ALLEN GILBERT
(Appellant)

v.

S.D. WARREN
(Appellee)

and

CONSTITUTION STATE SERVICES
(Insurer)

Conference held: January 29, 2015
Decided: April 20, 2016

PANEL MEMBERS: Administrative Law Judges[1] Stovall, Jerome, and Pelletier
BY: Administrative Law Judge Jerome

[¶1] Allen Gilbert appeals from a decision of an administrative law judge (*Elwin*, *ALJ*) denying his Petitions for Review and to Determine Extent of Permanent Impairment, and granting S.D. Warren's Petition for Review, allowing S.D. Warren to discontinue further payment of partial incapacity benefits. The ALJ determined that Mr. Gilbert had failed to demonstrate a change in physical or economic circumstances sufficient to withstand the *res judicata* effect of the ALJ's prior rulings on these issues. Mr. Gilbert maintains that the ALJ erred (1) in denying his petitions because the evidence established a change of physical circumstance affecting work capacity sufficient to overcome that *res judicata*

[1] Pursuant to P.L. 2015, ch. 297 (effective October 15, 2015) Workers' Compensation Board hearing officers licensed to practice law are now designated administrative law judges.

effect of the previous decision, and (2) in making insufficient findings in support of her decision. Finding no error, we affirm the ALJ's decision.

## I. BACKGROUND

[¶2] Allen Gilbert was an oiler at S.D. Warren's Skowhegan mill for many years. In 2006, the ALJ issued a decree finding that Mr. Gilbert suffered an injury to his bilateral upper extremities on July 19, 2001, and based on Dr. Peter Esponnette's assessment, he was entitled to partial incapacity benefits with a $300 per week imputed earning capacity. The ALJ also found that Mr. Gilbert suffered from 8% whole person permanent impairment as a result of his work injury. In a 2008 decision, the ALJ permitted S.D. Warren to reduce Mr. Gilbert's ongoing partial incapacity benefits pursuant to 39-A M.R.S.A. § 221 (Supp. 2015) because he had begun receiving an early retirement pension. The ALJ further permitted S.D. Warren to take a "holiday" to recover for pension benefits already paid.

[¶3] Mr. Gilbert thereafter brought petitions seeking to increase his benefit level and his permanent impairment rating, based upon evidence of what he regarded as a worsening of his condition since the date of the previous proceeding. S.D. Warren filed a petition for review seeking to apply the durational limit of 39-A M.R.S.A. § 213 (Supp. 2015) and Me. W.C.B. Rule, Ch. 1, § 2.

[¶4] In her initial decree in this round of litigation, the ALJ denied Mr. Gilbert's petitions, finding that Mr. Gilbert had failed to provide comparative

medical evidence establishing a change in circumstances with respect to his physical condition or the extent of his permanent impairment. S.D. Warren's petition was granted allowing it to discontinue benefit payments pursuant to 39-A M.R.S.A. § 213 (Supp. 2015); Me. W.C.B. Rule, Ch. 1, § 2.

[¶5] Mr. Gilbert filed a motion for additional findings of fact and conclusions of law. The ALJ issued further findings of fact and conclusions of law, but the outcome remained unchanged. Among other things, the ALJ concluded that because Mr. Gilbert failed to establish that his medical condition had worsened or his permanent impairment had increased since the evidence closed prior to issuance of the June 17, 2006, decision, *res judicata* prevents the Board from altering the 8% permanent impairment level established in that decision.

[¶6] Mr. Gilbert maintains that these findings are in error. Specifically, Mr. Gilbert argues that Dr. Pavlak's 2010 report contains evidence that his condition worsened and that the independent medical examiner's report contains evidence supporting changes in his physical condition. This appeal followed.

## II. DISCUSSION

### A. Standard of Review

[¶7] 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). The ALJ's findings of fact are not subject to appeal. 39-A M.R.S.A § 321-B(2) (Supp. 2015).

B. Comparative Medical Evidence

[¶8] The Board's decision in 2006 established that Mr. Gilbert had a partial earning capacity and a permanent impairment rating of 8%. "[V]alid and final decisions of the Workers' Compensation Board are subject to the general rules of *res judicata* and issue preclusion, not merely with respect to the decision's ultimate result, but with respect to all factual findings and legal conclusions that form the basis of that decision." *Grubb v. S.D. Warren Co*., 2003 ME 139, ¶ 9, 837 A.2d 117 (quotation marks omitted). In order to overcome the *res judicata* effect of the previous decision, Mr. Gilbert was required to provide comparative medical evidence establishing a change of medical circumstances sufficient to revisit the issues of earning capacity and permanent impairment. "The purpose of the [comparative evidence] rule is 'to prevent the use of one set of facts to reach different conclusions.'" *McIntyre v. Great N. Paper, Inc*., 2000 ME 6, ¶ 5, 743 A.2d 744 (quoting *Folsom v. New England Tel. & Tel. Co*., 606 A.2d 1035, 1038 (Me. 1992).

