

ROBIN HAMILTON
(Appellee)

v.

MAINE DEPARTMENT OF HEALTH AND HUMAN SERVICES
(Appellant)

Argued: March 17, 2017
Decided: February 1, 2018

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

[¶1] The Maine Department of Health and Human Services (DHHS) appeals a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) granting Robin Hamilton's Petition for Payment of Medical and Related Services, partially granting her Petition for Review, and granting DHHS's Petition to Determine the Extent of Permanent Impairment.¹ The ALJ awarded Ms. Hamilton ongoing partial incapacity benefits and fixed her whole person permanent impairment at 17% for an established mental stress injury that occurred on December 29, 2010. DHHS contends that the ALJ erred by (1) awarding ongoing benefits when Ms. Hamilton's current psychological condition relates, at least in part, to nonoccupational stressors, including those related to the workers' compensation process; and (2) by adopting the opinions of experts who did not

¹ The ALJ's decision to grant Ms. Hamilton's Petition for Payment of Medical and Related Services is not at issue for purposes of this appeal.

review all of DHHS's surveillance evidence. Finding no error in the underlying decision, we affirm.

I. BACKGROUND

[¶2] On September 7, 2011, the board (*Greene, HO*) awarded Ms. Hamilton protection of the Act for a December 29, 2010, mental stress injury that resulted from her work as a DHHS caseworker. In doing so, the board adopted an agreement of the parties with respect to payment, allowing DHHS to pay total incapacity benefits without prejudice and specifically reserving DHHS's right to reduce or discontinue benefits pursuant to 39-A M.R.S.A. § 205(9)(B)(1) (Supp. 2016).

[¶3] After the 2011 decree, Ms. Hamilton continued to receive treatment for her mental stress condition with medication and counseling. She remained out of work. DHHS obtained surveillance evidence and sent Ms. Hamilton to two psychological medical examiners pursuant to 39-A M.R.S.A. § 207 (Supp. 2016)—first Dr. Voss in 2012 and 2013, then Dr. Gallon in 2014. DHHS provided Dr. Voss with surveillance evidence that showed Ms. Hamilton attending her granddaughter's sporting event. Dr. Voss endorsed her behavior as reflecting good motivation to function in a public setting. After reexamining Ms. Hamilton in 2013, he opined that her condition had worsened and that she suffered a 17% whole person permanent impairment due to her injury.

[¶4] After Dr. Voss’s examination, DHHS retained a private investigator who observed Ms. Hamilton and uncovered social media postings that showed Ms. Hamilton attending a musical performance in a crowded venue, finding a place to stay while the floors in her apartment were being replaced, and attending her grandchild’s sporting events. DHHS provided this information to Dr. Gallon who, after a contentious examination of Ms. Hamilton, concluded that Ms. Hamilton had been exaggerating her disability, that she could immediately return to work, and that Ms. Hamilton suffered only a 2.5% whole person permanent impairment.

[¶5] On April 19, 2015, DHHS decreased Ms. Hamilton’s weekly incapacity benefits pursuant to 39-A M.R.S.A. § 205(9)(B)(1). In response, Ms. Hamilton filed a Petition for Review seeking total incapacity benefits. DHHS thereafter filed a Petition to Determine the Extent of Permanent Impairment.

[¶6] Ms. Hamilton was then evaluated by Dr. Werrbach, a psychologist, who opined that the effects of Ms. Hamilton’s work injury continued and that she had no work capacity as a result. He noted that the workers’ compensation litigation itself was playing a role in her condition: “Ms. Hamilton is being retraumatized,” he wrote “by the events that are occurring as a result of the . . . video surveillance of her and writing letters to discontinue her income protection, mental health treatment, and prescription coverage.” Dr. Werrbach rendered his opinion without having reviewed DHHS’s surveillance evidence.

[¶7] On May 31, 2016, the ALJ granted Ms. Hamilton’s Petition for Review, in part, awarding her partial incapacity benefits subject to an imputed earning capacity of \$150.00 per week. However, the ALJ declined DHHS’s request to terminate Ms. Hamilton’s incapacity benefits entirely. He acknowledged that nonoccupational stressors were contributing to her ongoing psychological condition, but found that “it was the traumatic events to which Ms. Hamilton was exposed during the course of her employment that have led to her lasting symptoms and difficulties with handling all manner of stressors since that time including both the compensable and non-compensable sources of stress outlined above.” The ALJ also granted DHHS’s Petition to Determine the Extent of Permanent Impairment, adopting the 17% whole person impairment rating as assessed by Dr. Voss.

