APRIL MORTON
(Appellant)

v.

CUMBERLAND FARMS, INC.
(Appellee)

and

GALLAGHER BASSETT SERVICES
(Insurer)

and

MAINE EMPLOYERS' MUTUAL INSURANCE CO.
(Insurer)

Conference held: June 13, 2018
Decided: September 30, 2019

PANEL MEMBERS: Administrative Law Judges Stovall, Collier, and Knopf
BY: Administrative Law Judge Knopf

[¶1] April Morton appeals from a Workers' Compensation Board administrative law judge (*Elwin, ALJ*) decision that granted in part her Petitions for Award and for Payment of Medical and Related Services for a November 26, 2009, work injury to her neck and right shoulder, and denying her Petitions related to an alleged May 11, 2015, work injury to her hips and low back. Ms. Morton contends, among other things, that the evidence compels the conclusion that both of her injuries were caused by her work activities and that she is entitled to ongoing total incapacity benefits. We disagree with these contentions and affirm the ALJ's decision.

I. BACKGROUND

[¶2] Ms. Morton worked at a Cumberland Farms convenience store as a customer service associate and assistant manager. On November 26, 2009, Ms. Morton injured herself when she fell at work, landing on her right side. Although Ms. Morton testified that she felt symptoms in her right hip, leg, and knee, as well as her neck, the ALJ noted that on December 1, 2009, she reported only right arm and shoulder pain to her primary care provider. Ms. Morton continued to work despite her symptoms. In January 2011 she worked every day for over two weeks when she was the acting manager of the store. She was generally able to work within her restrictions by delegating heavier tasks to other employees, but eventually went out of work in February 2011.

[¶3] As a result of the work injury, Ms. Morton underwent two surgeries. In September 2012, Dr. Mancini performed a right rotator cuff surgery and in January 2013, Dr. D'Angelo performed a cervical fusion surgery. Ms. Morton returned to work after recovering from her surgeries on May 7, 2013. She was out of work briefly in September 2013 for right elbow symptoms that she believes were aggravated due to her stocking the coolers. Thereafter, she returned to work for Cumberland Farms full duty.

[¶4] In March and April 2015, Ms. Morton began experiencing pain in both hips, which she noticed mainly when mopping at work. By mid-May, her hip pain

had worsened, and Ms. Morton developed sciatic pain down both legs. Ms. Morton testified that her condition was aggravated on May 21, 2015, when she lifted an iced tea canister at work. Ms. Morton was taken out of work shortly thereafter, and Dr. D'Angelo performed a discectomy at L4-5 on June 1, 2015. Since recovering from the most recent surgery, Ms. Morton has continued to experience a variety of symptoms, but has been medically released to return to work full-time, with restrictions. At the time the case was heard, Ms. Morton had not returned to work.

[¶5] Ms. Morton filed her petitions in October 2015. The parties did not dispute that Ms. Morton fell at work on November 26, 2009. Dr. Donovan, who performed an evaluation of Ms. Morton on July 19, 2016, pursuant to 39-A M.R.S.A. § 312 (Supp. 2018), indicated that Ms. Morton's right shoulder rotator cuff tear and herniated cervical disc at C6-7, both of which required surgery, were caused by the November 26, 2009, work injury. Dr. Donovan did not believe that Ms. Morton injured her ribs in the 2009 injury. The ALJ adopted Dr. Donovan's opinion as it pertained to that injury.

[¶6] The ALJ was not persuaded, however, that Ms. Morton suffered a second work-related injury in May of 2015. The ALJ found that Ms. Morton's testimony regarding the canister-lifting incident was not credible, was not supported by contemporaneous medical records, and was contradicted by the testimony of her

coworkers. She also found that there is no medical support for finding that Ms. Morton's work activities, including mopping, caused a gradual lower back injury.

[¶7] The ALJ determined that Ms. Morton has a partial incapacity as result of the 2009 work injury. Based on Ms. Morton's age, education, work experience, and restrictions, the ALJ determined that Ms. Morton is able to work 40 hours per week earning $10 per hour. Because Ms. Morton's earning capacity exceeded the average weekly wage for the 2009 work injury, the ALJ determined that she is not entitled to partial incapacity benefits. The ALJ also determined that treatment to Ms. Morton's neck and right shoulder are compensable. Neither party filed a motion for further findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318 (Supp. 2018). Ms. Morton appeals.

