STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
App. Div. Case No. 19-0033
Decision No. 21-31

ESTHER O'BRIEN-NOLIN
(Appellant)

v.

SEASIDE HEALTHCARE
(Appellee)

and

MAINE HEALTH CARE ASSOCIATION
(Insurer)

Conferenced: August 20, 2020
Decided: November 17, 2021

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

[¶1] Esther O'Brien-Nolin appeals from a decision of a Workers' Compensation Board administrative law judge (*Goodnough, ALJ*) denying her Petitions for Award of Compensation and for Payment of Medical and Related Services. Ms. O'Brien-Nolin contends that the ALJ erred by failing to find clear and convincing evidence contrary to the independent medical examiner's opinion on causation and by denying her request to subpoena medical records of a former patient who resided at Seaside Healthcare's facility while she worked there. We disagree and affirm the ALJ's decision in all respects.

I. BACKGROUND

[¶2] Esther O'Brien-Nolin began working for Seaside Healthcare (Seaside) in May of 2011 as a registered nurse providing skilled care, primarily to elderly patients. Ms. O'Brien-Nolin had pre-existing hearing deficiencies in both ears. As a child, she had left ear surgery that resulted in her being functionally deaf in that ear. While in her twenties, Ms. O'Brien-Nolin had surgery on her right ear. That surgery caused partial hearing loss, which resulted in her wearing a hearing aid in her right ear. Ms. O'Brien-Nolin's right ear had been stable for years before her asserted date of injury, but she occasionally suffered drainage issues that required medical treatment.

[¶3] In early Spring of 2012, Ms. O'Brien-Nolin developed an infection in her right ear. With treatment, her condition improved; however, it returned later in the year. It was determined that Ms. O'Brien-Nolin had Methicillin-Resistant Staphylococcus Aureus (MRSA). Ms. O'Brien-Nolin's MRSA led to medical complications that, unfortunately, left her functionally deaf in both ears. Ms. O'Brien-Nolin returned to work despite her condition; however, she had difficulty doing her job and developed depression. She has essentially been out of work since February 12, 2016.

[¶4] Ms. O'Brien-Nolin alleges that her MRSA infection and resulting deafness constitute a work injury because it was caused by her exposure to a MRSA-

infected patient at Seaside. There is no dispute that this patient had a prior case of MRSA before coming to Seaside. Ms. O'Brien-Nolin contends that the patient likely had respiratory MRSA, in addition to his leg infection while at Seaside, and that she contracted MRSA while caring for him between November 7, 2011, and January 17, 2012. Seaside disputes whether Ms. O'Brien-Nolin contracted MRSA at work and whether MRSA caused the additional hearing loss in her right ear. Seaside asserts that there is no evidence that the patient had MRSA when he arrived at Seaside or at any time during his stay there.

[¶5] Ms. Barbara Walker, a registered nurse and board-certified in gerontology was a consultant for Seaside. She conducted a records review of the patient's stay at Seaside, including a summary of some of his pre-admission hospital records. Ms. Walker noted that the patient's blood cultures were done on October 18, 2011, approximately three weeks before his admission to Seaside. That culture established his blood to be free of MRSA. Ms. Walker then reviewed the patient's stay at Seaside, noting that he had no respiratory complaints until he had a cold on December 20, 2011. On January 16, 2012, the patient went to the emergency room. Blood cultures were re-taken on January 17, 2012. The cultures again showed no sign of MRSA.

[¶6] Ms. Walker went on to review Ms. O'Brien-Nolin's involvement in caring for the patient while he resided at Seaside. According to her review of the

records, Ms. O'Brien-Nolin provided the patient medication at night and evaluated his condition during her shift. Ms. Walker found that Ms. O'Brien-Nolin did not change the patient's dressings on his leg because that was done during earlier shifts.

