STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 17-0011
Decision No. 19-20

JOANNE O'LEARY
(Appellant)

v.

NORTHERN MAINE MEDICAL CENTER
(Appellee)

and

SYNERNET
(Insurer)

Conference held: September 20, 2017
Decided: June 7, 2019

PANEL MEMBERS:

Majority: Administrative Law Judges Elwin and Knopf
Concurrence: Administrative Law Judge Jerome

BY: Administrative Law Judge Elwin

[¶1] Joanne O'Leary appeals from a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) denying her Petition for Review regarding an established April 18, 2011, work-related low back injury she experienced while working for Northern Maine Medical Center (NMMC).[1] Ms. O'Leary contends that the ALJ erred by finding that she was not entitled to partial incapacity benefits even though she was subject to work restrictions and took

[1] Ms. O'Leary also filed a Petition for Payment of Medical and Related Services, which was granted in part and is not the subject of this appeal.

a lower-paying job after being terminated for cause by NMMC. We affirm the decision.

I. BACKGROUND

[¶2] Ms. O'Leary worked for NMMC from 1998 through 2012 as a registered nurse. She suffered a compensable low back injury on April 18, 2011, when she and a co-worker were repositioning a large patient and Ms. O'Leary forcefully pulled on a sheet beneath the patient. She treated for her low back pain conservatively with injections and chiropractic adjustments. For a period following her injury, Ms. O'Leary returned to her regular job as a registered nurse with NMMC, but her employment was terminated on May 18, 2012, for cause. The termination was unrelated to her work injury.

[¶3] Immediately after leaving NMMC, Ms. O'Leary was hired by Fish River Rural Health as an office nurse, setting up immunizations and other outpatient procedures, and working as a school nurse. Ms. O'Leary works about 36 hours per week at Fish River, earns a lower hourly rate than she earned at NMMC, and has consistently earned less at the job than her pre-injury average weekly wage.

[¶4] Ms. O'Leary filed a Petition for Review seeking to establish entitlement to ongoing partial incapacity benefits. After conducting an independent medical examination pursuant to 39-A M.R.S.A. § 312 (Supp. 2018), Dr. Bradford established work restrictions for Ms. O'Leary. The ALJ accepted Dr. Bradford's

restrictions, but was not otherwise persuaded that Ms. O'Leary's work injury resulted in reduced earning capacity. The ALJ thus denied Ms. O'Leary's claim for ongoing incapacity benefits. Ms. O'Leary filed a Motion for Additional Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318 (Supp. 2018), which the ALJ denied. Ms. O'Leary appeals.

II. DISCUSSION

[¶5] "A finding of fact by an administrative law judge is not subject to appeal [before the Appellate Division]." 39-A M.R.S.A. § 321-B (Supp. 2018). Instead, appellate review of factual findings is "limited to assuring that [the ALJ's] factual findings are supported by competent evidence." *Hall v. State*, 441 A.2d 1019, 1021 (Me. 1982). On issues of law, we assure "that [the ALJ's] decision involves no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Id.*

[¶6] Ms. O'Leary contends that her lower earnings at her post-injury position with Fish River established a reduced post-injury earning capacity, and that the ALJ erred in determining otherwise. We disagree.

[¶7] Partial incapacity benefits are based on the employee's physical capacity to earn wages and the availability of work within the employee's physical limitations. *Avramovic v. R.C. Moore Trans. Inc.*, 2008 ME 140, ¶ 15, 954 A.2d 449 (citing *Morse v. Fleet Fin. Group*, 2001 ME 142, ¶ 5, 782 A.2d 769).

[¶8] In this case, the ALJ determined that Ms. O'Leary's earnings at Fish River constitute prima facie evidence of her post-injury ability to earn, citing *Fecteau v. Rich Vale Construction*, 349 A.2d 162, 165 (Me. 1975) and *Flanigan v. Ames Department Store*, 652 A.2d 83, 85 (Me. 1995). The ALJ also determined, however, that because Ms. O'Leary lost employment due to her own fault, it was appropriate to include the existence of and earnings from the job she lost in his analysis of the labor market, citing *Merrill v. Wal Mart Associates, Inc.*, W.C.B. 09-033798 (Me. 2011) (reasoning that a work-restricted employee terminated for fault may be found to have lost earning capacity primarily because of the termination instead of the work restrictions).

[¶9] Specifically, the ALJ found that Ms. O'Leary's post-injury position with NMMC was "evidence that such opportunities exist in her geographic region." Ms. O'Leary offered no work search or other evidence to bolster her contention that her wages at Fish River were an accurate measure of her post-injury earning capacity. The ALJ was not persuaded that Ms. O'Leary's earnings at Fish River reflected her post-injury ability to earn, and on appeal we may not substitute our judgment for that of the ALJ. *See Bruton v. City of Bath*, 432 A.2d 390, 394 (Me. 1981).

[¶10] Ms. O'Leary further argues that the record of her post-injury, pre-termination earnings is not sufficient to meet NMMC's burden of production because NMMC did not itself produce that information as evidence. *See McIntyre*

v. Great N. Paper, Inc., 2000 ME 6, ¶ 8, 743 A.2d 744; *Thurlow v. Rite Aid of Maine, Inc.*, Me. W.C.B. No. 16-23, ¶ 21 (App. Div. 2016). She contends that these earnings are not probative of her post-injury ability to earn because she was working in an accommodated position before she was terminated. We are not persuaded.

[¶11] Competent evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *In re Maine Clean Fuels, Inc.*, 310 A.2d 736, 751 (Me. 1973). Which party offered evidence into the record is not relevant to the inquiry of whether it is competent; rather, the basic inquiry on a burden of production is whether or not a rational basis *exists* to find for the party with the burden. *Ibbitson v. Sheridan Corp.*, 422 A.2d 1005, 1008 (Me. 1980).

[¶12] Moreover, the ALJ did not err when relying on evidence of accommodated post-injury employment to meet NMMC's burden of production. The burden of production is a minimal burden; it requires the employer to come forward with some evidence to suggest that employment paying higher wages and compatible with Ms. O'Leary's limited physical ability to work was reasonably available. *See Farris v. Georgia-Pacific Corp.*, 2004 ME 14, ¶ 16, 844 A.2d 1143. The ALJ did not err when concluding that evidence of Ms. O'Leary's post-injury, pre-termination employment as a nurse at NMMC is sufficient to suggest that such work is available.

[¶13] Because her pre-termination earnings were in the record, and because it was reasonable for the ALJ to be persuaded by them, it was not error to conclude that they met NMMC's burden of production.

III. CONCLUSION

[¶14] The ALJ determined that because Ms. O'Leary failed to demonstrate that her reduced earnings were caused by her work injury, she was not entitled to partial incapacity benefits. There is competent evidence to support the ALJ's factual findings, and the ALJ applied the appropriate legal standards to those facts.

The entry is:

The administrative law judge's decision is affirmed.

Administrative Law Judge Jerome, concurring

[¶15] I concur in the result reached above but write separately because I do not agree that NMMC had a burden of production in this matter, as the employer was held to have had in *Thurlow v. Rite Aid of Maine, Inc.*, Me. W.C.B. No. 16-23 (App. Div. 2016).

[¶16] In this case, the ALJ correctly determined that Ms. O'Leary's post-injury employment was prima facie evidence of the extent of her post-injury earning capacity. He then analyzed the totality of the evidence on that issue and determined that Ms. O'Leary had failed to carry her ultimate burden of proving that she suffered

any work-related earning incapacity. I believe this analysis is consistent with the case law and is supported by the record, and for this reason I concur in the result reached above.

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. 2018).

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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