

DARLA DUNN-MORRELL
(Appellee)

v.

VIKING MOTORS
(Appellant)

and

MADA WORKERS' COMPENSATION TRUST
(Insurer)

Argument held: June 8, 2016
Decided: April 19, 2017

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

[¶1] Viking Motors appeals from a decision of a Workers' Compensation Board administrative law judge (*Goodnough, ALJ*) granting its Petition for Review and granting Darla Dunn-Morrell's Petition for Payment in part. Viking Motors contends that the ALJ committed legal error by rejecting the medical opinion of the independent medical examiner appointed pursuant to 39-A M.R.S.A § 312 (Supp. 2016) to conclude that: (1) Ms. Dunn-Morrell's back condition for which surgery was performed was related to a work injury; (2) her sacroiliac fusion surgery was reasonable and proper under 39-A M.R.S.A § 206 (Supp. 2016); and (3) Ms. Dunn-Morrell is 66% partially incapacitated due to the effects of a work-related injury. We disagree and affirm the ALJ's decision in all respects.

I. BACKGROUND

[¶2] Darla Dunn-Morrell began working for Viking Motors in July 1999 as an office worker. In a 2007 decision, Ms. Dunn-Morrell was granted protection of the Act for a May 8, 2003, lower back and right shoulder injury that occurred when she twisted awkwardly while handling a large box in a small space. The ALJ awarded her ongoing total incapacity benefits pursuant to 39-A M.R.S.A § 212 (Supp. 2016). In that decision, the ALJ noted that Ms. Dunn-Morrell had been recently diagnosed by Dr. Waecker (now Waecker-Collins) “as suffering from ongoing right shoulder pain, right sacroiliac joint instability, gluteal enthesopathy, pelvic pain and somatic dysfunction.”

[¶3] Dr. Waecker-Collins referred Ms. Dunn-Morrell to Dr. Amaral in Georgia. Dr. Amaral performed a sacroiliac fusion and decompression of the right sciatic nerve by piriformis release in November of 2010. Ms. Dunn-Morrell underwent L4-5 back surgery performed by Dr. Barth on December 4, 2013, to address left-sided leg pain.

[¶4] On April 19, 2014, Ms. Dunn-Morrell filed a Petition for Payment regarding the sacroiliac and back surgeries. On September 5, 2014, Viking Motors filed a Petition for Review of Incapacity.

[¶5] In the course of litigation, Dr. Donovan evaluated Ms. Dunn-Morrell pursuant to 39-A M.R.S.A § 312 on April 17, 2014. Dr. Donovan opined that

(1) the effects of Ms. Dunn Morrell’s work-related right shoulder injury had ended; (2) Ms. Dunn-Morrell continues to experience symptoms from the November 2010 sacroiliac fusion and piriformis release surgery and therefore “continues to be subject to the effects of the work-related injury”; and (3) that Ms. Dunn-Morrell’s left-sided leg pain—and therefore the 2013 surgery performed by Dr. Barth—was not causally related to the work injury. Dr. Donovan apportioned 90% responsibility for incapacity to Ms. Dunn-Morrell’s non-work-related conditions.

[¶6] On November 10, 2014, Dr. Donovan issued a supplemental report, finding that the muscular release performed by Dr. Amaral was reasonable and proper, but that the sacroiliac joint fusion was “at best controversial . . . and not proper.” At deposition, Dr. Donovan testified that there was no evidence of sacroiliac instability and that any improvement in Ms. Dunn-Morrell’s symptoms following the procedure was likely the result of the successful piriformis release performed contemporaneously with the fusion procedure.

[¶7] Preliminarily, the ALJ determined that Dr. Donovan’s analysis was sufficiently comparative in nature to overcome the res judicata effect of the 2007 decision. The ALJ, adopting Dr. Donovan’s opinion on Ms. Dunn-Morrell’s right shoulder condition, concluded that the effects of the work-related right shoulder injury have ended and any ongoing right shoulder symptoms are related to a subsequent non-work injury. Citing clear and convincing evidence, the ALJ

rejected Dr. Donovan's opinion to conclude that (1) Ms. Dunn-Morrell's back condition for which surgery was performed was related to a work injury; (2) the sacroiliac surgery performed by Dr. Amaral was reasonable and proper; and (3) Ms. Dunn-Morrell is 66% partial incapacitated due to the effects of a work-related injury.

[¶8] The ALJ granted Viking Motors' Petition for Review and allowed it to reduce benefit payments to a level reflecting a 66% partial rate, or \$221.49 per week. The ALJ also granted Ms. Dunn-Morrell's Petition for Payment in part, concluding that all medical bills relating to treatment for all aspects of her low back are reasonable and necessary, and that Viking Motors is not responsible for any medical bills associated with treatment for the right shoulder.

[¶9] Ms. Dunn-Morrell filed a Motion for Further Findings of Fact and Conclusions of Law, which the ALJ issued but did not alter the outcome. Viking Motors appeals.