II. DISCUSSION

A. Standard of Review

[¶8] 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). When a party does not request further findings of fact pursuant to 39-A M.R.S.A. § 318, the Appellate Division will treat the ALJ "as having made whatever factual

determination could, in accordance with correct legal concepts, support [the] ultimate decision, and we inquire whether on the evidence such factual determinations must be held clearly erroneous." *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Scope of 2009 Injury

[¶9] Ms. Morton first contends that the ALJ erred when failing to find that she injured her ribs as part of the 2009 work injury. With respect to that injury, the ALJ adopted the opinion of Dr. Donovan, who was appointed by the Board as an independent medical examiner. Dr. Donovan stated in his report that "[t]he right rib condition and others do not appear related to either [date of injury]."

[¶10] The ALJ is required to adopt the medical findings of an independent medical examiner "unless there is clear and convincing evidence to the contrary in the record." 39-A M.R.S.A. § 312(7). Clear and convincing evidence is evidence that demonstrates that it is highly probable that a disputed fact is contrary to that found by the examining doctor. *Dubois v. Madison Paper Co*., 2002 ME 1, ¶ 14, 795 A.2d 696. The Appellate Division may reverse an ALJ's decision based on an independent medical examiner's findings only if the decision is unsupported by competent evidence and the record discloses no rational basis to support the IME's medical findings. *See Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983); *Dillingham v. Great N. Paper*, Me. W.C.B. No. 15-7, ¶ 3 (App. Div. 2015).

[¶11] Dr. Donovan's medical findings are rationally based on medical evidence that is thoroughly documented in his report and deposition. That evidence includes contemporaneous medical records that refer only to injury to the neck, right shoulder, and right arm, and do not reference any injury to the ribs. The ALJ did not err by adopting Dr. Donovan's findings.

C. Incapacity

[¶12] Ms. Morton next contends that the ALJ erred by failing to award her total incapacity benefits from May 22, 2015, to the present and continuing. Dr. Donovan, however, placed no restrictions on the number of hours Ms. Morton could work. As with Dr. Donovan's findings concerning Ms. Morton's ribs, the ALJ was required to accept his medical findings absent clear and convincing evidence to the contrary. 39-A M.R.S.A. § 312(7). Additionally, Dr. Herzog produced two reports in which he provided specific restrictions but placed no limitations on work hours.[1] Although the record contains conflicting evidence that restrictions on work hours were appropriate for Ms. Morton, including Dr. Lawes's opinion that Ms. Morton was able to work only twenty hours per week, Ms. Morton made no argument that this evidence contradicted Dr. Donovan's opinion on a clear and convincing basis.

[1] Ms. Morton also suggests that the record does not contain all of Dr. Herzog's reports. The record contains two reports from Dr. Herzog dated March 2, 2016, and September 30, 2015. We see no suggestion in the record that Ms. Morton was seen by Dr. Herzog on any additional dates. We have carefully reviewed both of those reports and neither recommends any restrictions on the hours that Ms. Morton can work.

Moreover, it is within the ALJ's authority to decide between conflicting versions of the facts. *See Boober v. Great N. Paper Co*., 398 A.2d 371, 375 (Me. 1979). The ALJ's finding regarding work capacity is supported by the evidence, and as such, we do not disturb it.[2] *See Dillingham*, Me. W.C.B. No. 15-7, ¶ 3.

D. Incomplete Record

[¶13] Ms. Morton next contends that the ALJ based her decision on an incomplete record. In her brief, she states that she went to Express Care on July 21, 2016, because she was experiencing increased symptoms after attending the independent medical examination. She asserts that the record of that visit, which was not submitted to the ALJ before the evidence closed, should be included in the record on appeal. We disagree.

[¶14] The Appellate Division is not free to add evidence to the record that was not before the ALJ when she made her determination. Our review of the merits of an appeal is limited to the facts and evidence in the record before the administrative law judge. *See Beane v. Me. Ins. Guaranty Ass'n*, 2005 ME. 104, ¶ 9, 880 A.2d 284. We do not consider new materials that were not presented to the ALJ. *Id.*

[2] Even if the evidence supported this contention, in her position paper submitted to the ALJ, Ms. Morton requested a closed-end period of total incapacity benefits, followed by ongoing 100% partial incapacity benefits. No evidence was submitted to support a claim for 100% partial benefits, and no specific request was made for ongoing total incapacity benefits. Accordingly, the claim for ongoing total incapacity benefits has been waived. *See Severy v. S.D. Warren Co.*, 402 A.2d 53, 56 (Me. 1979).

[¶15] Moreover, it does not appear that Ms. Morton requested that her case be reopened at the hearing level to introduce additional documentation pursuant to 39-A M.R.S.A. § 319 (2001). Accordingly, her contention lacks merit.

E. Work Hardening

[¶16] Ms. Morton contends that the ALJ erred by failing to find that she had been denied work hardening by Cumberland Farms. Work hardening had been suggested by Dr. Herman and Dr. Herzog. Without work hardening, Ms. Morton argues that her condition has not improved and that is why she has not returned to work.

