STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
App. Div. Case No. 20-0012
Decision No. 22-2

MICHAEL BOULANGER
(Appellee)

v.

S.D. WARREN
(Appellant)

and

ESIS/CCMSI/HELMSMAN
(Administrators)

Argued: February 11, 2021
Decided: January 14, 2022

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

[¶1] S.D. Warren/Helmsman and S.D. Warren/CCMSI appeal from a decision of a Workers' Compensation Board administrative law judge (*Jerome, ALJ*) granting Michael Boulanger's Petition for Review and increasing his benefit level to total. The appellants argue that the ALJ erred by (1) finding that Mr. Boulanger met his burden of proving that the record contained comparative medical evidence sufficient to support a change in circumstances since the 2016 decree; and (2) admitting Dr. Voss's 2019 report over timeliness objections. Helmsman additionally argues the ALJ erred in denying Helmsman's petition to terminate benefits due to the lack of evidence establishing a causal relationship between Mr. Boulanger's psychological impairment and Helmsman's 1998 injury. We affirm the decision.

I. BACKGROUND

[¶2] This case involves an employee who sustained multiple injuries while working for a single employer, with the responsibility for those injuries falling to three separate third-party administrators (TPAs). A June 2, 1989, left shoulder injury occurred while CCMSI was the TPA; a January 13, 1998, right shoulder injury occurred while Helmsman Management Services was the TPA; and on January 15, 2002, a carpal tunnel injury occurred while ESIS was the TPA. Together they have been the subject of numerous board decisions and a 2019 Appellate Division decision. *See Boulanger v. S.D. Warren*, Me. W.C.B. No. 19-1 (App. Div. 2019) (authorizing apportionment among different third-party administrators pursuant to 39-A M.R.S.A. § 354(3) (Pamph. 2020) despite there being only one employer in this multiple injury case).

[¶3] Thereafter, Helmsman filed a Petition to Terminate Benefits based on the expiration of the 520-week durational limit for the 1998 injury. ESIS then filed a Petition to Determine Offset, asserting that it would be entitled to reduce its compensation obligation by the portion of benefits attributable to the 1998 injury if Helmsman's petition is granted. Following mediation on those petitions in April 2019, Mr. Boulanger filed a Petition for Review, seeking to increase his partial incapacity benefits to total. ESIS then filed a Petition to Determine Rights and Responsibilities, seeking a ruling that CCMSI's payment obligation on the 1989

injury should be revived if Mr. Boulanger's Petition for Review is granted. The petitions were consolidated and mediated on October 2, 2019, the date of a previously scheduled hearing.

[¶4] Six days before the hearing, Mr. Boulanger notified the parties of his intention to offer a new medical report by Dr. Voss, a psychiatrist. Helmsman objected to the admission of Dr. Voss's report as untimely as it had not been exchanged at least seven days before the hearing, as contemplated by Me. W.C.B. Rule, ch. 12. Mr. Boulanger asked for a continuance to which Helmsman objected. The ALJ denied the request for continuance and overruled the objection to Dr. Voss's report.

[¶5] The ALJ issued a decision on January 31, 2020, finding Mr. Boulanger had carried his burden of establishing by comparative medical evidence that his medical circumstances had changed since the May 23, 2016, decree, and he had become totally incapacitated due to his physical and psychological conditions as of September 11, 2019, the date of Dr. Voss's psychiatric assessment. In granting Mr. Boulanger's petition, the ALJ relied on the opinions of Dr. Voss and Dr. Stockwell, as well as her observations of Mr. Boulanger during the 2015 and 2019 hearings.

[¶6] Given the finding of total incapacity, the ALJ granted Mr. Boulanger's Petition for Review, and denied Helmsman's Petition to Terminate Benefits and ESIS's Petition to Determine Offset as moot. The ALJ granted ESIS's Petition for

Determination of Rights and Responsibilities and ordered CCMSI to resume reimbursing ESIS for its share of incapacity due to the 1989 injury. The ALJ continued to apportion liability equally among the parties with initial payment responsibility assigned to ESIS on the 2002 work injury. Helmsman and CCMSI filed motions for findings of fact and conclusions of law, which were denied. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶7] The Appellate Division's role on appeal is "limited to assuring that the [ALJ's] factual 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). When a party requests and proposes additional findings of fact and conclusions of law, as was done in this case, the Appellate Division reviews "only the factual findings actually made and the legal standards actually applied" by the ALJ. *Daley v. Spinnnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Change of Circumstances Based on Comparative Medical Evidence

[¶8] CCMSI and Helmsman argue the ALJ erred in finding Mr. Boulanger had demonstrated a change in circumstances by comparative medical evidence,

sufficient to justify revisiting his prior award of partial incapacity benefits. We disagree.

