STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
App. Div. Case No. 20-0004
Decision No. 21-23

SUSAN CUSHMAN
(Appellee)

v.

WALGREEN EASTERN CO., INC.
(Appellant)

and

SEDGWICK CLAIMS MANAGEMENT SERVICES
(Insurer)

Argued: August 19, 2020
Decided: August 25, 2021

PANEL MEMBERS: Administrative Law Judges Elwin, Hirtle, and Knopf
By: Administrative Law Judge Hirtle

[¶1] Walgreen Eastern Co., Inc., (hereafter "Walgreen") appeals from a decision of a Workers' Compensation Board administrative law judge (*Collier, ALJ*). Walgreen contends the ALJ erred when determining that Susan Cushman established a work-related aggravation of a preexisting condition, pursuant to 39-A M.R.S.A. § 201(4) (Pamph. 2020). Specifically, Walgreen argues that the medical evidence presented by Ms. Cushman was inadequate to meet her burden of proof because the ALJ misidentified the author of the causation opinion he relied upon to grant Ms. Cushman's petitions.[1] We affirm the decision in part, vacate in part, and remand the case for further findings.

[1] With its brief, Walgreen also asserted that the ALJ committed reversible error in finding that Ms. Cushman provided timely notice of the alleged injury. At oral argument, counsel for Walgreen informed the panel that the notice issue was not being pursued on appeal.

## I. BACKGROUND

[¶2] Susan Cushman worked for Walgreen as a retail cashier and customer service associate. Her regular work duties included stocking shelves. Before the alleged work injury date, Ms. Cushman received medical treatment with Jeffrey Bean, D.O., for right shoulder pain in 2016 and bilateral shoulder pain in 2017. Dr. Bean diagnosed Ms. Cushman with calcific tendinosis and AC joint arthrosis, which he treated with corticosteroid injections.

[¶3] On October 4, 2018, Ms. Cushman experienced increased right shoulder pain while restocking shelves during a "busy day" after her store had received a truck delivery of goods. Ms. Cushman returned to the care of Dr. Bean on October 5, 2018, but Dr. Bean did not opine on the source of her right shoulder symptoms. On October 23, 2018, Ms. Cushman saw a different physician in the same practice: Benjamin Huffard, M.D. At the conclusion of this appointment, Dr. Huffard completed an M-1 practitioner's report[2] and identified Ms. Cushman's right shoulder condition as "work related." Ms. Cushman underwent right shoulder surgery and was out of work for approximately six months beginning in December of 2018. She then increased her hours, working with restrictions, for approximately one month. Thereafter, she resumed her pre-injury schedule, working the same number of hours as before the

[2] The M-1 practitioner's report is the reporting form authorized by 39-A M.R.S.A. § 208(2)(A) (Pamph. 2020) and specified by Me. W.C.B. Rule, ch. 5 § 1.11(6).

injury. Walgreen denied liability for lost wages and medical benefits and the case proceeded to litigation.

[¶4] The M-1 practitioner's report of October 23, 2018, was not the only such report in the record, but each M-1 identified by Ms. Cushman in her written argument on appeal was completed either by Dr. Huffard or by a physician's assistant in the same office; none were completed by Dr. Bean. In a decision dated November 4, 2019, the ALJ misidentified the author of the M-1 practitioner's report dated October 23, 2018, as Dr. Bean, instead of the correct author, Dr. Huffard or the physician's assistant. The ALJ found that Ms. Cushman had demonstrated legal causation with her description of her work tasks on the alleged date of injury as activity that "increased the risk of disability above that present in an average person's non-employment life, and thus satisfies the requirement that Ms. Cushman's employment contributed significantly to her disability." The ALJ then found that Ms. Cushman had demonstrated medical causation with the M-1 practitioner's report of October 23, 2018, noting that Dr. Bean "was certainly aware of her history of right shoulder pain, as he had personally treated her in 2016 and 2017."

[¶5] The ALJ then granted Ms. Cushman's pending petitions, ordering close ended periods of total and partial incapacity benefits and payment of medical expenses. Walgreen filed a Motion for Additional Findings of Fact and Conclusions

of Law under 39-A M.R.S.A. § 318 (Pamph. 2020)201(4), which the ALJ granted but made no substantive changes. This appeal followed.

## II. DISCUSSION

### A. Standard of Review

[¶6] 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 Walgreen requested findings of fact and conclusions of law following the decision, the Appellate Division will "review only the factual findings actually made and the legal standards actually applied by the [ALJ]." *Daley v. Spinnaker Inds., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

### B. Medical Causation

[¶7] Walgreen argues that the ALJ committed reversable error by misstating the identity of the medical provider who completed the M-1 practitioner's report on October 23, 2018, and compounded that misidentification by finding persuasive weight in the fact that the medical provider who completed the report had provided Ms. Cushman's prior right shoulder treatment. Ms. Cushman argues that where both medical providers worked in the same office, it is a reasonable inference that both

medical providers were aware of Ms. Cushman's prior treatment. She contends, therefore, that there is no error in the ALJ's reliance upon the M-1 practitioner's report, regardless of which medical provider actually completed the report.

[¶8] Walgreen's argument is persuasive. It is undisputed that the ALJ misidentified the author of the M-1 practitioner's report dated October 23, 2018. While such a misidentification alone may not rise to the level of reversible error, *see, e.g., Higgins v. H.P. Hood, Inc.*, 2007 ME 94, ¶ 19, 926 A.2d 1176, when it is accompanied by inferences based on past medical treatment that the author of the M-1 practitioner's report did not perform, we find that the ALJ's medical causation findings are without a rational foundation. The ALJ's findings regarding medical causation are therefore vacated and the case is remanded for further findings as to whether the opinions expressed by Dr. Huffard in the M-1 practitioner's report are sufficiently persuasive to carry Ms. Cushman's burden. *See Spear v. Town of Wells*, 2007 ME 54, ¶ 13, 922 A2d 474 (remanding for clarification of inconsistent or unclear findings of fact).

C. Legal Causation

[¶9] Walgreen also contends that the ALJ erred in his analysis of legal causation in the case, both for want of competent evidence supporting an acute, rather than a gradual, injury on the date alleged and for want of an expert medical opinion specifically stating that the facts surrounding Ms. Cushman's injury meet

the requirements of 39-A M.R.S.A. § 201(4). We do not address this contention because on remand, after addressing whether Ms. Cushman has met her burden of persuasion to establish medical causation, the ALJ must also address whether Ms. Cushman has met her burden of persuasion to establish her right shoulder condition as compensable pursuant to 39-A M.R.S.A. § 201(4). *Derrig v. Fels Co.*, 1999 ME 162, ¶ 6, 747 A.2d 580 (stating that subsection 201(4) is not applicable in the initial determination of whether an employee has suffered a work-related injury); *Spear*, 2007 ME 54, ¶ 13, 922 A.2d 474 (remanding for clarification of findings and application of section 201(4) after the hearing officer first determines whether an injury occurred).

## III. CONCLUSION

[¶10] Because the ALJ misidentified the author of the adopted causation opinion and made an inference regarding the knowledge of the opinion's author based on that misidentification, we vacate the decision in part, and remand for further findings on the issue of medical causation. On the other issues raised by Walgreen we affirm the decision.

The entry is:

> The administrative law judge's decision is affirmed in part, vacated in part, and remanded for further findings consistent with this decision.

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 (Pamph. 2020).

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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