LORRAINE SOMERS
(Appellant)

v.

S.D. WARREN CO.
(Appellee)

and

CONSTITUTION STATE SERVICES
(Insurer)

Argued: January 26, 2017
Decided: November 13, 2017

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

[¶1] Lorraine Somers appeals a decision of an administrative law judge (*Elwin, ALJ*) granting S.D. Warren's Petition for Review and request to discontinue payments to Ms. Somers due to the expiration of the 520-week durational limit on partial incapacity benefits. *See* 39-A M.R.S.A. § 213 (Supp. 2016); Me. W.C.B. Rule, ch. 2, § 2. Ms. Somers contends that the ALJ erred by (1) concluding that she failed to prove a change in circumstances necessary to overcome the res judicata effect of a 2008 decision establishing permanent impairment; and (2) improperly allocating the burdens of production and proof, pursuant to *Farris v. Georgia-Pacific Corp.*, 2004 ME 14, 844 A.2d 1143.

[¶2] The ALJ's "changed circumstances" analysis no longer applies to Ms. Somers' case in light of the Law Court's recent ruling in *Bailey v. City of Lewiston*, 2017 ME 160, ¶ 10, 168 A.3d 762. Nevertheless, the ALJ correctly concluded that principles of res judicata bar reconsideration of Ms. Somers' previously-fixed impairment rating. For that reason, we affirm.

I. BACKGROUND

[¶3] Lorraine Somers sustained a compensable injury to her right knee on December 6, 2000. Following surgery and a period of accommodated work, Ms. Somers returned to her regular duty job at S.D. Warren in December 2001. Eventually, her knee condition deteriorated, and in 2007, after S.D. Warren could no longer accommodate her restrictions, she was terminated.

[¶4] In a July 29, 2008, decree, the board (*Elwin, HO*) awarded Ms. Somers 100% partial incapacity benefits beginning May 31, 2007. The 2008 decree also granted S.D. Warren's Petition to Determine Extent of Permanent Impairment and determined that Ms. Somers' knee condition resulted in a 7% whole-body permanent impairment. The hearing officer specifically declined to award any permanent impairment for Ms. Somers' adjustment disorder, a psychological sequela of the knee injury, because, according to the board-appointed independent medical examiner, she did not sustain any permanent impairment due to that condition.

[¶5] S.D. Warren commenced the current round of litigation by filing a Petition for Review seeking to terminate benefits based upon the durational limit contained in 39-A M.R.S.A. § 213(1)(A) and Rule, ch. 2, § 2. S.D. Warren argued that Ms. Somers was no longer eligible for partial incapacity benefits because it had made payments for more than 520 weeks and her whole person permanent impairment remained at 7%, below the threshold for continuing benefits. Ms. Somers contended that a "change in circumstances" since the prior decree—specifically, a worsening of her right knee and psychological conditions—justified reevaluation of her impairment rating. *See, e.g., Grubb v. S.D. Warren Co*., 2003 ME 139, ¶ 7, 837 A.2d 117.

[¶6] The ALJ determined that Ms. Somers failed to establish a change in medical circumstances that could overcome the res judicata effect of the 2008 decree. She concluded that Ms. Somers had not presented the kind of comparative medical evidence necessary to show a change in either her physical or psychological condition. Thus, the ALJ held that Ms. Somers' impairment rating remained 7%. She granted the Petition for Review, and allowed S.D. Warren to cease paying partial incapacity benefits.

[¶7] Ms. Somers filed a Motion for Further Findings of Fact and Conclusions of Law. In response, the ALJ did not alter the outcome, but issued an

amended decree in which she added that any change in Ms. Somers' psychological condition was a change in degree rather than in kind. This appeal followed.

[¶8] Following briefing and oral argument, the Law Court issued its decision in *Bailey v. City of Lewiston*, 2017 ME 160, 168 A.3d 762. Because the issues addressed in *Bailey* appeared to have a bearing on the issues raised in the appeal, we requested further briefing in light of that case, and additional briefs were submitted.