[¶9] A party seeking a change in benefits from those awarded in a previous decree bears the burden of proving a change in circumstances since the previous decree. *Folsom v. New England Tel. & Tel. Co*., 606 A.2d 1035, 1037 (Me. 1992). When a party seeks to prove a change in circumstances based on a change in medical condition, the party must provide comparative medical evidence; a medical expert must explicitly compare the employee's medical condition before the previous decree was issued with the employee's medical condition currently. *Van Horn v. Hillcrest Foods, Inc*., 392 A.2d 52, 54-55 (Me. 1978).

[¶10] The ALJ specifically relied on two sources, Dr. Stockwell and Dr. Voss, in determining a change in circumstances had occurred sufficient to warrant review of the compensation payment scheme established in the 2016 decree. The ALJ noted that both doctors either treated or evaluated Mr. Boulanger's physical and emotional conditions in the last round of litigation and again in the current round of litigation. The ALJ further noted Dr. Stockwell assessed Mr. Boulanger with a sedentary work capacity as of July 2016, prior to the 2016 decree, but changed his assessment to total incapacity as of October 2016, after the 2016 decree.[1]

[1] S.D. Warren argues that Dr. Stockwell's opinion does not represent a change in circumstances because he changed his opinion on work capacity a number of times. Moreover, it argues that the change in opinion on this occasion was not the result of any change in Mr. Boulanger's underlying condition, but merely a reassessment of his work capacity. This argument lacks merit.

[¶11] The ALJ also relied on Dr. Voss's assessment in finding a change in circumstances by comparative medical evidence. In Dr. Voss's initial report from July 2015, he assessed "mild" permanent impairment at 5% whole person but in his report of September 2019, assessed permanent impairment in the "moderate range" finding a work-related impairment of 21%. In addition, in 2015, Dr. Voss noted that Mr. Boulanger was unable to do his former work, "a job that involves more than light duty." However, in his 2019 opinion, he indicated Mr. Boulanger "is not able to work in any job on a reliable sustained basis due to the combination of physical symptoms of pain and related impairments and symptoms of major depression and related impairments." He also reported that Mr. Boulanger's symptoms "have increased since he was seen four years ago" and Dr. Voss changed his diagnosis from "unspecified depressive disorder – somewhat improved with treatment" to "major depressive order – moderate to serious."

[¶12] The facts the ALJ relied on are sufficient to support a finding of a change in circumstances by comparative medical evidence.

C. Admission of Dr. Voss's Report

[¶13] Helmsman and CCMSI argue the ALJ violated 39-A M.R.S.A. § 309(3) (Pamph. 2020) and abused the discretion conferred by Me. W.C.B. Rule, ch. 12, § 12(1) in admitting Dr. Voss's 2019 report over a timeliness objection.

[¶14] Mr. Boulanger provided Dr. Voss's report and notified the parties of his intent to offer the report in evidence on September 26, 2019, six days before the October 2, 2019, hearing. That day, Helmsman sent a letter to the ALJ and the parties objecting to admission of the report, citing only Rule, ch. 12, § 12(1), which provides that an ALJ may exclude exhibits not exchanged within seven days before the hearing.

[¶15] At the hearing, Helmsman renewed its objection to the admission of Dr. Voss's report on that grounds that it was not timely provided, again citing Rule, ch. 12, § 12(1). Helmsman contended that Mr. Boulanger had asserted his argument regarding total incapacity as early as April 2019 and delayed unnecessarily in obtaining and providing the report. Mr. Boulanger represented that he requested Dr. Voss's report after learning that Dr. Stockwell had closed his practice and his records were not available, and he provided Dr. Voss's report as soon as he received it.

[¶16] The ALJ overruled the objection and admitted the report stating:

> It's a day late. I'm overruling your objection. If that puts any defense counsel in a position where they think they need to address it, you will let me know and we'll discuss it. I do think I have discretion to let it in, and I'm going to let it in. There's lot [sic] of legal arguments in this matter, and so if there is some procedural matter, something you want to address because of that, you can let me know.

[¶17] Helmsman and CCMSI reasserted the objection to the admission of Dr. Voss's report pursuant to the board rule in their position papers. However, Helmsman and CCMSI did not raise an objection based on section 309(3) until they

filed their proposed findings of fact and conclusions of law, *after* the ALJ issued her decision. They nevertheless contend that the ALJ erred by failing to address this argument, and that section 309(3) requires exclusion of the Voss report.[2]

1. Waiver

[¶18] Mr. Boulanger contends that Helmsman and CCMSI waived their section 309(3) argument by raising it belatedly. We agree.

