

TERRY BISCO
(Appellant)

v.

S.D. WARREN
(Appellee)

and

HELMSMAN MANAGEMENT SERVICES, INC.
(Insurer)

Conference held: November 30, 2016
Decided: September 22, 2017

PANEL MEMBERS: Administrative Law Judges Collier, Elwin, and Stovall
BY: Administrative Law Judge Elwin

[¶1] Terry Bisco appeals from a decision of a Workers' Compensation Board administrative law judge (*Goodnough, ALJ*) partially denying his Petition for Restoration filed in connection with a March 23, 1999, work-related injury to his neck, low back, and left shoulder. Mr. Bisco contends that the ALJ erred when he found no change of circumstances that would have justified reconsideration of the level of ongoing incapacity established in a 2011 decree. He argues that he proved both a change of medical and economic circumstances beyond the brief period awarded by the ALJ.

[¶2] Because we conclude that the findings of fact are inadequate for appellate review, we remand to the ALJ for further findings on those issues.

I. BACKGROUND

[¶3] Mr. Bisco suffered several work-related injuries, including one on March 23, 1999, when an overhead door came down on him as he drove under it, injuring his neck, left shoulder, and low back. In a 2002 decree, a hearing officer (*Jerome, HO*) determined that Mr. Bisco was restricted from frequent overhead lifting as a result of that injury and awarded him ongoing 45% partial incapacity benefits. In a 2011 decree, the same hearing officer determined that, although the effects of his injury continued, Mr. Bisco was able to earn his pre-injury average weekly wage of nearly \$800 and ongoing incapacity benefits were therefore no longer warranted.

[¶4] Mr. Bisco has taken high doses of ibuprofen since his 1999 injury to control the pain in his back, leg, hand, neck, and shoulder. The ibuprofen helped him function both at home and at work, but it eventually caused a gastro-intestinal bleed from a duodenal ulcer. That ulcer resulted in Mr. Bisco's hospitalization and surgery in February, 2014. Since that time, Mr. Bisco has been unable to take ibuprofen or other non-steroidal anti-inflammatory drugs (NSAIDs). His doctors have specifically recommended that he avoid NSAIDs and use a proton pump inhibitor for the remainder of his life. He testified that, despite using Tylenol and Vicodin, his neck and shoulder pain has increased since he stopped using ibuprofen.

[¶5] Mr. Bisco filed a Petition for Restoration. The ALJ (*Goodnough, ALJ*) granted the petition and awarded Mr. Bisco a period of total incapacity benefits, but only for the time period around Mr. Bisco's ulcer surgery. Other than that closed-ended period of less than three months, the ALJ found that there had been no change of circumstances that warranted reevaluation of Mr. Bisco's earning capacity as established in the 2011 decree. For that reason, the ALJ denied Mr. Bisco's claim for ongoing incapacity benefits. Mr. Bisco appeals.

II. DISCUSSION

[¶6] An administrative law judge cannot increase or decrease the level of an employee's established incapacity benefits unless there has been a change of circumstances since the prior determination. *Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 7, 837 A.2d 117. Either evidence of economic developments or comparative medical evidence can provide the basis for a change of circumstances. *See id.* Mr. Bisco asserts that evidence of economic and medical changed circumstances compels the conclusion that the res judicata effect of the prior decree has been overcome. We assess each of those contentions separately below.

A. Standard of Review

[¶7] 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.” *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted).

[¶8] Because Mr. Bisco requested additional findings of fact and conclusions of law pursuant to 39-A M.R.S.A. § 318 (Supp. 2016), and submitted proposed additional findings, we do not assume that the ALJ made all the necessary findings to support the conclusion that Mr. Bisco did not experience either changed economic or medical circumstances beyond the limited period surrounding his surgery. *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).

B. Change in Economic Circumstances

[¶9] Mr. Bisco contends that he proved a change in his economic circumstances by his testimony that he was able to earn only a small fraction of his nearly \$800.00 pre-injury average weekly wage since the time of the last decree. He points out that the evidence shows that he earned just over \$1,000 since 2011. Mr. Bisco testified that he had to stop doing handyman and auto body work because of pain from the work injury, and that his ability to function has since been further reduced by his inability to use ibuprofen for pain control.

[¶10] The ALJ concluded simply that Mr. Bisco had not shown a change in his economic circumstances but did not specifically address this evidence or explain why this evidence was insufficient to demonstrate a change in Mr. Bisco's economic circumstances since the 2011 decision. Mr. Bisco specifically sought findings of fact and conclusions of law on these points but the ALJ made no additional findings or conclusions. Because the findings on this issue are not adequate for appellate review, we remand for further findings of fact on the issue of changed economic circumstances.

