JUDY LINDEMAN-CIBELLI
(Appellee)

v.

MAINE MEDICAL CENTER
(Appellant)

and

SYNERNET
(Insurer)

Conference held: March 19, 2014
Decided: December 11, 2014

PANEL MEMBERS: Hearing Officers Jerome, Goodnough, and Stovall
BY: Hearing Officer Goodnough

[¶1] Maine Medical Center (MMC) appeals from a decision of a Workers' Compensation Board hearing officer (*Collier*, *HO*) denying its Petitions for Review and to Determine Extent of Permanent Impairment, and granting Judy Lindeman-Cibelli's Petition for Payment of Medical and Related Services, all related to two previously established work injuries. MMC contends, mainly, that the hearing officer erred when (1) accepting the findings of one independent medical examiner ("IME") while rejecting the findings of another, *see* 39-A M.R.S.A. § 312(7) (Supp. 2013); and (2) concluding that MMC had failed to prove a change in medical circumstances sufficient to warrant reexamination of the operative compensation payment scheme. We affirm the hearing officer's decision.

I. BACKGROUND

[¶2] Judy Lindeman-Cibelli sustained two work-related injuries while employed as a perfusionist at MMC: a gradual injury to her bilateral upper extremities on October 1, 1997, and an upper back, neck, and left arm injury on December 7, 2000. She suffered mental sequelae as a result of both injuries. In a board decree dated May 9, 2006, Ms. Lindeman-Cibelli was awarded total incapacity benefits pursuant to 39-A M.R.S.A. § 212(1) (2001).[1] She continues to receive those benefits.

[¶3] MMC filed Petitions for Review and to Determine Extent of Permanent Impairment, contending that Ms. Lindeman-Cibelli's medical circumstances changed for the better and that she is now less than totally incapacitated. Ms. Lindeman-Cibelli was examined by two independent medical examiners pursuant to 39-A M.R.S.A. § 312 (Supp. 2013). Dr. Jeffrey Barkin, who evaluated her psychological condition, opined that her condition had improved and that Ms. Lindeman-Cibelli no longer had any restrictions or limitations upon her ability to work from a psychological perspective. Dr. Karyn Woelflein, who evaluated her physical condition, opined that Ms. Lindeman-Cibelli's overall physical and mental condition had devolved into a chronic pain syndrome, the symptoms of

[1] Title 39-A M.R.S.A. § 212(1) has since been amended. *See* P.L. 2011, ch. 647, § 4 (effective Aug. 30, 2012, codified at 39-A M.R.S.A. § 212(1) (Supp. 2013)).

which had not changed appreciably since the 2006 decree, and that she remained unable to work despite a relatively active lifestyle.

[¶4] The hearing officer adopted Dr. Woelflein's medical findings, and found clear and convincing contrary evidence in the record sufficient to reject Dr. Barkin's opinion. *See* 39-A M.R.S.A. § 312(7). After the hearing officer denied MMC's Motion for Additional Findings of Fact and Conclusions of Law, MMC filed this appeal.

II. DISCUSSION

A. Rejection of Dr. Barkin's Opinion

[¶5] MMC asserts that the evidence cited by the hearing officer is insufficient to overcome Dr. Barkin's findings on a clear and convincing basis, as required by 39-A M.R.S.A. § 312(7), particularly in light of Ms. Lindeman-Cibelli's testimony regarding her level of activity. We disagree.

[¶6] Title 39-A M.R.S.A. § 312(7) provides:

> The board shall adopt the medical findings of the independent medical examiner unless there is clear and convincing evidence to the contrary in the record that does not support the medical findings. Contrary evidence does not include medical evidence not considered by the independent medical examiner. The board shall state in writing the reasons for not accepting the medical findings of the independent medical examiner.

[¶7] When determining whether there is clear and convincing evidence contrary to the IME's findings, the Appellate Division looks to whether the hearing

officer "could reasonably have been persuaded that the required factual finding was or was not proved to be highly probable." *Dubois v. Madison Paper Co*., 2002 ME 1, ¶ 14, 795 A.2d 696 (quotation marks omitted).

