BARBARA JONES
(Appellant)

v.

MEAD PAPER/RUMFORD PAPER COMPANY
(Appellee)

and

MSIGA
(Insurer)

and

NEWPAGE PAPER
(Appellee)

and

SEDGWICK CMS
(Insurer)

Argued: March 16, 2017
Decided: March 23, 2018

PANEL MEMBERS: Administrative Law Judges Pelletier, Collier, and Stovall
BY: Administrative Law Judge Stovall

[¶1] Barbara Jones appeals from a decision of a Workers' Compensation Board hearing officer[1] (*Elwin, HO*) rejecting her claim for ongoing incapacity benefits. Ms. Jones contends that the hearing officer erred (1) by concluding that the retirement presumption of 39-A M.R.S.A. § 223 (2001) renders her ineligible

[1] The hearing occurred and recusal order issued in this case prior to the effective date of the change in title from "hearing officer" to "administrative law judge." *See* P.L. 2015 ch. 297 (effective Oct. 15, 2015).

for incapacity benefits; and (2) by failing to recuse herself. We disagree with these contentions and affirm the hearing officer's decision.

I. BACKGROUND

[¶2] Ms. Jones began working at the employers' Rumford paper mill in June 1973. Her job included heavy lifting and pushing large rolls of paper across cement floors. She sustained work-related injuries on October 12, 2000, June 13, 2004, July 13, 2006, January 19, 2007, November 28, 2007, and December 10, 2010.[2] Ms. Jones transitioned to light duty work in 2008 after having surgery. She spent five years doing secretarial work at the mill's landfill until her position was eliminated in May 2013. At that point, Ms. Jones began testing paper, a job that entailed considerable walking throughout the mill.

[¶3] Ms. Jones retired from the mill on September 29, 2013, and began receiving a nondisability pension. Before her retirement, her personal physician had recommended that she limit herself to sedentary work. Ms. Jones alleges that her supervisors ignored her doctor's restrictions and required her to work within the less prohibitive restrictions issued by the mill's doctor. Although she did not tell a supervisor or the mill's medical staff that she was having trouble doing her job, and no doctor specifically opined that she was unable to work, Ms. Jones

[2] Ms. Jones also filed Petitions for Award based on asserted July 14, 2006, and September 25, 2013, injuries. Those petitions were denied.

testified that her inability to tolerate walking on the mill's cement floors motivated her to retire.

[¶4] After retirement, Ms. Jones filed eight Petitions for Award, seeking ongoing lost wage benefits. The board referred her to an independent medical examiner, who examined her pursuant to 39-A M.R.S.A. § 312 (Supp. 2017). The examiner reported that Ms. Jones had a sedentary work capacity, and that she could walk for short stretches.

[¶5] Before her formal hearing, Ms. Jones filed a motion requesting the hearing officer to recuse herself. The basis for her request was not that the hearing officer had a personal bias that would jeopardize her impartiality, but that the board had improperly assigned the case to her as a favor to the employers. The hearing officer denied Ms. Jones's motion and heard the case on the merits.

[¶6] In her October 7, 2015 decision, the hearing officer acknowledged that Ms. Jones had suffered work-related injuries, granting some of the petitions in part, but declined to award her incapacity benefits. The hearing officer reasoned that because Ms. Jones was actively employed at the time of her retirement and was receiving a nondisability pension from the employer, the board must presume that she does not have a loss of earnings or earning capacity consistent with the retirement presumption of 39-A M.R.S.A. § 223(1). The hearing officer concluded

that Ms. Jones failed to rebut that presumption and therefore was not entitled to incapacity benefits.

[¶7] Ms. Jones filed a motion for further findings of fact and conclusions of law. In response, the hearing officer issued an amended decree which supplemented her analysis but did not alter the outcome of the original decree. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶8] The role of the Appellate Division "is limited to assuring that the [hearing officer'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 a party requests further findings of fact and conclusions of law following a decision, the Appellate Division is to "review only the factual findings actually made and the legal standards actually applied by the [hearing officer]." *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted). We review the denial of a motion to recuse for an abuse of discretion. *Estate of Tingley*, 610 A.2d 266, 267 (Me. 1992).

B. Application of the Retirement Presumption

[¶9] Ms. Jones argues that the hearing officer misapplied the retirement presumption of section 223. That section provides:

> **Presumption.** An employee who terminates *active employment* and is receiving nondisability pension or retirement benefits under either a private or governmental pension or retirement program, including old-age benefits under the United States Social Security Act, 42 United States Code, Sections 301 to 1397f, that was paid by or on behalf of an employer from whom weekly benefits under this Act are sought is presumed not to have a loss of earnings or earning capacity as the result of compensable injury or disease under this Act. This presumption may be rebutted only by a preponderance of evidence that the employee is unable, because of a work-related disability, to perform work suitable to the employee's qualifications, including training or experience. This standard of disability supersedes other applicable standards used to determine disability under this Act.

39-A M.R.S.A. § 223(1) (emphasis added). Thus, to invoke the retirement presumption, the employers had the burden of proving: (1) that Ms. Jones terminated active employment; and (2) that she received a nondisability pension or retirement benefits paid by the employers. *See Hallock v. Newpage Corp*., Me. W.C.B. No. 16-6, ¶ 10 (App. Div. 2016).

