

NED E. HOOD  
(Appellant)

v.

MAINE DEPARTMENT OF CORRECTIONS  
(Appellee)

Argued: July 19, 2017  
Decided: February 13, 2018

PANEL MEMBERS: Administrative Law Judges Knopf, Goodnough, and Hirtle  
BY: Administrative Law Judge Hirtle

[¶1] Ned Hood appeals from a decision of a Workers' Compensation Board administrative law judge (*Elwin, ALJ*) granting, in part, Mr. Hood's Petition for Award and denying his Petition for Payment of Medical Services regarding an August 28, 2009, work injury. The ALJ adopted the medical opinion of an independent medical examiner appointed pursuant to 39-A M.R.S.A. § 312 (Supp. 2017) to find that the effects of Mr. Hood's respiratory injury ended after approximately one month. Mr. Hood argues that the ALJ erred by failing to make sufficient factual findings concerning how she weighed the medical opinion of a board-appointed medical examiner against other expert opinions. We agree in part and remand the decision for further findings.

## I. BACKGROUND

[¶2] Ned Hood suffered a respiratory injury while working for the Department of Corrections on August 28, 2009, when he was exposed to epoxy

paint fumes. Following his injury, Mr. Hood continued to work his regular job duties until experiencing chest pain, difficulty breathing, and profuse sweating on December 4, 2014. He has not worked for the Department of Corrections since that time. Mr. Hood then brought the pending petitions and alleged that the lasting effects of his respiratory injury contributed to the symptoms that began on December 4, 2014, and resulted in compensable earning incapacity under the Workers' Compensation Act.

[¶3] As part of the litigation process, the board referred Mr. Hood to an independent medical examiner pursuant to 39-A M.R.S.A. § 312. No motion was made before the examination to disqualify the independent medical examiner.

[¶4] In his report, the examiner opined that Mr. Hood likely suffered a work-related respiratory injury on August 28, 2009, but that the effects of his injury likely resolved by September 23, 2009. At the request of the parties, the examiner reviewed further medical records and issued a supplemental report but did not alter his conclusions. The parties then took the examiner's deposition testimony and the examiner testified that he had never treated a patient for the kind of substance exposure described by Mr. Hood, that his specialty is not occupational medicine or pulmonology, and that less than 1% of his current patients are being treated for any kind of toxic exposure. Thereafter, Mr. Hood argued that the ALJ should reject the examiner's opinion and adopt the opinions of other medical

experts who have experience treating toxic exposures and specialized training in pulmonology and occupational medicine.

[¶5] The ALJ issued the decision now being appealed and found that, although there were expert medical opinions contrary to that of the independent medical examiner, those opinions did not meet the statutory standard of “clear and convincing” evidence to rebut the examiner’s opinion as required by section 312(7). The ALJ therefore adopted the examiner’s opinion to find that the effects of Mr. Hood’s injury ended by September 23, 2009. The ALJ did not address Mr. Hood’s argument that the board should weigh the examiner’s lack of experience with toxic exposure cases and lack of specialization in occupational medicine or pulmonology when deciding if there was “clear and convincing” evidence to the contrary of the medical examiner’s opinion.<sup>1</sup>

[¶6] Mr. Hood filed a Motion for Additional Findings of Fact and Conclusions of Law, but in response, the ALJ made no substantive changes to her conclusions. This appeal followed.

## II. DISCUSSION

### A. Standard of Review

[¶7] When authoring decisions, an ALJ of the board is obligated to make adequate factual findings and conclusions of law so as to permit meaningful

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<sup>1</sup> The ALJ also found, in the alternative, that even if the effects of Mr. Hood’s injury had lasted beyond September 23, 2009, Mr. Hood had failed to demonstrate a causal connection between his respiratory injury and his symptoms of December 4, 2014.

appellate review. *Cote v. Town of Millinocket*, 444 A.2d 355, 359 n.5 (Me. 1982). In hearing appeals from ALJ decisions, 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) (quotation marks omitted). Because Mr. Hood requested findings of fact and conclusions of law following the decision, the Appellate Division may “review only the factual findings actually made and the legal standards actually applied by the [ALJ].” *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

#### B. Clear and Convincing Evidence Analysis

[¶8] Mr. Hood argues that the evidence and argument he presented to the ALJ—criticism of the examiner’s expertise and the relative expertise of conflicting medical experts—requires the Appellate Division to determine that the ALJ erred in finding no “clear and convincing” evidence to the contrary of the examiner’s opinion.

[¶9] We disagree that the evidence compels a contrary result on appeal. However, because Mr. Hood requested further findings of fact and conclusions of law following the ALJ’s decision, the Appellate Division is not free to make an

assessment of what findings the ALJ might have made regarding any issues of fact or law. Rather, our analysis is limited only to those factual findings and legal conclusions actually made by the ALJ.

[¶10] From the decision as written, we are unable to determine what findings or conclusions were made by the ALJ regarding the issue of the examiner’s level of experience with toxic exposure cases or the doctor’s specific medical expertise when compared to the expertise of competing expert medical opinions in the case. Under the procedural posture of this case, the ALJ’s decision does not contain sufficient findings for the Appellate Division to undertake meaningful review and we therefore remand for further findings addressing the “clear and convincing” evidence standard of section 312.<sup>2,3</sup>

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<sup>2</sup> On appeal, Mr. Hood does not challenge the ALJ’s alternative finding that he failed to demonstrate a causal connection between his respiratory injury and the symptoms that he experienced on December 4, 2014. That finding is therefore final. The limited issue on remand is thus whether there is clear and convincing evidence to the contrary of the examiner’s opinion regarding Mr. Hood’s respiratory symptoms beyond September 23, 2009; Mr. Hood may not on remand attempt for a second time to establish a causal connection between his injury and his symptoms of December 4, 2014.

With a footnote in his brief, Mr. Hood also states that it was error for the ALJ to exclude from evidence a letter from a medical expert dated May 25, 2016. Without citation to the applicable standard of review, *see White v. Ames Dep’t Store*, Me. W.C.C. 936, 939 (Me. App. Div. 1993) (reviewing a commissioner’s decision on the admissibility of evidence for an abuse of discretion), argument about why the ALJ’s evidentiary ruling is contrary to that standard, or citation to any authority in support of the asserted error, we find that this issue was not adequately briefed and therefore deem it waived on appeal, *see Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290 (“[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.”).

<sup>3</sup> This case is distinguished from recent decisions of the Appellate Division in which an ALJ’s authority to choose from among competing medical opinions has been upheld as solely within the province of the ALJ. *See e.g. White v. S.D. Warren Co.*, Me. W.C.B. No. 18-2, ¶ 5 (App. Div. 2018). In this case, the legal issue raised was the adequacy of the findings behind the ALJ’s choice among competing medical opinions and it is solely on that issue that we vacate in part and remand for further findings.

### III. CONCLUSION

[¶11] Because Mr. Hood requested further findings of fact and conclusions of law, the Appellate Division may only review the findings actually made by the ALJ. Those findings do not provide an adequate basis for meaningful review of the ALJ's "clear and convincing" evidence analysis and therefore the case is remanded for further findings.

The entry is:

The ALJ's decision is remanded for further findings on the issues specified in paragraph nine and footnote two.

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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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