ESTATE OF PETER W. JENSEN
(Appellee)

v.

S.D. WARREN
(Appellant, Self-Insured)

Oral Argument Date: December 12, 2018
Decided: November 20, 2020

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

[¶1] S.D. Warren appeals from a decision of a Workers' Compensation Board administrative law judge (*Stovall, ALJ*) granting the Estate of Peter Jensen's Petition for Award—Fatal, brought under the Occupational Disease Act, 39-A M.R.S.A. §§ 601-615 (2001 & Pamph. 2020). The ALJ applied the evidentiary presumption in 39-A M.R.S.A. § 327 (2001) and awarded the Estate total incapacity benefits for the 18-month period prior to Mr. Jensen's death on July 31, 2013, and death benefits since that date. S.D. Warren contends that the ALJ erred (1) in determining that there is a rational basis for application of the section 327 presumption because there is no competent evidence that Mr. Jensen suffered from work-related lung cancer; (2) in shifting the burden to S.D. Warren to negate the presumed fact that the injury arose out of his employment and determining that S.D. Warren failed to meet that burden; and (3) in allowing the Estate to depose its own medical expert. We affirm the decision.

I. BACKGROUND

[¶2] Peter Jensen worked for S.D. Warren for 29 years. By decree dated September 27, 1990, the former Commission found that as a result of several years of asbestos exposure while employed by S.D. Warren, Mr. Jensen sustained asbestos-related pleural plaque disease. Mr. Jensen continued to work for S.D. Warren until 1994.

[¶3] In 1997, Mr. Jensen had a heart attack and underwent cardiac bypass surgery. In March 2008, he underwent cardiac catheterization and angiography, which showed severe coronary artery disease. After experiencing shortness of breath in October 2008, Mr. Jensen was diagnosed with chronic obstructive pulmonary disease (COPD). CT scans over the next several years showed areas of density in Mr. Jensen's lungs, diagnosed at the time as pleural plaques.

[¶4] In December 2012, Mr. Jensen was diagnosed with non-Hodgkin's lymphoma and mantle cell lymphoma. After several rounds of chemotherapy, his lymph nodes and spleen returned to normal size, and a bone marrow biopsy was negative for lymphoma. A July 13, 2013, PET scan showed that a nodule in his left lung had increased in size, and the radiologist "[could] not exclude an underlying primary lung cancer." Mr. Jensen died at age 70 on July 31, 2013. The death certificate identified the cause of death as an "acute myocardial infarction due to (or as a consequence of) lung cancer."

[¶5] The Estate filed a Petition for Award—Occupational Disease—Fatal, which the ALJ granted. S.D. Warren filed a Motion for Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318 (Pamph. 2020), which the ALJ denied. S.D. Warren appeals.

II. DISCUSSION

A Standard of Review

[¶6] The Appellate Division's role on appeal "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 requests and proposes additional findings of fact and conclusions of law, "we review only the factual findings actually made and the legal standards actually applied" by the ALJ. *Daley v. Spinnaker Indus., Inc.*, 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

[¶7] Applying the section 327 presumption, the ALJ assigned S.D. Warren the burden of proving that Mr. Jensen's work-related pleural plaque disease did not contribute to his death. *See Lavalle v. Town of Bridgton,* Me. W.C.B. No. 15-13, ¶ 13 (App. Div. 2015). In cases in which an administrative law judge concludes that the party with the burden of proof failed to meet that burden, we will reverse that

determination only if the record compels a contrary conclusion. *Dunlop v. Town of Westport Island*, 2012 ME 22, ¶ 13, 37 A.3d 300.

B. Application of the Section 327 Presumption

[¶8] Title 39-A M.R.S.A. § 327 provides:

> In any claim for compensation, when the employee has been killed or is physically or mentally unable to testify, there is a rebuttable presumption that the employee received a personal injury arising out of and in the course of employment, that sufficient notice of the injury has been given and that the injury or death was not occasioned by the willful intention of the employee to injure or kill the employee or another.

[¶9] In order for the presumption to apply, the proponent must establish a linkage between the employment and the employee's condition, with

> evidence . . . of circumstances which indicate that the bringing of a claim for compensation is a rational act—that is, that the incident to which the claim relates has some rational potential of eventuating in an award of compensation when it is deemed supplemented by testimony which, within reasonable limits, may be conceived as potentially forthcoming from the employee were the employee available as a witness.

Toomey v. City of Portland, 391 A.2d 325, 330-31 (Me. 1978).

[¶10] S.D. Warren asserts that the presumption does not apply in this case because there was insufficient linkage between Mr. Jensen's employment (which caused his asbestos-related lung disease) and his death. *See id.* at 331-32. The ALJ found the requisite linkage based on (1) the death certificate, which identified lung cancer as a cause of the fatal heart attack, and (2) Dr. Oliver's medical opinion,

which provides support for a finding that Mr. Jensen had lung cancer as a result of his asbestos exposure at work.

