RAY BARTLETT
(Appellee)

v.

NESTLE WATERS NORTH AMERICA, INC.
(Appellant)

and

SEDGWICK
(Insurer)

Conference held: June 12, 2019
Decided: March 31, 2021

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

[¶1] Nestle Waters North America, Inc., appeals from a decision of a Workers' Compensation Board Administrative Law Judge (*Goodnough, ALJ*) that granted Ray Bartlett's Petition for Review. Nestle contends that the ALJ abused his discretion and violated due process by denying (1) its second request to depose the independent medical examiner (IME) appointed pursuant to 39-A M.R.S.A. § 312 (Pamph. 2020); (2) its request to have the IME review physical therapy notes; and (3) its request to enter the physical therapy notes into evidence. Nestle also contends the ALJ erred by adopting the IME's opinion regarding Mr. Bartlett's incapacity level. We affirm the decision.

I. BACKGROUND

[¶2] Ray Bartlett began working for Nestle Waters North America, Inc., in 2005 as a tractor-trailer driver. His job was to deliver large quantities of water to various locations in New England. Mr. Bartlett alleged that he sustained a work-related injury to his cervical spine on August 21, 2016, when he wrenched his neck by bumping his head on the underbody of a tractor-trailer. Upon Nestle's request, Mr. Bartlett underwent an independent medical examination pursuant to 39-A M.R.S.A. § 312 by Matthew J. Donovan, M.D. Dr. Donovan issued his report on November 28, 2017.

[¶3] A hearing was held on February 2, 2018. The record was kept open over Mr. Bartlett's objection to allow Nestle an opportunity to provide Dr. Donovan with an X-ray film and the radiologist report, after which Dr. Donovan issued a supplemental report. At a subsequent conference of counsel, the ALJ granted Nestle's request to depose Dr. Donovan over Mr. Bartlett's objection. However, on May 30, 2018, the day before the deposition was to occur, Nestle unilaterally canceled the deposition over Mr. Bartlett's objection and without board approval. Nestle canceled the deposition because it wanted more time to provide Dr. Donovan with additional physical therapy notes. Since the beginning of the litigation, Nestle had been in possession of Mr. Bartlett's primary care provider's medical records indicating that Mr. Bartlett had been referred to physical therapy.

[¶4] At a second conference of counsel held on June 4, 2018, Nestle renewed its request to depose Dr. Donovan. Mr. Bartlett objected to this request based on delay. On June 22, 2018, the ALJ issued an order denying Nestle's second request to depose Dr. Donovan. The ALJ also denied Nestle's request to have Dr. Donovan review the physical therapy notes and to supplement the record with the physical therapy notes. While Dr. Donovan did not have the physical therapy notes, the ALJ noted that he did have the medical records indicating that Mr. Bartlett had been referred to physical therapy due to ongoing neck pain before the work injury.

[¶5] Based in part on Dr. Donovan's medical findings, the ALJ found that Mr. Bartlett sustained a work-related injury on August 21, 2016, and that this injury significantly aggravated his preexisting condition, ankylosing spondylitis. Nestle appeals.

II. DISCUSSION

A. The Scope of the Administrative Law Judge's Discretion

[¶6] Nestle contends that the ALJ abused his discretion by refusing to allow it to reschedule the IME's deposition, refusing to allow it to provide physical therapy notes from 2009 to the IME, and excluding those notes from the evidentiary record. Nestle argues that between the hearing held on February 2, 2018, and the date of Dr. Donovan's scheduled deposition, May 31, 2018, it discovered by reading what it contends are "nearly illegible" medical reports in its possession, that Mr. Bartlett

had undergone physical therapy for his preexisting condition seven years before his work injury, and that it was entitled to explore the scope of that treatment with the IME.