II. DISCUSSION

[¶9] Partial incapacity benefits are generally subject to a durational cap of 520 weeks. *See* 39-A M.R.S.A. § 213(1)(A) (setting a 260-week limit subject to extension); Rule, ch. 2, § 2 (extending the 260-week limitation to 520 weeks). Employees are exempt from this cap if their injuries result in a whole person permanent impairment above a certain threshold percentage.[1] 39-A M.R.S.A. § 213(1)(A) (setting a 15% threshold subject to modification). Ms. Somers does not dispute that S.D. Warren paid her over 520 weeks of partial incapacity benefits. Rather, she argues that her impairment rating exceeds the applicable threshold and for that reason, the 520-week limit does not apply. Because the board's 2008 decree fixed Ms. Somers' impairment rating below the applicable threshold at 7%,

[1] Ms. Somers, whose injury occurred December 6, 2000, is subject to the 520-week cap unless her permanent impairment rating meets or exceeds an 11.8% threshold. Me. W.C.B. Rule, ch. 2, § 1(3).

the central issue on appeal is whether, as S.D. Warren contends, principles of res judicata bar reconsideration of her impairment rating.

A. Standard of Review

[¶10] An administrative law judge's decision on all questions of fact, absent fraud, is final. 39-A M.R.S.A. § 321(B)(2) (Supp. 2016); *Doucette v. Hallsmith/ Sysco Food Servs.*, 2011 ME 68, ¶ 21, 21 A.3d 99. The Appellate Division's role on appeal is "limited to assuring that the [administrative law judge'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).

B. Res Judicata

[¶11] Valid decisions of the Workers' Compensation Board, like court judgments, are subject to the rules of res judicata, and are no longer subject to collateral attack after they become final. *See Bailey*, 2017 ME 160, ¶ 10. Accordingly, "[a]bsent specific statutory authority, the [Workers' Compensation] Board may not reopen or amend a final decision." *Id.* ¶ 10. This rule applies to final determinations of permanent impairment and maximum medical improvement (MMI). *Id.* ¶ 13 ("[T]he workers' compensation statute provides no

opportunity for a redetermination of a hearing officer's or ALJ's findings regarding permanent impairment or MMI.").

[¶12] Here, the ALJ considered whether a "change of medical circumstances" justified reconsideration of Ms. Somers' permanent impairment rating. Such an analysis was consistent with the board's precedent as it existed at the time of her decision. *See, e.g., Strout v. Blue Rock Indus.*, Me. W.C.B. No. 16-37, ¶ 15 (App. Div. 2017) ("The doctrine of res judicata . . . does not bar an employee from bringing a petition to determine extent of [permanent impairment] after the issue has already been adjudicated if there has been a change in medical circumstances sufficient to justify revisiting the issue."). Since then, the Law Court has held that permanent impairment and MMI are not subject to reconsideration, even in the face of changed medical circumstances. *See Bailey*, 2017 ME 160 at ¶ 18 ("[A] 'changed circumstances' analysis does not apply to a permanent impairment finding."). Thus, *Bailey* rendered the changed circumstances analysis applied by the ALJ no longer applicable. For that reason, we revisit the res judicata effect of the 2008 decree on both Ms. Somers' right knee condition and her psychological sequela.

1. Right Knee

[¶13] In 2008, the board determined that Ms. Somers' right knee had reached maximum medical improvement and that she suffered a 7% whole person

permanent impairment as a result of the December 6, 2000, injury. Consistent with the Law Court's holding in *Bailey*, that finding is not subject to further review in a subsequent proceeding even if Ms. Somers could present persuasive medical evidence that her condition had worsened since that time. Thus, although it was unnecessary for the ALJ to decide whether Ms. Somers had proven a "change of circumstances" in light of *Bailey*, she nevertheless correctly concluded that res judicata precluded a finding that the permanent impairment attributable to her right knee was greater than 7%. In that respect, we affirm her decision. *See Bouchard v. Frost*, 2004 ME 9, ¶ 8, 840 A.2d 109 (affirming a judgment based on a rationale different from that relied on by the trial court).

