MARY LOW
(Appellant)

v.

NESTLE WATERS NORTH AMERICA d/b/a POLAND SPRINGS
(Appellee)

and

SEDGWICK CMS/INDEMNITY INS. CO. OF NORTH AMERICA
(Insurer)

Conferenced: March 15, 2017
Decided: September 8, 2017

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

[¶1] Mary Low appeals from decisions of a Workers' Compensation Board administrative law judge (*Collier, ALJ*) granting Nestle Waters North America's Petition for Review of Incapacity both before and after considering her Petition to Reopen Pursuant to 39-A M.R.S.A. § 319. Ms. Low argues that the ALJ erred by (1) determining that a change of circumstances warranted re-evaluation of her previously-fixed level of partial incapacity benefits; and (2) failing to alter his initial decision after considering additional medical evidence filed by Ms. Low in conjunction with her Petition to Reopen.

[¶2] We disagree, and affirm the decisions.

I. BACKGROUND

[¶3] Mary Low injured her right shoulder, upper back, and neck on May 11, 2009, when she tripped and fell while working for Nestle. The administrative law judge issued a decision on November 22, 2011, establishing the injury as a compensable aggravation of an underlying myofascial pain condition. The ALJ awarded Ms. Low ongoing partial incapacity benefits, reduced to account for an imputed earning capacity of $300.00 per week.[1]

[¶4] Nestle then filed a Petition for Review of Incapacity seeking to reduce or discontinue Ms. Low's benefits. In support of its petition, Nestle presented the opinion of its medical examiner, *see* 39-A M.R.S.A. § 207 (Supp. 2016), who reported that Ms. Low was no longer suffering from the effects of her injury, and that her ongoing symptoms were due to fibromyalgia, a non-work-related condition. Ms. Low's treating physician agreed that Ms. Low suffered from fibromyalgia but, unlike the section 207 examiner, still related her ongoing symptoms to the 2009 work injury. At hearing, Ms. Low testified that her condition had worsened since the last round of litigation.

[¶5] On July 21, 2014, the ALJ determined that Nestle demonstrated a change in circumstances since the last decision, citing the medical evidence and

[1] The ALJ issued an amendment to the November 22, 2011, decision on December 2, 2011, but did not alter any portion of the decision related to this appeal.

Ms. Lowe's testimony. The ALJ then adopted the causation opinion of the section 207 medical examiner, stating that:

> [T]he effects of Ms. Low's 2009 work-related aggravation of her myofascial pain syndrome had subsided at least as of May 18, 2012, which was the date on which [Ms. Low's treating physician] began treatment for fibromyalgia. I further conclude that Ms. Low's fibromyalgia is not the result of her 2009 work injury but rather an underlying, nonwork-related condition.

Based on these findings, the ALJ terminated Ms. Low's ongoing incapacity benefits. Ms. Low filed a Motion for Findings of Fact and Conclusions of Law, which the ALJ denied on February 12, 2015. Ms. Low did not file a Notice of Intent to Appeal following this ruling.

[¶6] On August 19, 2014, while her Motion for Findings of Fact and Conclusions of Law was pending, Ms. Low filed a Petition to Reopen the July 21, 2014, decision pursuant to 39-A M.R.S.A. § 319 (2001).[2] With her petition, Ms. Low submitted medical records of treatment she received after the close of evidence but before the ALJ's July 21, 2014, decision. Ms. Low argued that those medical records, which were unavailable at the time of the hearing, showed that she continued to suffer the effects of myofascial pain syndrome, rather than

[2] Title 39-A M.R.S.A.§ 319 provides**:**

> Upon the petition of either party, the board may reopen and review any compensation payment scheme, award or decree on the grounds of newly discovered evidence that by due diligence could not have been discovered prior to the time the payment scheme was initiated or prior to the hearing on which the award or decree was based. The petition must be filed within 30 days of the payment scheme, award or decree.

fibromyalgia, and that they thus proved that there had not been a change in diagnosis—or circumstances—since the 2011 decree. For that reason, she argued, her partial incapacity benefits should remain in place.