C. Change in Medical Circumstances

[¶11] As a threshold matter, we do not disturb the ALJ's conclusion that Mr. Bisco's allegedly worsening neck, shoulder, low back, and leg problems do not constitute a change of circumstances in and of themselves. Although Mr. Bisco testified that his neck was "a little stiffer" and his left shoulder "a little worse" than they had been in 2011, the ALJ specifically identified evidence that tended to show that Mr. Bisco's condition was more or less unchanged. Specifically, the ALJ noted that Mr. Bisco's treatment records did not document any appreciable change in those conditions since 2011.

[¶12] Even if Mr. Bisco's symptoms have been static, he alleged that his ability to cope with those symptoms is hindered now that he can no longer take ibuprofen, a treatment that had been effective before his ulcer developed. Mr.

Bisco testified that other medications have been an imperfect substitute and that his pain is less controlled than it had been in 2011. The ALJ credited that testimony, stating:

[Mr. Bisco] testified credibly that [ibuprofen] helped him function at work and at home. Mr. Bisco testified that he probably took 8 to 12 tablets each day from 2000–2014. He also testified that since terminating his use of ibuprofen, his pain levels have gone up despite using Tylenol and hydrocodone.

If ibuprofen formerly helped Mr. Bisco function in a work setting, it is fairly deduced that his inability to use ibuprofen currently hinders his ability to do so.

[¶13] That is not to say that the ALJ’s findings are contradictory. Conceivably, even if Mr. Bisco’s underlying pain level has not changed since 2011, his ability to work may have diminished now that he can no longer effectively control the same pain. Such a change could constitute the kind of changed circumstances that would justify reconsideration of the incapacity level as fixed in 2011. *See Cote v. Osteopathic Hosp. of Me., Inc.*, 447 A.2d 75, 76 (Me. 1982) (“[T]he requirement that the evidence of change be comparative is satisfied . . . by a showing of the appearance of a factor that is new in kind rather than degree.”).

[¶14] Mr. Bisco expressly requested and submitted a proposed finding on the issue of whether his increased pain due to the inability to take ibuprofen constituted a change in medical circumstances that would justify revisiting the

2011 payment scheme beyond the recovery period after his surgery. The ALJ's original findings do not address this specific issue, and there is some tension between his finding on the former effectiveness of ibuprofen and his conclusion that there had been no change of medical circumstances since the 2011 decree, except during the acknowledged, closed-ended period. When requested, an ALJ is under an affirmative duty under 39-A M.R.S.A. § 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). Accordingly, we remand for additional findings of fact on this issue.

D. Level of Incapacity

[¶15] If, on remand, the ALJ finds that there has been either a change of economic or medical circumstances beyond the closed-ended period around Mr. Bisco's surgery, then the final step of the analysis will be to fix Mr. Bisco's new earning capacity.

[¶16] We note that there is conflicting evidence of Mr. Bisco's restrictions and whether they stem from the work-related injury. On the one hand, Mr. Bisco's physician described him as feeling generally well after his surgery and did not specifically identify his stomach condition as a source of his inability to work. On the other hand, Mr. Bisco testified that he has been left too weak to work and "too sick to go anywhere" since his surgery. The ALJ as fact finder must weigh the

competing evidence and reach an appropriate conclusion. *See Dunkin Donuts of America v. Watson*, 366 A.2d 1127, 1125 (Me. 1976) (“The nature and extent of a disability is a question of fact.”). We note, however that the ALJ should consider whether Mr. Bisco’s inability to control his symptoms with ibuprofen—as he had been doing in 2011—diminishes his work capacity.

III. CONCLUSION

[¶17] The ALJ’s findings in the original decree did not address all arguments raised in Mr. Bisco’s motion for further findings, and are inadequate for appellate review. Therefore, we remand this case to allow the ALJ to make additional findings regarding (1) whether Mr. Bisco’s failed effort to regain his pre-injury earnings after the 2011 decree constitutes a change of economic circumstances, and (2) whether Mr. Bisco’s inability to control his symptoms with ibuprofen constitutes a change of medical circumstances. If the ALJ concludes that there has been either an economic or medical change of circumstances, the ALJ should reassess Mr. Bisco’s ongoing level of incapacity.

The entry is:

The administrative law judge’s decision is vacated in part and remanded for additional findings of fact and conclusions of law.

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. 2016).

Attorneys for appellant:
James J. MacAdam, Esq.
Nathan A. Jury, Esq.
Donald M. Murphy, Esq.
MACADAM JURY, P.A.
45 Mallett Drive
Freeport, ME 04032

Attorney for appellees:
Kaitlin G. Roy, Esq.
ROBINSON, KRIGER &
MCCALLUM
12 Portland Pier
Portland, ME 04101-4713