

GREGORY BURNS
(Appellee)

v.

MAINE DEPARTMENT OF PUBLIC SAFETY
(Appellant)

and

STATE OF MAINE WORKERS' COMPENSATION DIVISION
(Insurer)

Argued: February 7, 2018
Decided: October 9, 2019

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

[¶1] The Maine Department of Public Safety appeals a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) that denied its Petition for Review, finding that it failed to carry its burden of proving that Gregory Burns had regained an ability to work. The Department contends that the evidence presented compels a finding that Mr. Burns had regained an earning capacity, and that the ALJ erred in concluding otherwise. We affirm the decision.

I. BACKGROUND

[¶2] Gregory Burns worked as a Maine state trooper from 1998 through 2011. In a 2012 decree, the hearing officer (*Pelletier, HO*) established that Mr. Burns suffered a compensable work injury in the nature of post-traumatic stress disorder

(PTSD) with an injury date of July 10, 2010. The board ordered total incapacity benefits for a closed-end period of approximately six months, followed by ongoing partial incapacity benefits reflecting Mr. Burns's earnings performing carpentry work. As part of that opinion, the board rejected the medical opinion of Dr. Robert Gallon, who opined that Mr. Burns had been temperamentally unfit for work as a state trooper. Later, in 2013, the board (*Greene, HO*) granted Mr. Burns's Petition for Review, and awarded total incapacity benefits on an ongoing basis. In that decision, the board adopted the opinion of Dr. John Lorenz, Mr. Burns's treating psychologist, that he had a severe case of PTSD, that he was not psychologically capable of continuing his work as a carpenter, and that he should work on acquiring greater "emotional reserve" while not working. In 2016, the Department filed the pending Petition for Review seeking to reduce benefits based in part on surveillance evidence, contending that it demonstrates that Mr. Burns's condition has improved.

[¶3] The ALJ (*Hirtle, ALJ*) determined that the Department had carried its burden of proving a change in circumstances sufficient to re-open the issue of Mr. Burns's earning incapacity. Specifically, the ALJ concluded that the evidence established that Mr. Burns had some success in improving his functional capacity and in reintegrating with his community since the date of the previous decree. However, the ALJ further concluded that the evidence was not sufficient to carry the Department's burden of proving that Mr. Burns had regained a partial earning

capacity. The Department moved for additional findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318 (Supp. 2018), which the ALJ denied. The Department appeals, arguing that the evidence compels the conclusion that Mr. Burns has some work capacity.

II. DISCUSSION

[¶4] “A finding of fact by an administrative law judge is not subject to appeal [before the Appellate Division].” 39-A M.R.S.A. § 321-B(2) (Supp. 2018). 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 an [ALJ] concludes that the party with the burden of proof failed to meet that burden, we will reverse that determination only if the record compels a contrary conclusion to the exclusion of any other inference.” *Anderson v. Me. Pub. Employees Ret. Sys.*, 2009 ME 134, ¶ 28, 985 A. 2d 501; *Kelley v. Me. Pub. Employees Ret. Sys.*, 2009 ME 27, ¶ 16, 967 A. 2d 676; *Civiello v. Coventa Energy*, Me. W.C.B. No. 16-45, ¶ 2 (App. Div. 2016).

[¶5] The evidence in the record does not compel a finding that Mr. Burns has regained a partial earning capacity. The ALJ found that Mr. Burns’s functional capacity had improved over time, citing his ability to provide full-time care for his

young child, attend church, and help out at a campground where he stayed for periods of time. Nevertheless, the ALJ relied upon multiple relevant facts supported by evidence in the record to conclude that Mr. Burns remained totally incapacitated. Specifically, the ALJ assigned credibility and weight to Mr. Burns's accounts that he could not do volunteer work with the Bangor Police Department and could not do work on a delivery driver route because of stressful mental associations with his past police work. The ALJ similarly was persuaded by Mr. Burns's testimony that he could not complete accounting classes at Beal College because he found it too stressful. Furthermore, it was reasonable for the ALJ to credit Mr. Burns's testimony that he helped teach a class at a campground only after significant reluctance and because of specially accommodating circumstances.

[¶6] The Department argues that the ALJ erred in relying on Mr. Burns's testimony for various reasons related to credibility, namely that (1) he failed to report details about his activity at the campground during the first hearing; (2) he failed to report his work as a FedEx driver to his psychologist, Dr. Lorenz; and (3) he failed to cooperate with the examination by Dr. Gallon on behalf of the Department pursuant to 39-A M.R.S.A. § 207 (Supp. 2018). We find no error. While another fact-finder might have viewed this evidence as urged by the Department, the ALJ is the exclusive judge of credibility. *Gilbert v. S.D. Warren*, Me. W.C.B. No. 16-12, ¶ 11 (App. Div. 2016).

[¶7] Finally, the ALJ carefully analyzed the medical evidence in this matter. He found Dr. Gallon’s opinions to be “substantially unaltered from the opinion he expressed in 2011 which was rejected by the Board” and therefore deemed them unpersuasive. The ALJ also concluded that the portions of Dr. Lorenz’s opinions that tended to support work capacity were expressed “very tentatively and with a long list of conditions which undercut the persuasive weight of his opinions.” Based on these facts, and considering Mr. Burns’s work at the campground, the ALJ characterized Mr. Burns as having an “ability to earn occasional wages,” which he concluded was not sufficiently persuasive to carry the Department’s burden of proving that Mr. Burns had regained work capacity.

[¶8] As support for concluding that receipt of “occasional wages” does not legally preclude a finding of total disability, the ALJ cited to *Levesque v. Shorey*, 286 A.2d 606 (Me. 1972), a case in which the Law Court affirmed the Commissioner’s finding that an employee was totally incapacitated in spite of evidence that he was able to build a canoe worth \$75. *Id.* at 610. The Department argues that *Levesque* is distinguishable because Mr. Burns has “demonstrated much greater work capacity” than the employee in that case.

[¶9] The Department also argues that Dr. Lorenz’s opinion on Mr. Burns’s work capacity does not support a finding of total incapacity because, even with a long list of conditions, Dr. Lorenz’s opinion was that Mr. Burns had some ability

to work. However, the ultimate question for the ALJ was whether the evidence met the Department's burden of proving that Mr. Burns had regained work capacity, and the ALJ was not so persuaded. The ALJ was not required to directly adopt Dr. Lorenz's opinion, but was permitted to consider it as evidence of whether or not Mr. Burns's incapacity remains total. *See Johnson v. Maine Dept. of Transp.*, Me. W.C.B. No. 17-32, ¶ 15 (App. Div. 2017) ("We defer to the ALJ, as fact-finder, to determine what evidentiary weight to attach to particular evidence, and what inferences may or may not be drawn from the evidence." (citing *Zablotny v. State Bd. of Nursing*, 2017 ME 29, ¶ 18, 156 A.3d 126)). Competent evidence, including Dr. Lorenz's opinion, supported the ALJ's conclusion that Mr. Burns's work represented "occasional wages," and the ALJ's reliance on *Levesque* was a proper application of the law.

[¶10] There is competent evidence in the record supporting the facts found by the ALJ. Moreover, the evidence in the record does not compel a conclusion that the Department carried its burden of proving that Mr. Burns had an earning capacity. The ALJ did not err in concluding that Mr. Burns remains totally incapacitated.

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, 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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