[¶7] The ALJ denied the Petition to Reopen on May 23, 2016, five months after it disposed of Ms. Low's Motion for Findings of Fact and Conclusions of Law. In its decision, the ALJ listed some, but not all of the medical records attached to Ms. Low's Petition to Reopen. Those records, the ALJ concluded, "would not have altered the outcome" of the July 21, 2014, decision because they were from medical providers who "do not specifically discuss the distinction between fibromyalgia and myofascial pain syndrome, nor do they address causation in Ms. Low's case in any detail." Ms. Low filed a Motion for Further Findings of Fact and Conclusions of Law, which the ALJ denied on July 15, 2016.

[¶8] Ms. Low then filed the pending appeal.

II. DISCUSSION

A. Scope of Appeal

[¶9] The parties dispute the permissible scope of Ms. Low's appeal. Ms. Low filed a Notice of Intent to Appeal on August 3, 2016, within twenty days of the July 15, 2016, denial of her last Motion for Findings of Fact and Conclusions of Law, but not within twenty days of the denial of the motion associated with the July 21, 2014, decree. Nestle argues that Ms. Low's appeal is thus untimely

regarding the 2014 decree and that the Appellate Division should only review the May 23, 2016, denial of her Petition to Reopen, not the decree of July 21, 2014, which granted Nestle's Petition for Review of Incapacity.

[¶10] To appeal an ALJ's decision, a party must file a notice of intent to appeal with the Appellate Division within twenty days "after receipt of notice of the filing of the decision." 39-A M.R.S.A. § 321-B(1)(A) (Supp. 2016). However, a party also may ask an ALJ to reopen and review a final decree by filing a petition to reopen within 30 days. 39-A M.R.S.A. § 319 (2001). The Act does not authorize tolling the appeal period applicable to the underlying decision by filing a petition to reopen, as post-judgment motions in other settings may. *See, e.g.,* Fed. R. App. P. 4(A)(vi) (tolling the appeal period while a timely-filed motion for post-judgment relief under Federal Rule of Civil Procedure 60(b)(2) is pending). *But see* M.R. App. P. 2(b)(3) (excluding a motion to reopen for newly-acquired evidence as a basis for tolling the appeal period).

[¶11] In this case, we need not determine whether a petition to reopen tolls the appeal period because the ALJ's May 23, 2016, decree addresses all of the issues on which Ms. Low seeks appellate review. Even though the ALJ ostensibly denied Ms. Low's Petition to Reopen, we conclude from the language of his decision that he actually (1) determined that the Petition to Reopen met the criteria for reopening in § 319, (2) reopened the evidence, (3) considered the newly-

acquired medical records, and (4) reassessed the merits of the underlying Petition for Review of Incapacity in light of those records.[3] Considering all of the evidence, the ALJ again concluded that Nestle satisfied its burden of showing a change of circumstances—the precise issue that Ms. Low asks us to review.

[¶12] Had the ALJ rejected Ms. Low's request to reopen the record, the decision on the underlying Petition for Review of Incapacity might be beyond the reach of our appellate review. But because the ALJ in effect granted the Petition to Reopen and issued a new decree in which he considered whether the evidence as a whole demonstrated a change of circumstances, we are free to review the ALJ's treatment of that issue.[4] *See* Donald G. Alexander, *Maine Appellate Practice* § 303(f) (4th ed. 2013) ("A final judgment may lose its final judgment status when a trial court grants . . . a motion for relief from judgment.").

[3] Ms. Low also makes the argument that the ALJ abused his discretion in denying her Petition to Reopen the Evidence. As stated above, although the ALJ describes his May 23, 2016, decision as denying the Petition to Reopen, it is apparent from the face of the decision that the ALJ considered the additional medical records proffered in conjunction with the Petition and issued a new decision after considering the expanded record. In effect, he granted the Petition. Ms. Low therefore has no claim that the ALJ abused his discretion. Her appeal is from the substance of the May 23, 2016, decision.