[¶14] Ms. Somers contends that the language in *Bailey*, insofar as it states that the board cannot increase permanent impairment once it has been established, is *obiter dictum*, because it was unnecessary to the decision in the case and directed at an issue not raised or argued by the parties. Therefore, she asserts, it is not binding in this case. *See Answers to Question Propounded to the JJ. of the Supr. Jud. Ct. by the House of Representatives*, 118 Me. 503, 530 (1919) ("[D]ictum is not a judicial decision. It is binding upon no one, not even the Judge who utters it."). *Bailey*, she argues, addressed whether a downward revision of permanent impairment was possible and should be limited in its application to that set of facts. Ms. Somers, in contrast, is seeking an upward revision in permanent impairment,

which the Court has authorized in prior decisions. *See. e.g., Harvey v. H.C. Price Co.*, 2008 ME 161, ¶ 31, 957 A.2d 960. We disagree with this contention. The issue in *Bailey*, as framed by the Court, was whether the Workers' Compensation Act allows the board to revise a previously established impairment rating. It answered that question in the negative without distinguishing between upward and downward revisions. Therefore, pursuant to *Bailey*, the ALJ did not err when declining to revise the 7% impairment rating assigned to Ms. Somers' knee in the 2008 decree.

2. Psychological Condition

[¶15] Though Ms. Somers' right knee impairment is fixed, it is unclear whether, after *Bailey*, res judicata principles would foreclose the board from adding an impairment rating for a previously unrated sequela of her underlying injury. *See, e.g., id*. (affirming a 7% addition to a previously-fixed 5% whole person permanent impairment rating for major depression, a sequela of an underlying leg injury); *Cote v. Osteopathic Hosp. of Me., Inc.*, 447 A.2d 75, 78 (Me. 1982) ("The psychological feature was never raised, litigated or determined in any prior proceeding. Under these circumstances comparative evidence is neither possible nor required because there is nothing to which a comparison can be made."). To that end, Ms. Somers argues that the ALJ should have increased her

whole body impairment rating to account for the added impairment related to her psychological sequela.

[¶16] The board, however, decided the extent of Ms. Somers' psychological impairment in its 2008 decree when it found that her psychological condition was not permanent and thus, she suffered no permanent impairment as a result.[2] Although in 2016, Ms. Somers urged the ALJ to treat her psychological condition as two separate and distinct ailments defined by two different diagnoses spanning several years—adjustment disorder in 2008 and major depressive disorder in 2014—the ALJ declined to adopt such a distinction. While acknowledging that doctors have used different diagnoses to describe her condition, the ALJ found that the psychological problems that Ms. Somers exhibited in 2014 were a mere continuation of the problems that the board addressed in its 2008 decree. The record contains competent evidence to support the ALJ's finding that Ms. Somers did not develop a psychological condition separate and distinct from the condition addressed by the 2008 decree. Though her diagnosis changed, her overall psychological condition after 2008 remained substantially similar to what it had been at that time. Had she developed a new psychological condition sufficiently

[2] The current amended decree discusses whether Ms. Somers had reached maximum medical improvement with respect to her psychological condition. That discussion, however, is of no consequence to our decision. The hearing officer in the 2008 decree adopted the opinion of the independent medical examiner who "did not believe this psychological condition was permanent, and did not believe [Ms. Somers] sustained any permanent impairment due to a work-related mental injury." Therefore, there was a psychological permanent impairment determination in 2008 of 0% that cannot now be adjusted upward based on changed circumstances.

separate from the condition addressed in 2008, inquiry under the principles articulated by the Court in *Harvey* and *Cote*, *supra*, would be required.

[¶17] It follows, then, that Ms. Somers' psychological sequela is subject to the holding in *Bailey*. The 2008 decree set her psychological impairment at zero and that finding is not subject to reconsideration. The ALJ did not err by finding that Ms. Somers' whole person permanent impairment remained below the applicable threshold and granting S.D. Warren's Petition for Review.

III. CONCLUSION

[¶18] The ALJ correctly concluded that principles of res judicata precluded the board from increasing Ms. Somers' whole person permanent impairment rating as determined in 2008. Because that conclusion was definitive, we need not reach Ms. Somers' arguments regarding whether the ALJ correctly allocated the burdens of production and proof. For the reasons stated above, we affirm the decision of the ALJ to grant S.D. Warren's Petition for Review.

The entry is:

The ALJ'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).

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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