[¶19] By failing to make an argument based on section 309(3) until after the ALJ issued her decision, Helmsman and CCMSI forfeited consideration of that issue. *See Morey v. Stratton*, 2000 ME 147, ¶¶ 8-10, 756 A.2d 496 (emphasizing "the importance of bringing the specific challenge to the attention of the trial court at a time when the court may consider and react to the challenge"). The timing of

[2] 39-A M.R.S.A. § 309(3) provides:

> **3. Witnesses; discovery**. All witnesses must be sworn. Sworn written evidence may not be admitted unless the author is available for cross-examination or subject to subpoena; except that sworn statements by a medical doctor or osteopathic physician relating to medical questions, by a psychologist relating to psychological questions, by a chiropractor relating to chiropractic questions, by a certified nurse practitioner who qualifies as an advanced practice registered nurse relating to advanced practice registered nursing questions or by a physician's assistant relating to physician assistance questions are admissible in workers' compensation hearings only if notice of the testimony to be used is given and service of a copy of the letter or report is made on the opposing counsel 14 days before the scheduled hearing.
>
> Depositions or subpoenas of health care practitioners who have submitted sworn written evidence are permitted only if the administrative law judge finds that the testimony is sufficiently important to outweigh the delay in the proceeding.
>
> The board may establish procedures for the prefiling of summaries of the testimony of any witness in written form. In all proceedings before the board or its designee, discovery beyond that specified in this section is available only upon application to the board, which may approve the application in the exercise of its discretion.

that contention did not give opposing counsel or the ALJ a fair opportunity to respond to it, when all prior arguments urged exclusion based on the board rule. *See Henderson v. Town of Winslow*, Me. W.C.B. No. 17-46, ¶¶ 9-11 (App. Div. 2017) (finding waiver when issue was raised only perfunctorily in position papers and not in motion for findings); *Waters v. S.D. Warren Co.*, Me. W.C.B. 14-26, ¶¶ 17-18 (App. Div. 2014) (affirming determination that that the employer had forfeited consideration of an argument raised perfunctorily and for the first time in response to a position paper because it did not give opposing counsel fair notice of the issue, nor did it provide the hearing officer with an opportunity to assess whether any factual predicate was necessary to decide the issue). Accordingly, we do not address the merits of the section 309(3) argument.[3]

2. Me. W.C.B. Rule, Ch. 12, § 12(1)

[¶20] Helmsman and CCMSI reassert the argument that the ALJ erred by failing to exclude Dr. Voss's report pursuant to Rule, ch. 12, § 12(1). The rule provides, specifically:

> Absent agreement of the parties to the contrary, the Administrative Law Judge may exclude an exhibit offered at hearing that was not exchanged by the parties at least 7 days before the final hearing in the matter.

[3] It may be noteworthy, nonetheless, that the board's interpretation of section 309(3) is generally informed by the purpose of the provision as articulated in *Cote v. Osteopathic Hospital of Maine, Inc*., 432 A2d 1301, 1306 (Me 1981) (regarding its predecessor provision, 39 M.R.S.A. § 93(3)), namely to address hearsay concerns by making a physician's statement on medical questions admissible to the same extent that the physician's oral testimony would be.

[¶21] We review an ALJ's decision regarding the application of board rules for an abuse of discretion. *See Kuvaja v. Bethel Savings Bank*, 495 A.2d 804, 806 (Me. 1985) (applying an abuse of discretion standard of review to administrative body's decision based on its own rules); *Laursen v. Sapphire Mgmt.*, Me. W.C.B. No. 20-19, ¶ 12 (App. Div. 2020) (applying abuse of discretion standard to denial of a motion to depose an IME). We will vacate the ALJ's decision only if the proceedings violate due process; that is, considering all the circumstances, the proceedings were fundamentally unfair. *Kuvaja*, 495 A.2d at 806-07.