II. DISCUSSION

A. Standard of Review

[¶10] The role of the Appellate Division 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 application of the

law to the facts was neither arbitrary nor without rational foundation.” *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted).

B. Rejection of Dr. Donovan’s Opinion

[¶11] Viking Motors contends that the ALJ erred by rejecting Dr. Donovan’s opinion because the record is devoid of contrary clear and convincing evidence sufficient to overcome the binding effect of section 312(7).¹

[¶12] 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 with regard to 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 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

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.

opinion is rejected, the ALJ must explain the reasons for that rejection in writing. 39-A M.R.S.A. § 312(7).

1. Ms. Dunn-Morrell's Back Condition

[¶13] The touchstone of Dr. Donovan's opinion that Ms. Dunn-Morrell's left leg symptoms were unconnected to her work-related back injury was that she did not experience symptoms until 2007. However, the ALJ found as fact that Ms. Dunn-Morrell complained about her leg symptoms as early as 2003. The ALJ, based upon the early contemporaneous medical records, stated that:

[Ms. Dunn-Morrell] began to experience radicular-type pain into her left leg within a couple of months of her injury, and perhaps earlier. Although there was a significant gap in treatment for the left leg pain (between 2004/2005 and 2007), its strong re-emergence after the 2010 [sacroiliac joint] surgery is well-documented and explained by Dr. Waecker Collins. I accordingly accept Dr. Barth's opinion (the only practicing neurosurgeon to opine on the topic, and in my view the best qualified under the circumstances of this case) that given early documentation for left leg pain, the surgery he performed in 2013 was more likely than not causally-related to the work injury. Dr. Barth's opinion, in conjunction with the opinion expressed by Dr. Waecker-Collins, constitutes clear and convincing contrary evidence to the opinion expressed by Dr. Donovan.

[¶14] The reasons given by the ALJ demonstrate that he could have been reasonably persuaded by the contrary medical evidence that it was highly probable that the record did not support the IME's findings. *See Dubois*, 2002 ME 1, ¶ 14; *Bean*, No. 13-6, ¶ 20.

2. Sacroiliac Joint Fusion Surgery

[¶15] The ALJ, in rejecting Dr. Donovan's opinion regarding the sacroiliac fusion surgery, relied on the medical opinions of Drs. Ball, Amaral, and Waecker-Collins; the medical opinion of Ms. St. Jean, a neuromuscular therapist; and the testimony of Ms. Dunn-Morrell. The ALJ concluded:

[Ms. Dunn-Morrell] testified credibly regarding the onset of her injury and how it affected her low back. . . . The testimony was consistent with the histories taken over the years by the various practitioners in this case. The injury, while unusual, was also without a doubt not as benign as Dr. Donovan concluded that it was when he saw her nine years after its occurrence.

[¶16] As the fact finder, the ALJ is the ultimate judge of the credibility of a claimant's factual assertions. *See, e.g., Dubois*, 2002 ME 1, ¶ 16; *Saltz v. M.W. Sewall & Co.*, Me. W.C.B. No. 14-34, ¶ 15 (App. Div. 2014). The ALJ credited Ms. Dunn-Morrell's testimony regarding the onset of her injury and how it affected her low back. Ms. Dunn-Morrell's testimony paired with the medical opinions from Drs. Ball, Amaral, and Waecker-Collins demonstrate that 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 findings regarding the reasonableness and propriety of the sacroiliac fusion surgery.

3. Percentage of Partial Incapacity Pursuant to Section 201(5)

[¶17] The ALJ adopted Dr. Donovan's opinion that Ms. Dunn-Morrell remains totally incapacitated by the totality of her work and non-work related

conditions. Because Dr. Donovan did not include the joint fusion procedure or any incapacity that might flow from residual sacroiliac joint problems, the ALJ rejected Dr. Donovan's allocation opinion that 90% of Ms. Dunn-Morrell's ongoing incapacity is due to non-work related conditions. The ALJ determined, based upon Ms. Dunn-Morrell's testimony; the opinion of Dr. Waecker-Collins; and Dr. Donovan's testimony regarding how he did his allocation; that each injury complex contributes roughly equally to her overall pain presentation and incapacity. Separating out the effects of the subsequent nonwork-related shoulder condition, the ALJ further concluded that Ms. Dunn-Morrell is 66% partially incapacitated due to the effects of the work-related injury to her left leg and right sacroiliac joint/piriformis conditions. The ALJ did not err when applying Section 201(5) to his factual findings, which are supported by the record evidence. *Pratt v. Fraser Paper LTD.*, 2001 ME 102, ¶ 12, 774 A.2d 351.

III. CONCLUSION

[¶18] The ALJ did not err in finding clear and convincing evidence contrary to the IME's findings. Further, the decision involved no misconception of applicable law, and 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).

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. 2016).

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

Attorney for Appellee:
Michael J. Welch, Esq.
HARDY, WOLF, & DOWNING
P.O. Box 3065
Lewiston, ME 04243-3065