[¶11] S.D. Warren contends that the inclusion of lung cancer as a cause of death on the death certificate was a "scrivener's error," and the evidence compels a finding that the certificate's author in fact meant "mantle cell lymphoma" because Mr. Jensen had undergone treatment for mantle cell lymphoma and had not been diagnosed with or treated for lung cancer. S.D. Warren further contends that there is no competent evidence that Mr. Jensen suffered from lung cancer, and that Dr. Oliver's opinion is unsupported in the record. We disagree with these contentions.

[¶12] Although Mr. Jensen had been treated for mantle cell lymphoma in the months leading up to his death, Dr. Oliver noted and the evidence shows that the lymphoma was in remission at that time. It is undisputed that Mr. Jensen sustained pleural plaque disease due to his exposure to asbestos at work. Dr. Oliver connected the eventual development of lung cancer, which she considered a causal factor in his death, to asbestos exposure. There is also a PET scan of Mr. Jensen's left lung taken shortly before his death that shows a nodule which was growing in size and which the radiologist could not exclude as a primary lung cancer.

[¶13] Accordingly, the ALJ's finding that Mr. Jensen's cause of death is linked to work-related lung cancer is supported by competent evidence and cannot be disturbed on appeal. 39-A M.R.S.A. § 321-B(2) (Pamph. 2020). Moreover, the

record contains evidentiary support for determining that the Estate's claim had some rational potential of eventuating in an award of compensation. Thus, the ALJ did not err in applying the section 327 presumption.

C. Effect of the Presumption

[¶14] S.D. Warren contends that the ALJ erred by shifting the burden of proof to the employer to disprove the facts established by the section 327 presumption, consistent with *Hall v. State*, 441 A.2d 1019, 1021 (Me. 1982) and *Estate of Sullwold v. The Salvation Army,* Me. W.C.B. No. 13-13, ¶ 21 (App. Div. en banc 2013). S.D. Warren asserts the "bursting bubble" approach, established by the Law Court in *Toomey*, 391 A.2d at 332, should have been applied.

[¶15] Although we acknowledge that adoption of the *Hill* approach in our *en banc* decision in *Sullwold* was *obiter dictum*, *see Estate of Sullwold v. Salvation Army,* 2015 ME 4, ¶ 17, 108 A.3d 1265, we nevertheless have affirmed the use of the *Hall* approach in several subsequent cases. *See, e.g., Lavalle,* Me. W.C.B. No. 15-13, ¶ 13; *Stein v. Inland Hosp.*, Me. W.C.B. No. 19-40, ¶ 10 (App. Div. 2019); *see also Axelsen v. Interstate Brands Corp.*, Me. W.C.B. No. 15-27, ¶ 18 (App. Div. en banc 2015) (applying the presumption in 39-A M.R.S.A. § 217 (Pamph. 2020)). Accordingly, we conclude that the ALJ did not err when shifting the burden to S.D. Warren to disprove the presumed facts.

[¶16] Additionally, we conclude that the ALJ did not err when determining that S.D. Warren failed to disprove the presumed fact that the lung condition that contributed to Mr. Jensen's death arose out of and in the course of employment. While acknowledging that S.D. Warren's two experts, Drs. Welch and Eule, opined that Mr. Jensen did not have lung cancer, the ALJ relied on the death certificate and on Dr. Oliver's medical opinion. The ALJ explicitly stated that he found Dr. Oliver's opinion more persuasive than that of the employer's medical experts because her background and training gave her a superior ability to assess the impact of asbestos exposure on Mr. Jensen's lung condition. The choice between competing medical opinions is a matter for the ALJ who hears and decides the case. *See Davis v. Boise Cascade*, Me. W.C.B. No. 17-41, ¶ 21 (App. Div. 2017).

[¶17] Moreover, Dr. Eule could not say that asbestos exposure played no role in Mr. Jensen's death, testifying that the exact circumstances of Mr. Jensen's death are unknown. The ALJ found that "… this testimony makes it very difficult for the employer to rebut the presumption under section 327."

[¶18] Consequently, a finding that Mr. Jensen's lung condition did not arise out of and in the course of his employment—which S.D. Warren had the burden to prove—is not compelled on this record.

D. Deposition of the Estate's Medical Expert

[¶19] S.D. Warren asserts that the ALJ erred by allowing the Estate to depose Dr. Oliver. This argument is without merit. We review the ALJ's decision regarding the conduct of proceedings to determine whether, in light of all the circumstances, the ALJ acted beyond the scope of his allowable discretion. *See Kuvaja v. Bethel Savings Bank*, 495 A.2d 804, 806 (Me. 1985) (applying abuse of discretion standard of review for administrative body's ruling on a motion to dismiss); *Laursen v. Sapphire Mgmt.*, Me. W.C.B. No. 20-19, ¶¶ 12-13 (App. Div. 2020) (applying abuse of discretion standard to ALJ's denial of a request to reschedule the deposition of an independent medical examiner).

[¶20] Me. W.C.B. Rule ch. 12, § 8(3) allows for depositions of witnesses "by agreement of the parties or order of the Administrative Law Judge," and there is no prohibition against deposing a party's own expert. The ALJ has discretion under the rule, and S.D. Warren has failed to establish that the ALJ acted outside the bounds of that discretion in allowing Dr. Oliver's deposition.

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 (Pamph. 2020).

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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