Additionally, despite Ms. Low's contention, the ALJ did not commit reversible error by failing to list and make explicit his review of every medical record submitted with the petition to reopen. *Nielsen v. Kelly Servs.*, W.C.B. 16-15, ¶ 10 (App. Div. 2016) ("[T]he ALJ's failure to recite the record evidence relied upon by Ms. Nielsen in her brief does not create reversible error.").

[4] Moreover, Nestle did not challenge the ALJ's exercise of discretion in reopening the record and considering the proffered evidence. *See Matthews v. Shaw's Supermarkets*, W.C.B. 15-25, ¶ 20 (App. Div. 2015) (stating that the decision to grant or deny a petition to reopen is reviewed for abuse of discretion); *see also Kuvaja v. Bethel Sav. Bank*, 495 A.2d 804, 806 (Me. 1985) (applying an abuse of discretion standard of review to an administrative body's ruling on a motion to dismiss).

B. Standard of Review

[¶13] 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).

[¶14] When a party requests and proposes additional findings of fact and conclusions of law, as was done in this case, "we review only the factual findings actually made and the legal standards actually applied" by the ALJ. *Daley v. Spinnaker Indus.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted). In addition, the Appellate Division will not disturb a factual finding made by the ALJ absent a showing that it lacks competent evidence to support it. *Dunkin Donuts of Am., Inc. v. Watson*, 366 A.2d 1121, 1125 (Me. 1976).

C. Res Judicata and Causation

[¶15] In order to overcome the res judicata effect of a prior decree, the moving party must show a "change in circumstances." *See Grubb v. S.D. Warren, Co.*, 2003 ME 139, ¶ 7, 837 A.2d 117. This requirement serves to "prevent the use of one set of facts to reach different conclusions." *Folsom v. New England Tel. & Tel., Co.*, 606 A.2d 1035, 1038 (Me. 1992). A petitioner can demonstrate such a change with "comparative medical evidence," that is, evidence that the employee's

medical condition has worsened or improved. *See Grubb*, 2003 ME 139, ¶ 7. The Law Court has also held that an employer can prove a change of medical circumstances with proof that an injured worker is no longer disabled because of the work-related injury. *Lowe v. C.N. Brown Co.*, 448 A.2d 1358, 1361 (Me. 1982); *Curtis v. Bridge Constr. Corp.*, 428 A.2d 62, 65 (Me. 1981).

[¶16] Ms. Low argues that the ALJ erred by finding that the effects of her injury ended because Nestle failed to demonstrate a change in circumstances with comparative medical evidence showing a change in her condition. However, Nestle introduced the same kind of medical evidence described in *Lowe* to demonstrate that the effects of the work related injury ended: "[W]here the employer seeks to meet its burden of proof with evidence showing that the worker no longer is disabled as a result of a work-related injury," the Court wrote, "comparative medical evidence of the employee's condition need not be presented before a finding of full capacity may be upheld." 448 A.2d 1361. Because the employer's doctor opined that the work injury no longer contributed to her incapacity, the commissioner had enough evidence to discontinue the employee's ongoing benefits. *See id.*

[¶17] Similarly, Nestle presented expert medical evidence that Ms. Low's work-related myofascial pain syndrome ceased to be the source of her ongoing incapacity. As was the case in *Lowe*, the examiner's opinion serves as competent

and legally sufficient evidence to support the ALJ's finding that the effects of Ms. Low's injury ended by May 18, 2012. Where competent and legally sufficient evidence supports the ALJ's findings, and the decision contains no misconception of applicable law, we will not disturb the decision on appeal and therefore affirm.

III. CONCLUSION

[¶18] The ALJ acted within the bounds of his discretion when considering the new evidence proffered in conjunction with Ms. Low's Petition to Reopen, and issuing a new decision in which he re-affirmed the decision granting Nestle's Petition for Review. Upon review of that decision, we conclude that the ALJ neither misapplied nor misconceived the law, and there is competent evidence to support the finding that Ms. Low's work injury no longer contributes to her incapacity.

The entry is:

The ALJ'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. 2014).

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