STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
App. Div. Case No. 20-0025
Decision No. 22-23

RICHARD M. ASHLEY
(Appellee)

v.

S.D. WARREN CO.
(Appellant)

and

CCMSI

and

CONSTITUTION STATE SERVICES

Conference held: April 28, 2021
Decided: August 2, 2022

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

[¶1] S.D. Warren appeals from a decision of a Workers' Compensation Board administrative law judge (*Jerome, ALJ*) denying its Petitions for Review and to Terminate Benefit Entitlement, and leaving Richard Ashley's existing total incapacity benefit payment scheme in effect. S.D. Warren contends that the ALJ erred by failing to conclude that Mr. Ashley's work-related incapacity has decreased from total to partial since the prior decree. We disagree and affirm the decision.

I. BACKGROUND

[¶2] In a 2008 decree, Mr. Ashley was awarded total incapacity benefits from December 2006 and ongoing based on the combined effects of established 1995 (left

foot/ankle/right knee) and 2000 (bilateral shoulder) work injuries and their psychological sequela. In the current round of litigation, S.D. Warren has filed Petitions for Review and to Terminate Benefit Entitlement, contending that Mr. Ashley's incapacity level has decreased to partial and that he has received all incapacity benefits to which he is entitled. *See* 39-A M.R.S.A. § 213.

[¶3] To prevail on a subsequent petition for review, the petitioning party must show a change of circumstances from the previous decree sufficient to justify revisiting the previously established payment scheme. *McIntyre v. Great N. Paper, Inc.*, 2000 ME 6, ¶ 5, 743 A.2d 744. The burden to show changed circumstances "may be met by either providing comparative medical evidence or by showing changed economic circumstances." *Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 7, 837 A.2d 117 (quotation marks omitted). Accordingly, S.D. Warren, seeking to decrease the level of compensation ordered in the prior decree, bore the burden of proof to demonstrate that Mr. Ashley's circumstances had changed and if so, to establish that that Mr. Ashley had regained work capacity. *See McIntyre,* 2000 ME 6, ¶ 6, 743 A.2d 744; *Tripp v. Philips Elmet Corp.,* 676 A. 2d 927, 929 (Me. 1996).

[¶4] Mr. Ashley underwent independent medical examinations with a psychiatrist, Dr. Barkin, and a physical medicine specialist, Dr. Guernelli. *See* 39-A M.R.S.A. § 312 (requiring the ALJ to adopt the medical findings of an independent medical examiner absent clear and convincing contrary evidence). The

ALJ determined that Mr. Ashley's circumstances had changed sufficiently to revisit the decree based on (1) Dr. Barkin's assessment that Mr. Ashley's psychological condition no longer presents any limitations on his ability to work; (2) Dr. Guernelli's medical finding that Mr. Ashley's knee condition has improved since the prior decree due to a bilateral knee replacement; and (3) the fact that Mr. Ashley had aged from 62 to 73 years since the prior decree.

[¶5] Despite finding an improvement in his knee and psychological conditions, the ALJ determined that S.D. Warren did not meet its burden to establish that Mr. Ashley regained an earning capacity since the 2008 decree. Based on Dr. Guernelli's report, the ALJ found that Mr. Ashley continued to experience significant work-related physical limitations, including left foot and ankle disfunction, bilateral shoulder pain with chronic rotator cuff tendinopathy, and acromioclavicular joint osteoarthritis with recent adhesive capsulitis. Based on these conditions, as well as other factors relevant to work capacity such as such as his age, weight, and general medical condition, Dr. Guernelli opined that it was "highly unlikely" that Mr. Ashley would be able to return to any type of work, even with restrictions. Accordingly, the ALJ found that he remained totally incapacitated and denied S.D. Warren's petition.

[¶6] The ALJ subsequently denied S.D. Warren's Motion for Findings of Fact and Conclusions of Law, and S.D. Warren appeals.

II. DISCUSSION

[¶7] S.D. Warren contends that when determining that Mr. Ashley remained totally incapacitated, the ALJ erred by failing to separate out incapacity caused by certain subsequent nonwork-related conditions—namely, Mr. Ashley's age, weight, and general medical condition, pursuant to 39-A M.R.S.A. § 201(5). Subtracting the incapacity related to those conditions, S.D. Warren argues, would reduce Mr. Ashley's incapacity level to partial. We disagree with this contention.

[¶8] Title 39-A M.R.S. § 201(5) provides:

> **Subsequent nonwork injuries**. If an employee suffers a nonwork-related injury or disease that is not causally connected to a previous compensable injury, the subsequent nonwork-related injury or disease is not compensable under this Act.

[¶9] This language means that a subsequent nonwork injury or disease "that is not causally related to work cannot increase the level of or extend the duration of workers' compensation benefit payments." *Roy v. Bath Iron Works*, 2008 ME 94, ¶ 11, 952 A.2d 965. It requires the ALJ to separate out the effects of the subsequent nonwork injury or disease in calculating benefits "and in determining whether the compensation level for the benefits is governed by the partial incapacity section or the total incapacity section." *Pratt v. Fraser Paper, Ltd.*, 2001 ME 102 ¶ 12, 774 A.2d 351.

[¶10] While the ALJ did note that Dr. Guernelli considered Mr. Ashley's age, weight, and general medical condition when issuing his opinion on work capacity,

she concluded that they are not subsequent nonwork injuries or diseases and thus, the incapacity related to those conditions is not subject to separation under section 201(5). We find no reason to disturb this conclusion.

[¶11] Mr. Ashley has not worked since the 2000 injury to his bilateral shoulders, and since 2008 has received total incapacity benefits for the continuing effects of the 2000 injury combined with the continuing effects of the 1995 injury to his left foot and ankle. The ALJ determined correctly that none of the conditions mentioned by S.D. Warren has been shown to be a *subsequent* "injury or disease." Moreover, even if weight (obesity) is arguably a disease, there is no evidence to satisfy S.D. Warren's burden to show that it (a) arose after the injury or (b) is not causally related to the injuries. In his report, Dr. Guernelli specifically lists "morbid obesity" under Mr. Ashley's "Past Medical History/Pre-existing injuries/Accidents" and does not mention weight when answering questions regarding whether Mr. Ashley's medical circumstances have changed and whether he has limitations regarding his ability to work.

[¶12] Finally, although age is a relevant consideration in the assessment of work capacity, it remains a truism that '"the employer takes the employee as [they find them]."' *Bryant v. Masters' Machine Co.*, 444 A.2d 329, 338 (Me. 1982) (quoting *Barrett v. Herbert Eng'g Inc.*, 371 A. 2d 633, 636 (Me. 1977)). This includes the employee's age (which is generally considered an immutable

characteristic under the law) when injured, and age is not an injury or disease. *See generally* Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY LAW REV. 1483, 1487 (2011); *see also, e.g.*, 5 M.R.S.A. § 4571 (declaring the opportunity to secure employment without discrimination on the basis of age a civil right).

[¶13] In this case, the plain language of section 201(5) does not support subtracting incapacity resulting from age, weight, or general medical condition to arrive at a benefit level less than total.

III. CONCLUSION

[¶14] The ALJ's factual findings are supported by competent evidence, and the ALJ neither misconceived nor misapplied the law when denying S.D. Warren's Petitions for Review and to Terminate Benefit Entitlement. *See Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983).

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.

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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