ESTATE OF LARRY ENOS
(Appellant)

v.

GERRITY INDUSTRIES
(Appellee)

and

MEMIC
(Insurer)

Conference held: April 12, 2018
Decided: February 12, 2019

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

[¶1] The Estate of Larry Enos appeals from a decision of a Workers' Compensation Board administrative law judge (*Goodnough, ALJ*) denying its Petition for Award: Fatal, regarding a respiratory injury that occurred at work on March 11, 2014, and Mr. Enos's subsequent death by suicide on May 18, 2015. The ALJ awarded the Estate the protection of the Act for a transient respiratory injury, but determined that Mr. Enos's exacerbated mental health symptoms and eventual death were not caused by that injury. Accordingly, the ALJ denied the Estate's claim for benefits. The Estate appeals, arguing that the ALJ committed multiple legal errors by (1) adopting or misconstruing the medical findings of the board's independent medical examiners; (2) failing to apply 39-A M.R.S.A.

§ 201(3) and (4) (2001);[1] (3) admitting certain evidence and allowing witnesses to review documents while testifying; and (4) making unsupported factual findings. We disagree with the Estate's contentions, and affirm the decision.

I. BACKGROUND

[¶2] Larry Enos suffered a work-related respiratory injury on March 11, 2014, after an odor or irritant was emitted into the cab of the John Deere loader he was operating. Medical records from July 16, 2014, and October 14, 2014, described his respiratory condition as having improved, and he continued to work on a full-time basis. Later records describe his condition as worsening in March and April of 2015, but at that time, his treating physicians were not able to determine an objective cause of his complaints. In addition to his respiratory complaints, Mr. Enos was suffering from anxiety and depression. The inability to identify a cause of his respiratory problems exacerbated his mental health condition. He committed suicide near his home on May 18, 2015.

[¶3] The Estate of Larry Enos filed the pending petition, asserting that there was an unbroken chain of causation between Mr. Enos's March 2014 respiratory injury and his May 2015 suicide, and seeking benefits pursuant to 39-A M.R.S.A. §§ 215 (Supp. 2018) and 216 (2001). The board appointed two independent medical examiners (IMEs) pursuant to 39-A M.R.S.A. § 312 (Supp. 2018):

[1] Section 201(3) has since been repealed and replaced by P.L. 2017, ch. 294, §§ 1-2 (effective Nov. 1, 2017) codified at 39-A M.R.S.A. § 201(3) (Supp. 2018).

a pulmonary specialist and a psychiatrist. Without objection, the IMEs were provided a report from a medical expert commissioned by Gerrity Industries pursuant to 39-A M.R.S.A. § 207 (Supp. 2018).[2] The section 207 examiner's report, among other medical records, was submitted to the ALJ without objection as part of a joint medical records stipulation.

[¶4] The IME/pulmonary specialist opined that Mr. Enos's March 11, 2014, exposure caused a respiratory injury that resolved fairly quickly, before his mental state worsened in the spring of 2015. The IME/psychiatrist opined that Mr. Enos's work-related respiratory injury was not a cause of his depression and ultimate suicide. Instead, the IME opined that underlying recurrent depression with psychosis, first diagnosed in 2001, was the ultimate cause of the suicide. The ALJ was required to adopt the findings of the IMEs unless there was clear and convincing evidence in the record that does not support the findings. 39-A M.R.S.A. § 312(7). Although the Estate produced a contrary psychiatric opinion, the ALJ was not persuaded on a clear and convincing basis that the work injury contributed to Mr. Enos's death. He therefore adopted the IMEs' medical findings,

[2] Title 39-A M.R.S.A. § 207 provides, in relevant part:

> An employee being treated by a health care provider of the employee's own choice shall, after an injury and at all reasonable times during the continuance of disability if so requested by the employer, submit to an examination by a physician, surgeon or chiropractor authorized to practice as such under the laws of this State, to be selected and paid by the employer.

and found as fact that Mr. Enos's death was not causally connected to the work-related respiratory injury.

[¶5] The ALJ granted the Estate's petition insofar as it awarded the protection of the Act for the transient respiratory injury, but denied an award of death benefits. Neither party filed a motion for further findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318 (Supp. 2018). The Estate filed this appeal.