[¶8] Dr. Barkin opined in the context of his report and at his deposition that Ms. Lindeman-Cibelli had "improved vastly" psychologically relative to the time of the prior decision, while Dr. Woelflein opined that she had not improved. Dr. Woelflein stated in her report that "given the combination of her widespread pain disorder and her psychological issues, I do not think she has the capacity to work." She further stated that "[M]ultiple physical complaints in addition to her psychological issues make it very unlikely that she will return to work."

[¶9] The hearing officer stated his reasons in writing for not accepting Dr. Barkin's medical findings. He noted that Dr. Barkin's opinion was based on Ms. Lindeman-Cibelli's representation to him during the examination that her symptoms had improved, and other significant statements, which Ms. Lindeman-Cibelli denied having made to him and which were contradicted in the contemporary medical records.

[¶10] In addition, Dr. Barkin's opinion was based, in part, on his interpretation of Ms. Lindeman-Cibelli's personal counselor's records, which he characterized as fully corroborating his opinion that she had "vastly improved"; however, the hearing officer found and the record confirms that the counselor's

records did not reflect such clear improvement. Further, the hearing officer adopted Dr. Woelflein's finding in her report that the employee had informed her that she had not improved.

[¶11] The hearing officer's main reason for rejecting Dr. Barkin's medical findings in light of Ms. Lindeman-Cibelli's testimony, however, is grounded in an evaluation of credibility. Giving deference to the hearing officer's findings with regard to credibility and factual medical issues, *see Dubois*, 2002 ME 1, ¶ 16, 795 A.2d 696, it is apparent that the hearing officer could reasonably have been persuaded by the contrary evidence that it was highly probable that Dr. Barkin was wrong. The reasons given were sufficient to support the hearing officer's findings. *See Bean v. C.A. Dean Mem'l Hosp.*, Me. W.C.B. No. 13-6, ¶ 20 (2013) (affirming hearing officer's rejection of independent medical examiner's medical findings that were based upon factual assumptions not proven to be accurate).

B. Adoption of Dr. Woelflein's Opinion and Finding

[¶12] MMC asserts that the hearing officer was bound to reject Dr. Woelflein's opinion because it was contradicted by clear and convincing evidence regarding the high level and range of nonwork activities in which Ms. Lindeman-Cibelli participates. We disagree with this contention.

[¶13] The hearing officer acknowledged that Ms. Lindeman-Cibelli engaged in nonwork activities, which included, to varying degrees, skiing, biking, walking,

skating, gardening, stretching, exercising, and volunteering on her condominium committee. He also noted that Ms. Lindeman-Cibelli monitored the length of her participation in those activities, rested often, and continued to experience nightmares, sleeplessness, and anxiety. He also credited the opinion of Ms. Lindeman-Cibelli's primary care physician, who stated that "she remained permanently disabled as a result of her multiple work-related medical problems, with 'no chance for working.'"

[¶14] Weighing this evidence, the hearing officer adopted Dr. Woelflein's opinion that Ms. Lindeman-Cibelli suffers from work-related chronic pain syndrome, the symptoms of which had not changed appreciably since the prior decree, and that she remained unable to work despite her ongoing level of activity. The hearing officer's decision, heavily dependent on the statutory prescription to accept such opinions absent clear and convincing contrary evidence, is fully supported by the record. *See* 39-A M.R.S.A. § 312(7). We are not required to conclude that the hearing officer could reasonably have been persuaded by the contrary evidence that it was highly probable that Dr. Woelflein was wrong. *See Dubois*, 2002 ME 1 ¶ 14, 795 A.2d 696.

C. Changed Circumstances

[¶15] MMC contends that the hearing officer erred when determining that it did not meet its burden of establishing changed circumstances sufficient to

re-examine the compensation payment scheme established by the 2006 decree. MMC asserts that the hearing officer's summary of Ms. Lindeman-Cibelli's testimony, including that she "remains fairly active and is able to walk, ride a bike, ski and skate, garden, exercise and stretch for periods," demonstrates conclusively that her medical condition has improved because no such activities were noted in the 2006 decree. This argument also lacks merit.

[¶16] "[I]n order to prevail on a petition to increase or decrease compensation in a workers' compensation case when a benefit level has been established by a previous decision, the petitioning party must first meet its burden to show a 'change of circumstances' since the prior determination, which may be met by either providing 'comparative medical evidence,' or by showing changed economic circumstances." *Grubb v. S.D. Warren Co*., 2003 ME 139, ¶ 7, 837 A.2d 117 (citations omitted). There is no dispute that Ms. Lindeman-Cibelli's economic circumstances remain unchanged; thus, as the petitioner, MMC bore the burden to prove that her medical circumstances had changed. *See McIntyre v. Great N. Paper, Inc.*, 2000 ME 6, ¶ 5, 743 A.2d 744.