[¶7] Ms. O'Brien-Nolin had an independent medical examination performed by Dr. Renato Medrano, M.D., pursuant to 39-A M.R.S.A. § 312 (Pamph. 2020). Dr. Medrano did not have the patient's medical records or Ms. Walker's review when he published his report on November 30, 2018. Based on the information he had, Dr. Medrano opined that it was more likely than not that Ms. O'Brien-Nolin developed a MRSA infection in her right ear due to her exposure to the patient at work with a MRSA infection. Dr. Medrano wrote, "Ms. O'Brien-Nolin's medical history and medical records are consistent with a health-care associated MRSA infection rather than a community associated MRSA infection."

[¶8] The parties deposed Dr. Medrano on May 13, 2019. Before his deposition, he was given a copy of the patient's medical records, Ms. Walker's summary of those same records, and Ms. Walker's deposition testimony. At that time, Dr. Medrano reversed his opinion. The ALJ found that "Dr. Medrano was obviously focused upon two interrelated facts: 1) that (the patient), although perhaps previously 'colonized' by MRSA, was not actively infected ('positive') with MRSA (whether wound-based or respiratory) during any period he was residing at Seaside, and 2) Ms. O'Brien-Nolin, although she was in contact with (the patient), her actual

close contact with him was probably quite limited, and MRSA precautions were likely taken."

[¶9] Ms. O'Brien-Nolin testified that upon returning to work in April of 2013, following an illness complicated by MRSA, she was told by another nurse that the patient did have respiratory MRSA while he was at Seaside. Ms. O'Brien-Nolin testified that she examined the patient's chart and found a loose note from the hospital lab showing that the patient had respiratory MRSA before his admission to Seaside. The ALJ noted that this lab report "appeared nowhere in (the patient's) chart later reviewed by Ms. Walker, or by Dr. Medrano." Ultimately, the ALJ found that while it was possible that Ms. O'Brien-Nolin contracted MRSA from (the patient) at Seaside, it is not probable based upon the evidence presented. The ALJ found no clear and convincing contrary medical evidence to Dr. Medrano's opinion offered during his deposition. Ms. O'Brien-Nolin requested further findings of fact and conclusions of law, which the ALJ granted. The ALJ issued an amended decision but did not alter the outcome. This appeal followed.

II. DISCUSSION

A. Standard of Review

[¶10] The Appellate Division's role on appeal is "limited to assuring that the [ALJ's] factual 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). When a party requests and proposes additional findings of fact and conclusions of law, as was done in this case, the Appellate Division reviews "only the factual findings actually made and the legal standards actually applied" by the ALJ. *Daley v. Spinnnaker Indus*., 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Competency of the Evidence

[¶11] Ms. O'Brien-Nolin contends that the ALJ's findings were not supported by competent evidence and that the ALJ erred by giving weight to the fact that the patient had no evidence of MRSA in his blood culture in the fall of 2011. Ms. O'Brien-Nolin asserts that blood cultures for MRSA only indicate whether a patient has MRSA in their bloodstream. A blood culture does not eliminate the possibility that the patient had respiratory MRSA. Dr. Medrano confirmed during his deposition that the proper test for respiratory MRSA is a sputum culture. Ms. O'Brien-Nolin asserts that because the patient was not given a sputum culture while residing at Seaside, the absence of evidence of MRSA in the patient's records at Seaside is of no significance. Therefore, according to Ms. O'Brien-Nolin, the ALJ committed legal error in relying on Dr. Medrano's opinion.

[¶12] Ms. O'Brien-Nolin's argument misplaces the burden of proof. As a general matter, the petitioning party bears the burden to establish all elements of

a claim on a more probable than not basis. *Fernald v. Dexter Shoe Co*., 670 A.2d 1382, 1385 (Me. 1996); *see also Rowe* v. *Bath Iron Works Corp*., 428 A.2d 71, 73 (Me. 1981). Establishing that the patient did not have a sputum culture to either confirm or rule out respiratory MRSA does not serve to carry Ms. O'Brien-Nolin's burden of proving that she contracted MRSA from the patient.