II. DISCUSSION

A. Standard of Review

[¶6] 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). When a party does not request further findings, the Appellate Division will treat the ALJ "as having made whatever factual determination could, in accordance with correct legal concepts, support [its] ultimate decision, and we inquire whether on the evidence such factual determinations must be held clearly erroneous." *Daley v. Spinnaker Indus.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (citing *Gallant v. Boise Cascade Paper Group*, 427 A.2d 976, 977 (Me. 1981)).

B. The Independent Medical Examiners' Medical Findings

[¶7] The Estate contends that the ALJ erred by adopting the opinion of the IME/psychiatrist instead of the opinion of the Estate's psychiatric expert, and by adopting or misconstruing the medical findings of the IME/pulmonologist. We disagree with these contentions.

[¶8] The ALJ is required to adopt the medical findings of an IME "unless there is clear and convincing evidence to the contrary in the record." 39-A M.R.S.A. § 312(7). The Appellate Division may reverse an ALJ's decision based on an independent medical examiner's findings only if the decision is unsupported by competent evidence and the record discloses no rational basis to support the IME's medical findings. *See Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983); *Dillingham v. Great N. Paper*, Me. W.C.B. No. 15-7, ¶ 3 (App. Div. 2015). Although the Estate has identified evidence that might have supported contrary findings, the medical findings and opinions of the IME/psychiatrist are rationally based on medical evidence that is thoroughly documented in his report, including medical records from Mr. Enos's treating physicians and providers. The ALJ did not err by adopting the IME/psychiatrist's medical findings.

[¶9] With regard to the IME/pulmonologist's report, the Estate contends that the ALJ erred by interpreting it as stating that Mr. Enos's physical injury had resolved before his mental illness escalated, rather than having merely improved.

However, the IME/pulmonologist's report states that the initial medical findings after the exposure were confined to the nasal passages, possibly causing a local irritation in the nose, sinus blockage, and a subsequent sinus infection, and did not reveal pneumonia or any significant respiratory abnormalities. The report further states that these symptoms healed rather quickly, and that after the symptoms had improved, Mr. Enos developed shortness of breath, the cause of which was never determined. These findings are consistent with the Mr. Enos's treating physician's medical records, and the IME/psychiatrist's statement in his report that the effects of the chemical exposure had abated before Mr. Enos's anxiety and recurrent depression intensified.

[¶10] The ALJ's finding that the physical symptoms caused by the chemical exposure had resolved before the Mr. Enos's mental condition deteriorated does not misconstrue the IME/pulmonologist's report, and is supported by competent evidence in the record.

C. Legal Standards Applied

[¶11] The Estate contends that the ALJ erred by failing to apply 39-A M.R.S.A. § 201(3), related to mental stress injuries, to the claim. [3] Section 201(3)

[3] Although the section 201(3) issue was not raised by the Estate at the hearing stage, it was raised by Gerrity Industries. Therefore, the section 201(3) issue can be fairly addressed on appeal.

requires that the elements of a mental stress claim be established by the heightened "clear and convincing evidence" standard.

[¶12] However, the Estate presented the mental component of its claim as resulting from the physical injury. Section 201(3) applies to mental stress injuries caused by work-related stress. There was no contention, and the ALJ did not find, that that Mr. Enos suffered a discrete mental injury arising from work-related mental stress. Instead, the ALJ found that the psychological symptoms suffered by Mr. Enos in 2015 were caused by his preexisting, nonwork-related mental illness. As such, section 201(3) does not apply in this case, and the ALJ did not err by failing to undertake the analysis.[4]

D. Factual Findings

[¶13] The Estate argues that the ALJ erred by relying on medical records from July 16, 2014, and October 14, 2014, to find that Mr. Enos's respiratory injury was short-lived. Portions of those and other records, the Estate argues, support a different conclusion—that although the injury improved, it had not resolved. The Estate also argues that the ALJ erred by finding that Mr. Enos had a

[4] The Estate also contends on appeal that 39-A M.R.S.A. § 201(4), which addresses compensation for the combined effects of a new work injury and a preexisting physical condition, should have been applied. However, the section 201(4) issue was not directly raised by the Estate to the ALJ. The Estate's argument before the ALJ was not that the physical injury aggravated the preexisting mental condition; instead, it was that the physical injury resulted in Mr. Enos's disordered mental state that, in an unbroken chain of causation, impaired Mr. Enos's ability to resist the impulse to take his life, thus rendering the act not willful under 39-A M.R.S.A. § 202. Because the issue of applying section 201(4) was not raised to the ALJ, the Appellate Division may not consider it on appeal. *Severy v. S.D. Warren Co.*, 402 A.2d 53, 56 (Me. 1979).

long, pre-injury history of depression and anxiety because there are only two previous documented periods of mental illness, in 2001 and 2006, and he had been well in that regard since 2006. The Estate also contends that the ALJ's finding that another non-occupational diagnosis "undoubtedly preoccupied [Mr. Enos] to a certain extent over the year" is unsupported.

