related Services and ordered payment of all outstanding expenses for treatment of Mr. Breunig's work injury. Mr. Breunig contends that he is entitled to an order that includes future medical expenses. However, the ALJ lacks authority to order payment for unspecified future treatment. As provided in title 39-A M.R.S.A. § 206(7) (Pamph. 2020):

> When any services are procured or aids are required by the employee, it is the employee's duty to see that the employer is given prompt notice of that procurement or requirement. The employer shall then make prompt payment for them to the provider or supplier or reimburse the employee, in accordance with section 205, subsection 4, if the costs are necessary and adequate and the charges reasonable[.]

[¶15] To the extent that Mr. Breunig requires additional medical treatment for his work injury, upon notice, the Employer/Insurer may voluntarily pay for such treatment, based on the ALJ's positive causation findings. If payment is not made voluntarily, Mr. Breunig may file a new Petition for Payment of Medical and Related Services.

E. Discrimination

[¶16] The ALJ found that FPS's termination of Mr. Breunig was not "… rooted substantially or significantly in [his] exercise of his rights under the Workers' Compensation Act," *Maietta v. Town of Scarborough*, 2004 ME 97, ¶ 14, 854 A.2d 223, and therefore concluded that the termination did not constitute unlawful discrimination under 39-A M.R.S.A. § 353 (Pamph. 2020). This finding is supported by ample competent evidence, including the termination notice, two prior written disciplinary warnings, and the testimony of FPS's Assistant Director of Security Nate Shelton, whom the ALJ expressly found to be a credible witness. The ALJ's determination of a witness's credibility is entitled to great deference. *Lovejoy v. Beech Hill Dry Wall Co., Inc*., 361 A.2d 252, 254 (Me. 1976) (holding that it is the sole province of the ALJ, who "had the opportunity to hear the witnesses and judge their credibility ... to resolve the evidentiary conflicts in the case.").

F. Assistance of the WCB Employee Advocate

[¶17] Mr. Breunig was represented by a Workers' Compensation Board employee advocate prior to the hearing in this matter, and he 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 Nelson v. Boeing Co.*, 446 F.3d 1118, 1121 (10th Cir. 2006) (holding the statutory right to assistance of counsel under Title VII does

not create a 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), 318 (Supp. 2020). The issue of the effectiveness of advocacy is beyond the scope of the Appellate Division's mandate.

[¶18] Moreover, after the advocate's withdrawal, Mr. Breunig presented his case at hearing, prepared and submitted a closing statement and a response to FPS's closing statement, and filed a Motion for Findings of Fact and Conclusions of Law (incorporating proposed findings). Not only did Mr. Breunig thoroughly marshal the evidence in support of his contentions, but the ALJ found that "Mr. Breunig has a college degree and is an obviously intelligent man who communicates unusually well, both verbally and in writing." Under these circumstances, it is highly probable that any alleged deficiency on the advocate's part did not affect the outcome of Mr. Breunig's case. *See Cote* 432 A.2d at 1307 (applying harmless error standard in workers' compensation context).

III. CONCLUSION

[¶19] We conclude that there is ample competent evidence in the record that supports the ALJ's factual findings, and the ALJ neither misapplied nor misconstrued the law when determining that Mr. Breunig has no ongoing earning incapacity due to his work injury, was entitled to payment of outstanding (but not unspecified future) medical expenses, and that his termination was not due to his

assertion of a workers' compensation claim. Moreover, the ALJ acted within his discretion on all evidentiary issues.

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.

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