[¶17] Although hearing officers' findings of fact are not subject to appeal, 39-A M.R.S.A § 321-B(2) (Supp. 2013), a determination "that any party has or has not sustained the party's burden of proof . . . is considered a conclusion of law and is reviewable[.]" 39-A M.R.S.A. § 318 (Supp. 2013). Because MMC had the

burden of proof, and the hearing officer found that it failed to meet its burden, MMC can prevail on appeal only if it can demonstrate that the facts as found by the hearing officer legally compelled the conclusion that Ms. Lindeman-Cibelli's medical circumstances had changed since the 2006 decree. *See Kelley v. Me. Pub. Emps.' Ret. Sys.*, 2009 ME 27, ¶ 16, 967 A.2d 676; *see also Savage v. Georgia Pacific Corp.*, Me. W.C.B. No. 13-5, ¶ 7 (App. Div. 2013). When, upon conflicting evidence, the hearing officer has found facts to exist, we cannot substitute our judgment for that of the hearing officer. *See Bruton v. City of Bath*, 432 A.2d 390, 394 (Me. 1981).

[¶18] The 2006 decree, which established the point of comparison, determined that Ms. Lindeman-Cibelli was totally incapacitated from work as a result of her work injuries and their physical and mental sequelae. When considering Ms. Lindeman-Cibelli's current level of activity, the hearing officer noted what she can do but also that "she has to monitor the length of her activity and rest often." The hearing officer also considered her primary care physician's testimony that she remained unable to work as a result of her medical problems. Finally, and, most compellingly, the hearing officer adopted Dr. Woelflein's report, which included a section 312 opinion that Ms. Lindeman-Cibelli's medical condition had not changed since 2006.

[¶19] Ms. Lindeman-Cibelli's testimony regarding the activities she engages in does not compel the conclusion that her medical circumstances have changed or that she is less than totally disabled.[2] The hearing officer did not err when determining that MMC failed to meet its burden of proof on the issue of changed medical circumstances and declining to reopen the compensation payment scheme.[3]

III. CONCLUSION

The entry is:

The decision of the hearing officer is affirmed.

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[2] MMC also contends that the hearing officer's finding that Ms. Lindeman-Cibelli is totally incapacitated under section 212(1) is unsupported in the record and is contrary to law. Because we affirm the hearing officer's determination that MMC did not establish that Ms. Lindeman-Cibelli's medical circumstances changed, we do not revisit the finding of total incapacity established in the 2006 decree. In any event, we note that a hearing officer's determination that an employee is or is not totally incapacitated under section 212(1) is multifactorial in nature and heavily fact-dependent. *See Folsom v. New England Tel. & Tel. Co.*, 606 A.2d 1035, 1037-38 (Me. 1992). A hearing officer does not (and should not) turn to a strict checklist in order to determine whether an employee falls within section 212(1). Moreover, "[t]he nature and extent of [an] employee's disability is a question of fact upon which the finding of the [hearing officer] is final if there is any creditable, competent evidence to support it." *Cote v. Cent. Tire Co.*, 290 A.2d 368, 370 (Me. 1972); *see also Overlock v. E. Fine Paper, Inc.*, 314 A.2d 56, 60 (Me. 1974). There is ample evidence to support a finding of total incapacity in this case, including a section 312 opinion.

[3] With respect to the remaining issues raised by MMC, (1) because an employee's level of permanent impairment is relevant only to the duration of partial incapacity benefit payments, the hearing officer did not err when determining that the issue of permanent impairment was moot, *see Legassie v. Securitas, Inc.*, 2008 ME 43, ¶ 30, 944 A.2d 495 (overruled by statute in part on other grounds); and (2) and there is competent medical evidence in the record to support the hearing officer's assessment that the medical treatment was reasonable, proper, and causally connected to the work injury, *see Crosby v. Grandview Nursing Home*, 290 A.2d 375, 379 (Me. 1972) (a finding that the need for treatment is causally connected to the work injury is sustainable if supported by competent evidence in the record).

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. 2013).

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