[¶7] We review an ALJ's decisions regarding the conduct of proceedings to determine whether, considering all the circumstances, the ALJ acted beyond the scope of his allowable discretion. *See Estate of Jensen v. S.D. Warren*, Me. W.C.B. No. 20-22, ¶ 19 (App. Div. 2020); *Laursen v. Sapphire Mgmt.,* Me. W.C.B. No. 20-19, ¶¶ 12-13 (App. Div. 2020). We will vacate the ALJ's decision only if, considering all the circumstances, the proceedings were fundamentally unfair. *Kuvaja v. Bethel Savings Bank*, 495 A.2d 804, 806 (Me. 1985).

[¶8] An Appellate Division panel recently addressed the extent of the ALJ's discretion to disallow the deposition of an IME. *See Laursen*, Me. W.C.B. No. 20-19, ¶¶ 12-13. Noting that the Workers' Compensation Act does not address the issue of whether a party must be provided an opportunity to depose an IME, the panel stated:

> [T]here is no Maine statutory or regulatory provision giving rise to an unfettered right to depose the IME. . . .
>
> The Administrative Procedures Act authorizes limiting cross examination to prevent unreasonable delay in the proceedings. 5 M.R.S.A. § 9056(2) (2013). The Workers' Compensation Act does not address the issue of whether a party must be provided an opportunity to depose an independent medical examiner. [Applicable] Board Rules give the ALJ the discretion to grant or deny a request to depose an IME, stating that "A party may set a deposition of the

> independent medical examiner only upon agreement of the parties or with permission of the Administrative Law Judge." Me. W.C.B. Rule, ch. 4 § 3(6).

Laursen, Me. W.C.B. No. 20-19, ¶¶ 12-13 (footnotes omitted). Applying these principles, the panel in *Laursen* affirmed the ALJ's decision to close the evidence without allowing an IME's deposition to be rescheduled for the fourth time, in order to avoid unreasonable delay. *Id.* ¶ 13.

[¶9] Here, the ALJ detailed his reasons for denying Nestle's second request to set the deposition of Dr. Donovan. Those reasons were grounded in concerns related to undue delay and Nestle's unilateral and last-minute decision to cancel a long-scheduled deposition that had been permitted over Mr. Bartlett's objection. We conclude that the ALJ did not abuse his discretion when denying the request to reschedule the deposition.

[¶10] With regard to the physical therapy notes, the ALJ found that Nestle had the medical reports from which it ascertained that Mr. Bartlett had prior physical therapy in its possession since the beginning of the litigation. Further, the ALJ found that the physical therapy notes at issue essentially confirm that Mr. Bartlett has a lengthy preexisting history of ankylosing spondylosis, a fact acknowledged and discussed by Dr. Donovan in his report.

[¶11] The physical therapy notes excluded from evidence would have merely provided cumulative evidence of Mr. Bartlett's preexisting condition. Thus, it was

not fundamentally unfair, and within the bounds of ALJ's discretion, to deny the request to provide those notes to the IME and to exclude them from the evidentiary record.[1]

B. Due Process

[¶12] Nestle contends that the ALJ violated its right to due process by the same conduct—refusing to allow it to reschedule the IME's deposition, refusing to allow it to provide physical therapy notes from 2009 to the IME, and excluding those notes from the evidentiary record. Nestle contends it was prevented from preserving Dr. Donovan's testimony or demonstrating how he has misunderstood, been deprived of, or ignored important medical evidence in arriving at his conclusion on causation.

[¶13] Due process of law is a requirement of both the Maine and United States Constitutions. U.S. CONST., amend. V and IV, § 1; ME. CONST. art. 1, § 6-A. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319,

[1] Even if we concluded that it was erroneous to exclude the physical therapy notes from evidence and Dr. Donovan's review, we find that any such error would have been harmless. The Law Court has stated that preserved error should be treated as harmless if the appellate court believes it highly probable that the error did not affect the judgment. *State v. True*, 438 A.2d 460, 467 (Me. 1981). *See also State v. Francis*, 539 A.2d 213, 215 (Me. 1988); *Midland Fiberglass v. L.M. Smith Corp*., 581 A.2d 402, 403-04 (Me. 1990). We find it highly probable that even if it were an error to exclude this evidence, it would not have affected the judgment because the evidence was cumulative.