[¶14] An ALJ's factual findings are final and, if supported by competent evidence in the record, are not subject to appeal. 39-A M.R.S.A. § 321-B(2) (Supp. 2018). Thus, we must uphold the ALJ's findings if supported by competent evidence, even if other evidence in the record could support a contrary conclusion. *See Wescott v. S.D. Warren Div. of Scott Paper Co.*, 447 A.2d 78, 80 (Me. 1982).

[¶15] The finding that Mr. Enos's respiratory complaints after late-2014 were not explained by the chemical exposure at work is well-documented in the record, including in the IME/pulmonologist's report and Mr. Enos's treating pulmonologist's records. The finding that Mr. Enos suffered from depression and anxiety is supported by records dating back to 2001, as documented in the IME/psychiatrist's report. The finding that Mr. Enos was previously examined and tested for a degenerative neurological condition is supported in his medical records, and the IME/psychiatrist opined that this condition is associated with depression and cognitive disturbance. Because the ALJs findings are supported by competent evidence, we find no error.

E. Admission of Evidence and Conduct of Hearing

[¶16] The Estate contends the ALJ erred when admitting the medical report from Gerrity Industries' section 207 examiner into evidence, and by allowing the IMEs to consider the 207 examiner's medical findings. The Estate also argues that the ALJ erred by allowing employer witnesses to testify while referring to unidentified documents or while viewing the laptop screen of Gerrity Industries' counsel, and by allowing counsel to make what the Estate construed as an improper joke.

[¶17] Our review of the record indicates, however, that the Estate failed to preserve these issues for appellate review. An issue is preserved for appellate review if there is a sufficient basis in the record to alert the administrative law judge and the opposing party to the existence of that issue at a point where that issue can be addressed. *Verizon New England, Inc., v. Pub. Utils. Comm'n*, 2005 ME 16, ¶ 15, 866 A.2d 844.

[¶18] During the hearing process, the medical reports now in dispute were admitted into evidence without an objection from the Estate's counsel. Similarly, the Estate did not object to the manner in which Gerrity Industries presented its witness's testimony or use of documents, including those accessed by computer, or

any misguided attempts at humor by Gerrity's counsel.[5] Thus, the ALJ was not alerted to the existence of those issues, and was not given the opportunity to address them at the hearing stage. Because the Estate raises these arguments for the first time on appeal, they have not been preserved for appellate review, and are waived. *Severy*, 402 A.2d at 56 ("Whether in the criminal or civil sphere, we have long adhered to the practice of declining to entertain arguments not presented to the original tribunal."); *Henderson v. Town of Winslow*, Me. W.C.B. No. 17-46, ¶ 10 (App. Div. 2017) (explaining the importance of raising legal arguments at a time and manner sufficient to give the ALJ and opposing party a fair opportunity to respond and address it).

III. CONCLUSION

[¶19] The ALJ did not err when adopting or interpreting the IMEs's medical findings. Nor did he err by failing to apply the legal standards for compensation in 39-A M.R.S.A. § 201(3) or (4). Moreover, any evidentiary issues or issues concerning the conduct of the hearing have been waived by the Estate's failure to

[5] Although we conclude that the Estate waived its objections to the admissibility of the disputed evidence, we note that the board is not bound by the rules of evidence observed by courts. *See* 39-A M.R.S.A. § 309(2) (Supp. 2018).

assert a timely objection at the hearing stage. Finally, the ALJ's factual findings are supported by competent evidence in the record.[6]

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. 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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[6] The ALJ did not reach the issue of whether 39-A M.R.S.A. § 202 (2001) bars the Estate's claim. Section 202 bars a claim if "it is proved that the injury or death was occasioned by the employee's willful intention to bring about the injury or death of the employee . . . ." Because we affirm the ALJ's decision to deny benefits on other grounds, we also do not reach this statutory issue.