[¶17] Although work hardening may have benefited Ms. Morton, the record does not indicate that Ms. Morton requested that she be allowed to return to work. To the contrary, Ms. Morton testified that she was waiting for a release from her primary care physician, Dr. Lawes, before requesting that she be allowed to return to work. Further, there is nothing in the record to suggest that her condition worsened because she did not return to work in an accommodated position or otherwise.

[¶18] Additionally, that specific relief was not requested in her position paper. Because Ms. Morton raises this argument for the first time on appeal, it has not been preserved for appellate review. *Severy v. S.D. Warren Co.*, 402 A.2d 53, 56 (Me. 1979) ("Whether in the criminal or civil sphere, we have long adhered to the practice of declining to entertain arguments not presented to the original tribunal.");

Henderson v. Town of Winslow, Me. W.C.B. No. 17-46, ¶ 10 (App. Div. 2017) (explaining the importance of raising a legal argument at a time and manner sufficient to give the ALJ and opposing party a fair opportunity to respond and address it). The ALJ did not err by failing to address issues related to work hardening.

F. The May 2015 Injury

[¶19] Ms. Morton contends the ALJ erred when finding that she did not prove that the May 2015 injury to her hips and back—either acute or gradual—was work-related. Ms. Morton had the burden of proof on the issue of whether her injury was caused by her work. To prevail on appeal, she must establish that the evidence compels the conclusion that her work caused an acute or gradual injury to her hips and back as of May 21, 2015. *Savage v. Georgia Pacific*, Me. W.C.B. No. 13-5, ¶ 7 (App. Div. 2013).

[¶20] First, the ALJ did not credit Ms. Morton's testimony that an acute injury occurred to her hips or back at work in May 2015. Specifically, the ALJ noted that Ms. Morton visited Dartmouth Collaborative Care the day after the alleged May 21, 2015, incident, but the note from that visit does not mention that Ms. Morton told the providers about lifting an iced tea canister. It was not until May 28, 2015, in her consultation at Maine Medical Center with Nurse Practitioner Ellen Murphy, that she mentioned lifting an iced tea canister, but she said it happened on May 14, 2015.

In addition, the ALJ credited the testimony of Mr. Manzo, the store manager, that Ms. Morton did not mention the canister-lifting incident to him. Lastly, the ALJ credited the testimony of Sadie Davis, Ms. Morton's coworker, who worked with Ms. Morton on the same shift when the canister-lifting incident purportedly occurred. Ms. Davis testified that she did the heavy lifting when they worked together because Ms. Davis was aware that Ms. Morton had difficulty lifting heavy objects.

[¶21] The ALJ, as the fact-finder and sole judge of the credibility of witnesses, was well within her authority to choose between conflicting versions of the facts. We find no reversible error in the ALJ's decision not to credit Ms. Morton's testimony, particularly in light of the contemporaneous medical records that lacked reference to the alleged canister-lifting incident, and her co-workers' testimony. *See See Boober*, 398 A.2d at 375.

[¶22] With regard to the alleged gradual injury, the ALJ found that "there is no medical support for finding that Ms. Morton's work activities, including mopping, which she identified as causing her hip discomfort, caused a gradual lower back injury which required surgery." Again, there is conflicting evidence in the record regarding the cause of Ms. Morton's disc herniation, including Dr. Donovan's report that points to a preexisting hip condition, and his deposition testimony that the disc herniation could have originated with manipulative treatment in her

provider's office. As noted above, it is within the province of the ALJ to decide between conflicting versions of the facts. *See id*.

[¶23] The ALJ did not err when finding that Ms. Morton's work did not cause an acute or gradual injury to her hips and low back.

G. Inadequate Representation

[¶24] Ms. Morton contends that her attorney did not represent her interests adequately by ensuring a complete record or zealously representing her at Dr. Donovan's deposition. 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, e.g.*, *Nelson v. Boeing Co*., 446 F.3d 1118, 1121 (10th Cir. 2006) (holding that the statutory right to request assistance of counsel under Title VII does not create corresponding right to effective assistance of counsel). Moreover, having carefully reviewed the board file, we find no suggestion of ineffective assistance on the face of the record.

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. 2018).

Pursuant to board Rule, ch. 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.

Appellant:
April Morton, pro se
6 Preston Street
Apartment 1
Waterville, ME 04901

Attorney for Appellee/Gallagher Bassett:
Lindsey Morrill Sands, Esq.
NORMAN HANSON & DeTROY
P.O. Box 4600
Portland, ME 04112

Attorney for Appellee/MEMIC:
Elizabeth Eddy Grifffin, Esq.
MEMIC
261 Commercial Street
P.O. Box 3606
Portland, ME 04104