[¶22] This case presented a complex set of procedural circumstances for the ALJ. Multiple petitions had been pending and a hearing already scheduled when Mr. Boulanger filed his related petition, and ESIS filed a second related petition. Helmsman sought a speedy determination of its Petition for Review, having argued that it was continuing to pay partial incapacity benefits beyond its statutory obligation. To avoid further delay, the ALJ consolidated Mr. Boulanger's Petition for Review and ESIS's Petition to Determine Rights and Responsibilities with the other pending petitions, but declined to continue the October 2, 2019, hearing, noting that a subsequent hearing would be scheduled if necessary. She also scheduled mediation for the morning of the October 2, 2019, hearing. Lastly, she indicated "any further procedural issues raised by the consolidation of recently filed petitions (such as whether further discovery is necessary and/or whether the timeframe for

312 exam request should be extended) will be discussed at hearing." And specifically, when overruling the objection to the Voss report, the ALJ offered to cure any lateness by allowing the parties to request an opportunity to respond. The ALJ offered the option of deposing Dr. Voss, to further ameliorate possible harm from the late submission of his report. Helmsman and CCMSI chose not to exercise that option.

[¶23] Given the circumstances of this case and its procedural posture, we see no fundamental unfairness in the ALJ's decision. The ALJ acted within the bounds of her discretion as authorized in Rule, ch. 12, § 12(1) when admitting the Voss report and giving all parties an opportunity to respond. *See also* Me. W.C.B. Rule, ch. 12, § 16 ("Upon notice to the parties and for good cause, an Administrative Law Judge may alter the requirements and timeframes in this chapter.").

3. Harmless Error

[¶24] Even if the section 309(3) argument had not been waived and we determined that it required exclusion of the Voss report, or if we determined that the ALJ had abused her discretion in admitting the report, we conclude that neither potential error would have constituted reversible error. *See Cote v. Osteopathic Hosp. of Me.*, 432 A.2d 1301, 1307 (Me. 1981) (applying harmless error analysis to erroneous exclusion of evidence pursuant to 39 M.R.S.A. § 93(3), the predecessor to section 309(3)).

[¶25] In finding a change in circumstances sufficient to warrant review and that Mr. Boulanger met his burden of establishing an increase in his level of incapacity to total, the ALJ relied on Dr. Stockwell's opinion as well as Dr. Voss's. Setting aside Dr. Voss's opinion, Dr. Stockwell's opinion, as described above, is sufficient competent evidence for the ALJ to find Mr. Boulanger's medical circumstances had changed and he is now totally incapacitated. And, although the ALJ based the date on which she ordered S.D. Warren to begin paying total incapacity benefits on the date of Dr. Voss's report, September 11, 2019, she also relied on and explicitly credited Dr. Stockwell's office notes dated October 13, 2016, stating that Mr. Boulanger has no work capacity. While Dr. Stockwell's notes might have provided support for commencing the higher payment obligation earlier, they also provide support for an award of total incapacity payments from the date ordered. Finally, the ALJ properly considered her own observations of Mr. Boulanger's presentations at hearing in 2015 and 2019.

D. Causal Relationship Between Psychological Impairment and 1998 Injury

[¶26] Helmsman next contends that in the absence of evidence establishing a causal relationship between Mr. Boulanger's psychological impairment and its 1998 date of injury, the ALJ erred in denying Helmsman's Petition to Terminate Benefits. In the decision, the ALJ stated:

> I find that Mr. Boulanger is entitled to total incapacity benefits on account of the combined effects of his 1989, 1998 and 2002 work injuries as of the date of Dr. Voss's assessment on September 11, 2019. Liability continues to be apportioned equally between the injuries with payment responsibility on the last work injury.

[¶27] Helmsman's arguments lack merit. Its responsibility for incapacity was previously established by board decree. In addition, Dr. Stockwell's opinion regarding Mr. Boulanger's incapacity is based on Mr. Boulanger's physical condition. Even without Dr. Voss's opinion, there is support in the record for the ALJ's determination. Beyond that, a fair reading of Dr. Voss's 2019 report establishes that chronic pain due to the work injuries is at least partially responsible for his mental health symptoms.

III. CONCLUSION

[¶28] Competent, comparative medical evidence in the record supports the ALJ's finding that Mr. Boulanger's medical circumstances had changed since the prior decree, and competent evidence supports the finding that he is now totally incapacitated. The ALJ acted within the bounds of her discretion when admitting Dr. Voss's 2019 report into evidence. Helmsman and CCMSI waived the argument that the Voss report should have been excluded based on 39-A M.R.S.A. § 309(3). Most importantly, even if admission of that report were error, it was nevertheless harmless because, absent the report, sufficient competent evidence supports the findings of changed medical circumstances and total incapacity. Finally, competent evidence

supports a sufficient causal connection between Mr. Boulanger's level of incapacity as determined by the ALJ and the 1998 work injury.

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 (Pamph. 2020).

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.

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