[¶9] Comparative medical evidence need not come from the same physician who issued the prior medical opinion, as long as the record shows that

the more recent examiner was familiar with the previous physician's medical findings. *Van Horn v. Hillcrest Foods, Inc*., 392 A.2d 52, 54-55 (Me. 1978). "If the second physician is asked to assume, hypothetically, the validity of the findings of the prior examining physician, he may then give his opinion as to whether or not a change in condition has occurred, based on that assumption." *Id*.; *see also See Jackson v. Pratt-Abbott Cleaners*, Me. W.C.B. No. 14-13, ¶¶ 10-11 (App. Div. 2014).

[¶10] Mr. Gilbert argues that the record contained comparative medical evidence of his deteriorating condition which was not considered by the ALJ. Specifically, he cites 2010 and 2012 reports from Dr. Pavlak concluding that Mr. Gilbert's condition had worsened. The 2010 report does address the issue of whether there had been a change in Mr. Gilbert's condition during the relevant period. Dr. Pavlak reported: "Again, these are subjective complaints that I cannot corroborate with any objective tests, but if this is an appropriate criteria then [he] would have to say that his physical condition has definitely worsened over time since 2006." While the ALJ did not explicitly comment on the findings in the 2010 report, the credibility of Mr. Gilbert's subjective complaints was clearly addressed. The ALJ found that "the only evidence of such a change was Mr. Gilbert's testimony that his symptoms have progressively worsened over the years." The ALJ did not find Mr. Gilbert to be credible in his complaints because his testimony

was not supported by the medical records or by a comparison of Mr. Gilbert's past and current testimony about his symptoms and functional abilities.

[¶11] An assessment of credibility is uniquely within the province of the fact-finder, who has the opportunity to directly observe witnesses and hear the testimony, and we will not disturb such a finding. The Law Court has held that the "fact-finder has the prerogative selectively to accept or reject it, in terms of the credibility of the witnesses or the internal cogency of the content." *Dionne v. LeClerc*, 2006 ME 34, ¶ 15, 896 A.2d 923; *see also In RE Andrea W.*, 537 A.2d 596, 598 (Me. 1988) ("We have long recognized the principle that the [fact-finder] has the responsibility to assess the credibility of the witnesses and to find facts, and may reject the entire testimony of an uncontradicted witness."). A fact-finder is not required to believe witnesses, even if their testimony is not disputed. *Dionne v. LeClerc*, 2006 ME 34 at ¶ 15.

[¶12] In sum, although the ALJ did not specifically address Dr. Pavlak's statement in support of a worsening of Mr. Gilbert's condition, the underlying issue of credibility, upon which that report was based, was clearly addressed.[2] Because Dr. Pavlak's medical findings were based upon the credibility of Mr.

[2] In addition, the ALJ specifically references Dr. Pavlak's 2010 and 2012 reports in further explaining her finding that the record did not support a worsening of Mr. Gilbert's condition. "In 2012, Dr. Pavlak recommended, just as he did in 2010 and Dr. Esponnette did in 2005, that Mr. Gilbert avoid heavy or repetitive activity."

Gilbert's complaints, we find no error in the ALJ's implicit rejection of Dr. Pavlak's opinion on this subject.

[¶13] Mr. Gilbert cites other record evidence which he maintains the ALJ refused to consider in support of his claim that his condition had deteriorated over time. Specifically, he relies upon a medical finding by Dr. Bradford, who conducted an independent medical exam pursuant to 39-A M.R.S.A § 312 (Supp. 2015) on November 11, 2012, that documented a grip strength of 38 kilos on the right and 40 kilos on the left (converted to 83 lbs. and 88 lbs.). An earlier examination by Dr. Esponnette in 2005 measured an average of 107 lbs. and 105 lbs. In addition, Dr. Bradford noticed some degree of atrophy in the left forearm. Mr. Gilbert maintains that these findings represent a change in circumstances.[3]

[¶14] There is no evidence in the record, however, that discusses the medical relevance of these two findings with respect to the issue of the extent of Mr. Gilbert's alleged declining incapacity or the extent of his permanent impairment comparatively from 2006 to the time of litigation. Contrary to Mr. Gilbert's assertions, it is not self-evident that a reduction in grip strength or a finding of atrophy measured by different examiners at different points in time is reliable evidence of a change in circumstances affecting Mr. Gilbert's physical restrictions and therefore the extent of his incapacity or level of permanent

[3] Dr. Bradford does not directly address either (1) the issue of the extent of Mr. Gilbert's work capacity in relation to that of 2006, or (2) whether or to what extent his physical condition had changed since 2006.

impairment. Because Dr. Bradford's opinion was not based on a comparative analysis, the ALJ was barred by the doctrine of *res judicata* from relying on it as a basis to find declining incapacity or the extent of his permanent impairment.[4] *See Klein v. State of Me*., Me. W.C.B. No. 15-5, ¶ 12 (App. Div. 2015).