333 (1979) (quotation marks omitted). We conclude that no due process violation occurred.

[¶14] As noted above, there is no unfettered right in Maine law to depose an IME. The ALJ nevertheless granted Nestle the opportunity to depose the IME, over Mr. Bartlett's objection, at a meaningful time and in a meaningful manner. Nestle unilaterally canceled the deposition without the ALJ's approval because, in its view, the medical record was not complete and could not be made complete before the deposition was held. However, Nestle had the primary care provider's notes indicating that Mr. Bartlett had undergone physical therapy in 2009 since the beginning of the litigation, eighteen months prior, and Dr. Donovan likewise had access to those notes. Nestle's own conduct in this matter, having waited until the last minute to cancel the deposition without seeking approval from the ALJ, renders its due process arguments unpersuasive.

[¶15] Nestle had full and fair opportunity to depose the IME, and could have had an opportunity to explore the import of the 2009 physical therapy notes with the IME had it not made the choice to cancel the deposition.[2] The ALJ's conduct comported with due process.

[2] In the Order denying the request to reschedule the deposition dated June 22, 2018, the ALJ stated: "The proper course of action would have been to go forward with the deposition as permitted and scheduled, and thereafter move to have the notes forwarded to Dr. Donovan for his review in order to ascertain whether his opinion would change based on the content of those notes."

C. Adoption of the IME's Opinion

[¶16] Nestle asserts the ALJ erred by adopting the IME's finding that Mr. Bartlett has no real work capacity. Nestle asserts that evidence that Mr. Bartlett engaged in numerous outdoor activities since his injury constitutes clear and convincing evidence contrary to Dr. Donovan's opinion.[3] This contention lacks merit.

[¶17] When considering whether clear and convincing medical evidence contrary to the IME's findings permitted a rejection of those findings by the ALJ, "we determine whether the [ALJ] could reasonably have been persuaded by the contrary medical evidence that it was highly probable that the record did not support the IME's medical findings." *Dubois v. Madison Paper Co*., 2002 ME 1, ¶ 14, 795 A.2d 696 (quotation marks omitted). However, when as here, the ALJ adopts the IME's findings, we will reverse only if those findings are not supported by any competent evidence, or the record discloses no reasonable basis to support the decision. *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).

[¶18] The ALJ specifically found that although Mr. Bartlett had continued some of his recreational activities such as backyard deer hunting, ice fishing,

[3] Pursuant to 39-A M.R.S.A. § 312(7), the ALJ must adopt the IME's medical findings unless there is clear and convincing contrary evidence in the record.

sweeping floors, riding a motorcycle, and occasional snowmobiling, these activities do not translate into a meaningful capacity to work.

[¶19] Total incapacity under the Act does not always require a showing of complete inability to perform tasks. An employee may be capable of doing trivial, occasional work of small remunerative value and yet retain his status of totally disabled in law. *Levesque v. Shorey*, 286 A.2d 606, 610 (Me. 1972). An employee that is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled. *Dailey v. Pinecap, Inc*., 321 A.2d 492, 495 (Me. 1974); *Bolduc v. Pioneer Plastics Corp.*, 302 A.2d 577, 580 (1973).

[¶20] Dr. Donovan's opinion provides a rational basis, based on competent evidence, for the ALJ's determination of total incapacity. Accordingly, we find no error.

III. CONCLUSION

[¶21] Under these circumstances, the ALJ neither abused his discretion nor violated Nestle's right to due process by refusing to allow it to provide Dr. Donovan with the physical therapy notes or depose Dr. Donovan. Further, we find no reversible error in excluding the physical therapy notes from evidence. Finally, the

ALJ did not err in accepting Dr. Donovan's opinion regarding work capacity because that opinion is rationally based on competent evidence.

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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