[¶10] Ms. Jones does not dispute that the second prerequisite—her receipt of retirement benefits—is met. Rather, she argues that the presumption should not apply because her work injuries rendered her unable to fulfill her duties and, combined with the employers' failure to accommodate her, effectively forced her to retire. We do not find the employee's argument persuasive. Section 223 does not

distinguish between voluntary and involuntary retirement. *Bowie v. Delta Airlines, Inc.*, 661 A.2d 1128, 1131 (Me. 1995). Thus, even employees who are forced into early retirement with no intention of leaving the active work force may be subject to the presumption if they terminate "active employment." *Costales v. S.D. Warren Co.*, 2003 ME 115, ¶ 4, 832 A.2d 790.[3] "[T]he phrase 'active employment' is usually understood to mean one who is actively on the job and performing the customary work of his job." *Cesare v. Great N. Paper Co., Inc.*, 1997 ME 170, ¶ 5, 697 A.2d 1325 (quoting *Bowie*, 661 A.2d at 1131).

[¶11] The Appellate Division addressed a nearly identical scenario in *Wing v. NewPage Corp.*, Me. W.C.B. No. 16-5 (App. Div. 2016). In that case, an employee was working modified duty after suffering an incapacitating work injury. *Id.* ¶ 2. When he retired, his employer invoked the retirement presumption of section 223 to discontinue the partial incapacity benefits that it had been paying. *Id.* ¶ 3. Mr. Wing argued that the presumption did not apply because the employer had been requiring him to perform duties that exceeded his restrictions and that he had only worked beyond his restrictions long enough to qualify for an early retirement. *Id.* ¶ 5. The Appellate Division disagreed, holding that Mr. Wing had been "actively employed" at the time of his termination notwithstanding his

[3] Although the Court's decision in *Costales* focused on the issue of whether the employee had rebutted the retirement presumption, the fact that the employee did not retire voluntarily was acknowledged and it did not preclude application of the retirement presumption. *Id.*

restrictions, and that the retirement presumption therefore applied when he stopped working and began receiving retirement benefits. *Id.* ¶¶ 13-14 .

Ms. Jones, like the employee in *Wing*, terminated active employment when she retired. Neither the fact that she was working with restrictions nor her retrospective claim that her job exceeded her capacity defeat application of the retirement presumption.

[¶12] Moreover, the hearing officer properly concluded that Ms. Jones did not rebut the retirement presumption. The hearing officer found, based upon a report from the board's independent medical examiner, that Ms. Jones retained a work capacity. Thus, Ms. Jones did not prove that her work injuries rendered her unable to work, as section 223 requires. *See Downing v. Dept. of Trans.*, *2*012 ME 5, ¶ 10, 34 A.3d 1150 ("[T]he employee must show a total physical inability to perform any work that would otherwise be suitable to the employee's qualifications, training and experience, regardless of the availability of that work [to rebut the presumption]."). Therefore, the hearing officer committed no error in concluding that the retirement presumption barred Ms. Jones's claim for incapacity benefits.

C. Recusal

[¶13] Ms. Jones contends that the decision should be vacated on the ground that the hearing officer declined to recuse herself due to the manner in which she was assigned to this case. We disagree.

[¶14] Recusal is a matter within the broad discretion of the administrative law judge. Accordingly, we review the denial of a motion to recuse for an abuse of discretion. *See Estate of Dineen*, 1998 ME 268, ¶ 8, 721 A.2d 185.

[¶15] There are no standards specifically applicable to recusal of Workers' Compensation Board administrative law judges. The hearing officer's choice to look to the Maine Administrative Procedures Act (APA) and Maine's Code of Judicial Conduct for guidance was a reasonable one. The APA requires that hearings in administrative proceedings be "conducted in an impartial manner" and that requests for disqualification be determined "as part of the record." 5 M.R.S.A. § 9063(1) (2013). Canon 3(E)(2) of the Code of Judicial Conduct requires recusal in any proceeding in which the judge's impartiality might reasonably be questioned. M. Code Jud. Conduct I(3)(E)(2).[4]

[¶16] The purportedly improper manner in which the board assigned Ms. Jones's case to the hearing officer does not require the conclusion that she exceeded the bounds of her discretion. The hearing officer stated in her Order

[4] The Maine Code of Judicial Conduct was repealed and recodified effective September 1, 2015. The substance of Canon 3(E)(2) is now found at M. Code Jud. Conduct Canon 2, R. 2.2 and 2.11.

denying the motion for recusal that she has no control over the manner in which case assignments are made. She explained that her approach is to "simply handle the cases that appear on my docket as fairly and efficiently as I can." The employee introduced no evidence into the record which contradicts this statement by the ALJ. Thus, we conclude that the hearing officer did not abuse her discretion in denying Ms. Jones's Motion for Recusal.

III. CONCLUSION

The hearing officer's findings were supported by competent evidence; the application of the law was neither arbitrary nor without rational foundation; and the hearing officer did not abuse her discretion in denying Ms. Jones's Motion for Recusal. Accordingly, we affirm the hearing officer's decision.

The entry is:

The hearing officer'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. 2016).

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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