JEROME WEISS
(Appellant)

v.

MAINE SOAPSTONE CO., INC.
(Appellee)

and

MAINE EMPLOYERS' MUTUAL INSURANCE CO.
(Insurer)

Conference held: February 6, 2019
Decided: February 14, 2019

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

[¶1] Jerome Weiss appeals from a decision of a Workers' Compensation Board administrative law judge (*Pelletier, ALJ*) denying his Petition for Review. Mr. Weiss contends the ALJ erred when (1) admitting the independent medical examiner's report into evidence when that report was submitted outside the of the fourteen-day timeframe prescribed by board rules; (2) determining that Mr. Weiss's low back condition is not compensable; and (3) concluding that his evidence of a work search did not establish changed economic circumstances. We affirm the ALJ's decision.

[¶2] In a 2012 board decree, Mr. Weiss was awarded ongoing 55% partial incapacity benefits for a 2009 gradual work injury to his shoulders and neck. In 2016, he filed the current Petition for Review, seeking an increase in his

compensation to 100% partial, as well as compensation for a low back injury he asserts was overlooked by his prior counsel in the 2012 litigation. As the moving party, Mr. Weiss bore a burden to establish a change in his medical or economic circumstances since the 2012 decree. *See Grubb v. S.D. Warren Co*., 2003 ME 139, ¶ 7, 837 A.2d 117. He sought to establish changed medical circumstances with comparative medical evidence. The evidence included an independent medical examiner (IME) opinion obtained pursuant to 39-A M.R.S.A. § 312 (Supp. 2018). He also sought to establish changed economic circumstances with evidence of a work search.

[¶3] After the ALJ denied the Petition, Mr. Weiss filed a Motion for Additional Findings of Fact and Conclusions of Law. The ALJ issued additional findings without altering the decision. Mr. Weiss appeals.

A. Admission of the Independent Medical Examiner's Report

[¶4] In this round of litigation, Dr. Bradford served as IME. The ALJ was required to adopt the medical findings of the IME in the absence of clear and convincing medical evidence to the contrary. 39-A M.R.S.A. § 312(7). Dr. Bradford reviewed the medical evidence from 2012 and opined that Mr. Weiss's neck and shoulder condition is no worse now than it was at the time of the prior decree. Based on this opinion, the ALJ determined that Mr. Weiss's medical circumstances had not changed.

[¶5] Dr. Bradford's report was provided to the parties 57 days after the examination. Mr. Weiss objected to the admission of the report based on Me. W.C.B. Rule, ch. 4, § 3(5), which provides: "Upon completion of the final examination and all pertinent and indicated testing, the examiner shall submit a written report to the Board no later than fourteen (14) days after completion of the examination." Mr. Weiss now contends the admission of the report was erroneous. We disagree.

[¶6] Rule, ch. 4, § 3(5) does not prescribe any particular consequence for failing to timely submit the report, and specifically, does not require an ALJ to exclude a late report. Mr. Weiss received the report in advance of the hearing held on October 23, 2017. The report's admission falls within the bounds of a reasonable exercise of the ALJ's discretion. *See Kuvaja v. Bethel Savings Bank*, 495 A.2d 804, 806 (Me. 1985) (applying an abuse of discretion standard of review to administrative body's decision based on its own rules).

[¶7] Moreover, any error in the report's admission would be harmless because if excluded, we find no other comparative medical evidence in the record that would establish changed medical circumstances. *See Van Horn v. Hillcrest Foods*, 392 A.2d 52, 54-55 (Me. 1978) (requiring a medical expert to assume the validity of the findings of the prior examining physician and give an opinion that

the employee's condition had changed based on that assumption in order to establish changed medical circumstances).

B. Low Back Pain

[¶8] The ALJ concluded that the findings in the 2012 decree are conclusive as to the extent of the 2009 gradual injury, and any claim for back pain resulting from the 2009 gradual injury in the current litigation is barred by res judicata. Mr. Weiss contends that this constitutes legal error. He argues that his prior counsel should have raised the issue of back pain stemming from the 2009 gradual injury, but did not. We find no error.

[¶9] Principles of res judicata bar a party from bringing a cause of action that has already been subject to a valid, final decision. *Blance v. Alley*, 1997 ME 125, ¶ 4, 697 A.2d 828. The doctrine of res judicata may bar "the relitigation of issues that were tried, or that may have been tried, between the same parties or their privies in an earlier suit on the same cause of action." *Id.* (quotation marks omitted).

[¶10] The extent of the 2009 gradual injury had been actually litigated and decided in the prior litigation, and did not include low back pain. Mr. Weiss does not contend that he suffered a second injury to his low back, or that he was unaware of his back pain at the time of the prior litigation. Thus, the ALJ did not err when determining that the 2012 decree is res judicata on the issue of the extent

of the 2009 injury.[1] *See Day v. S.D. Warren Co.*, Me. W.C.B. No. 16-19, ¶ 7 (App. Div. 2016) (stating that res judicata can preclude an award when there was a prior adjudication regarding the same injury).

C. Work Search Evidence

[¶11] The ALJ concluded that the work search evidence submitted by Mr. Weiss did not establish that his economic circumstances had changed since 2012. Mr. Weiss contends this was error. However, the ALJ made an express finding that Mr. Weiss was not a credible witness, and that Mr. Weiss did not conduct the search in good faith. The employee's good faith effort is a proper factor to consider when evaluating work search evidence. *Monaghan v. Jordan's Meats*, 2007 ME 100, ¶ 21, 928 A.2d 786. Moreover, a finding regarding the credibility of a witness is uniquely within the province of theALJ, who has the opportunity to directly observe the witness and hear the testimony, and we will not disturb such a finding. *Gilbert v. S.D. Warren Co.*, Me. W.C.B. No. 16-12, ¶ 11 (App. Div. 2016).

D. Conclusion

[¶12] The ALJ's factual findings are supported by competent evidence in the record, the decision involved no misconception of applicable law, and the

[1] The ALJ determined, alternatively, that Mr. Weiss's claim for back pain is not compensable because he failed to provide Maine Soapstone with proper notice of the injury pursuant to 39-A M.R.S.A. §§ 301 and 302 (Supp. 2018). Mr. Weiss contends this is error. Because we conclude that the ALJ did not err when determining that the claim was barred by the doctrine of res judicata, we do not reach this issue.

application of the law to the facts was neither arbitrary nor without rational foundation. *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 (Supp. 2018).

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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