[¶8] DHHS filed a Motion for Further Findings of Fact and Conclusions of Law which the ALJ denied. This appeal followed.

II. DISCUSSION

A. Ms. Hamilton’s Petition for Review

[¶9] DHHS maintains that Ms. Hamilton is no longer entitled to incapacity benefits because nonoccupational stressors—such as the stress of being subjected to surveillance and personal hardships—are responsible for her ongoing psychological problems.

[¶10] We disagree. The ALJ’s task was not to determine whether non-occupational stressors were playing a role in Ms. Hamilton’s condition but whether her work injury continued to contribute to her incapacity.² *Cf., Roy v. Bath Iron Works*, 2008 ME 94, ¶ 15, 952 A.2d 965 (holding that an employee did not lose entitlement to incapacity benefits after he suffered a totally incapacitating nonwork injury). DHHS argues that the ALJ utilized an incorrect standard in evaluating the burden of proof in this matter, relying on *Soucy v. Fraser Paper, Ltd.*, 267 A.2d 919, 921 (“The incapacity continues to be compensable until the Defendant demonstrates by a fair preponderance of the evidence that the effect of the accident has ended.”). We conclude, however, that the standard actually applied by the ALJ is clearly articulated and correct. The ALJ acknowledged that Ms. Hamilton bore the burden of persuasion on all elements of her claim and concluded that she “demonstrated on a more probable than not basis that she suffers the ongoing effects of her December 29, 2010 work injury.” We conclude that this is an accurate statement of Ms. Hamilton’s burden on her Petition for Review and reference to *Soucy* is not error in this context.

² DHHS argued for the first time in its reply brief that the ALJ, rather than determining whether the effects of Ms. Hamilton’s injury continue, should have determined whether the special requirements of 39-A M.R.S.A. § 201(3) (Supp. 2016) were still met. We decline to address this argument because DHHS did not raise it in a timely manner, thereby giving opposing counsel and the ALJ a fair opportunity to address the issue. *See Henderson v. Town of Winslow*, Me. W.C.B. No. 17-46, ¶ 11 (App. Div. 2017); *Waters v. S.D. Warren Co.*, Me. W.C.B. No. 14-26, ¶ 18 (App. Div. 2014).

[¶11] Although the ALJ acknowledged the influence of stress from the workers' compensation process and Ms. Hamilton's personal life, he unequivocally found that the effects of the underlying work injury continued to play a role in Ms. Hamilton's incapacity. This finding is supported by competent evidence and forms an adequate basis for the ALJ's legal conclusion that Ms. Hamilton is entitled to ongoing partial incapacity benefits.

B. Sufficiency of the Evidence

[¶12] DHHS argues that the ALJ erred by adopting the opinions of Dr. Voss, which, it asserts, are not competent to support the ALJ's findings because Dr. Voss did not review DHHS's most recent surveillance evidence. It is the province of an ALJ, as fact-finder, to accept or reject expert medical opinions, in whole or in part. *Leo v. Am. Hoist & Derrick Co.*, 438 A.2d 917, 920–21 (Me. 1981); *Rowe v. Bath Iron Works*, 428 A.2d 71, 74 (Me. 1981). The fact that Dr. Voss did not have the most recent surveillance evidence does not render his opinions incompetent. Indeed, the ALJ specifically explained his rationale for crediting the opinion of Dr. Voss over that of Dr. Gallon. He noted that Dr. Voss was aware in 2012 that Ms. Hamilton had attended public events but viewed her behavior as demonstrating a healthy motivation to have regular social interactions. Thus, while the most recent surveillance evidence was “new,” it was not inconsistent with information already in the possession of Dr. Voss. For this

reason, we conclude that the record contains competent evidence to support the ALJ's findings.

III. CONCLUSION

[¶13] The ALJ did not misconceive or misapply the law in concluding that, because Ms. Hamilton's psychological condition remained causally related to her work injury, she remained entitled to workers' compensation benefits. Furthermore, the ALJ based his factual findings on competent medical evidence.

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 (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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