[¶15] It was incumbent on Mr. Gilbert to provide comparative medical evidence sufficient to overcome the principle of *res judicata*.[5] The evidence that he cites is not sufficient to meet that burden as a matter of law because the medical relevance of the facts relied upon are not self-evident and there is no comparative medical opinion establishing that those facts are relevant to the underlying issue. For this reason, the ALJ's failure to specifically discuss these findings in this regard was not error.

C. Insufficiency of the Findings

[¶16] Mr. Gilbert argues that the ALJ did not make adequate findings to generate a record that is sufficient for appellate review. *See Cote v. Town of*

[4] Mr. Gilbert contends that the ALJ erred in failing to adopt the opinion of Dr. Bradford. *See* 39-A M.R.S.A. § 312(7) (Supp. 2015). However, it is only after a demonstration of a change in medical circumstances affecting work capacity by comparative evidence sufficient to overcome the *res judicata* effect of the 2006 decision that Dr. Bradford's report may be used to consider the extent of his permanent impairment.

[5] Mr. Gilbert argues in his reply brief that once he testified that his condition had deteriorated, S.D. Warren thereafter bore the burden of proving that his condition had not changed since 2006 in order to terminate his benefits pursuant to S.D. Warren's Petition for Review. *See Bisco v. S.D. Warren*, 2006 ME 117, 908 A.2d 625. The record does not demonstrate that this argument was ever presented to the ALJ and thus we find that it is not timely raised. To the extent it was timely, we find that *Bisco* is inapposite. In Mr. Gilbert's case there is a previous adjudication on the issues of extent of incapacity and permanent impairment. There was no such adjudication in *Bisco* and thus the issue of *res judicata* was not raised. In this case, the burden was set by principles of *res judicata*. It was incumbent on Mr. Gilbert to demonstrate a change in circumstance in order to avoid being bound by the findings in the previous decision.

*Millinocket*, 444 A. 2d 355, 359 (Me. 1982). Specifically, Mr. Gilbert contends that the ALJ erred by omitting the objective findings of lost grip strength and muscle atrophy by Dr. Bradford, the independent medical examiner, as discussed above.

[¶17] Because Mr. Gilbert made a request for additional findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318 (Supp. 2015), and submitted proposed additional findings, we do not assume that the hearing officer made all the necessary findings to support the conclusion that there was not a change in circumstances sufficient to overcome *res judicata*. *See Spear v. Town of Wells*, 2007 ME 54, ¶ 10, 922 A.2d 474. "Instead, we review the original findings and any additional findings made in response to a motion for findings to determine if they are sufficient, as a matter of law, to support the result and if they are supported by evidence in the record." *Id.* (quotation marks omitted). When requested, an ALJ is under an affirmative duty under section 318 to make additional findings to create an adequate basis for appellate review. *See Coty v. Town of Millinocket*, 444 A.2d 355, 357 (Me. 1982); *Malpass v. Phillip J. Gibbons*, Me. W.C.B. No. 14-19, ¶ 18 (App. Div. 2014).

[¶18] The findings provide an adequate basis for appellate review. The issue in this case is whether Mr. Gilbert had a change in circumstances sufficient to overcome the principle of *res judicata*. Mr. Gilbert was required to provide

comparative medical evidence establishing a change of medical circumstances sufficient to revisit the issues of earning capacity and permanent impairment. The ALJ determined that Mr. Gilbert did not meet this burden, and made adequate findings of fact to support this determination. The ALJ found that there was an underlying credibility issue, that Dr. Pavlak's reports did not support a worsening of Mr. Gilbert's condition, and that Dr. Bradford's report was not comparative medical evidence. The ALJ's failure specifically to discuss Dr. Bradford's findings in terms of grip strength and atrophy or Dr. Pavlak's assessment of Mr. Gilbert's subjective complaints was not in error, as an ALJ is not required to make findings regarding each piece of medical evidence in the record in to explain the evidentiary basis of her decision. *Leo v. American Hoist & Derrick Co*., 438 A.2d 917, 921 (Me. 1981). Thus, the ALJ made adequate findings to resolve the issue in this case—whether Mr. Gilbert established a change in circumstances sufficient to overcome the principle of *res judicata*.

## III. CONCLUSION

[¶19] We find that the ALJ did not err in finding that Mr. Gilbert did not establish a change of medical circumstances sufficient to overcome the *res judicata* effect of the previous decision. Further, the ALJ made sufficient findings pursuant to 39-A M.R.S.A. § 318 (Supp. 2015).

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. 2015).

---

Attorney for Appellant:
James J. MacAdam, Esq.
MACADAM JURY
208 Fore St.
Portland, ME 04101

Attorneys for Appellee:
Daniel F. Gilligan, Esq.
TROUBH HEISLER
P.O. Box 9711
Portland, ME 04104-5011