[¶13] Further, Dr. Medrano's findings were not based merely on the absence of a sputum culture. Along with a review of the patient's medical records and Nurse Walker's report and deposition, he also considered the medical records from physician assistant Matthew Picard at Mercy Hospital. Dr. Medrano stated during his deposition, "PA Picard indicated that patient states today he is feeling well. He denies chest pain, palpitation, shortness of breath, even chills or sweats." Dr. Medrano went on to state, "In other words, he does not present with symptoms who (sic) has an active bacterial pneumonia or a methicillin-resistant Staphylococcus aureus."

[¶14] Title 39-A M.R.S.A. § 312(7) provides:

> The board shall adopt the medical findings of the independent medical examiner unless there is clear and convincing evidence to the contrary in the record that does not support the medical findings. Contrary evidence does not include medical evidence not considered by the independent medical examiner. The board shall state in writing the reasons for not accepting the medical findings of the independent medical examiner.

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). Dr. Medrano's medical opinion has a rational basis in the evidence. The ALJ did not err by adopting Dr. Medrano's opinion offered at deposition.[1]

C. Denial of the Requested Subpoena

[¶15] Ms. O'Brien-Nolin argues that the ALJ committed error when he denied her request to subpoena the patient's medical records that were created after he left Seaside. Ms. O'Brien-Nolin sought the subpoena on May 22, 2019, at a conference of counsel. The ALJ denied this request for three reasons. First, the ALJ found that it was untimely. Second, it would have caused further delay in a case that had been pending over two years. Third, given Dr. Medrano's opinion and the evidence provided by nurse Walker and physician assistant Picard, the ALJ found the subpoena unwarranted.

[¶16] Ms. O'Brien-Nolin contends that the ALJ's finding that her subpoena request was untimely was error because it was only after Dr. Medrano's opinion changed during his deposition that the patient's medical records following his stay

[1] Ms. O'Brien-Nolin also contends that the ALJ failed to address relevant case law. She cites *Venice Ridley v. Marshwood Nursing Center*, 2008 ME Wrk. Comp. LEXIS 403, and *Plourde v. St. Joseph's Nursing Home*, 2012 ME Wrk. Comp. LEXIS 525. However, as Ms. O'Brien-Nolin concedes, neither of these cases involved a 39-A M.R.S.A § 312 examination and opinion. Thus, those cases are distinguishable.

at Seaside became relevant. As Seaside points out, however, whether Ms. O'Brien-Nolin contacted MRSA as a result of working with the patient was a fundamental issue in dispute from the start. Ms. O'Brien-Nolin was aware at the January 29, 2019, hearing that there was an absence of medical documentation showing that the patient had respiratory MRSA. At that time, the parties did not have Dr. Medrano's report; thus, the failure to timely request a subpoena of the patient's records was not based on a favorable report.

[¶17] We review the ALJ's decisions regarding the conduct of a hearing 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); *Matthews v. Shaw's Supermarkets*, Me. W.C.B. No. 15-25, ¶ 28 (App. Div. 2015) (applying abuse of discretion standard to ALJ's decision to conduct hearings in a certain manner). We will vacate the ALJ's decision if the proceedings violated due process; that is, if they were fundamentally unfair. See *Kuvaja*, 495 A.2d at 806; *Potter v. Cooke Aquaculture*, Me. W.C.B. No. 19-37, ¶ 22 (App. Div. 2019).

[¶18] The ALJ's decision to deny Ms. O'Brien-Nolin's request to subpoena is supported by the principle of judicial economy and falls within a reasonable range of appropriate decision-making. We therefore find no error. *See Smith v. Maine*

Coast Sea Vegetables, Me. W.C.B. No. 20-01, ¶ 13 (App. Div. 2020) ("Matters regarding the sequence and conduct of hearings, and the admission or exclusion of evidence, are reviewable for abuse of discretion."); *see also Sager v. Town of Bowdoinham*, 2004 ME 40, ¶ 11, 845 A.2d 567 (finding no abuse of discretion when the decisionmaker did not exceed the bounds of reasonable choices available to them).

III. CONCLUSION

[¶19] The ALJ's factual findings are supported by competent evidence, and the decision involved no misconception or misapplication of the law. The ALJ did not abuse his discretion in denying Ms. O'Brien-Nolin's motion for subpoena.

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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