STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 21-0011
Decision No. 22- 12

JEROME WEISS
(Appellant)

v.

MAINE SOAPSTONE COMPANY, INC.
(Appellee)

and

MAINE EMPLOYERS' MUTUAL INSURANCE COMPANY
(Insurer)

Conference held: September 29, 2021
Decided: May 23, 2022

PANEL MEMBERS: Administrative Law Judges Elizabeth Elwin, David Hirtle, and Katherine Rooks
By: Administrative Law Judge Rooks

[¶1] Jerome Weiss appeals from a decision of a Workers' Compensation Board Administrative Law Judge (*Pelletier*, *ALJ*) granting Maine Soapstone Company's Petition to Terminate Benefit Entitlement and denying Mr. Weiss's Petition to Determine Permanent Impairment. Mr. Weiss contends that the ALJ erred in placing the burden of proof upon him regarding the permanent impairment issue. We disagree with Mr. Weiss's contentions and affirm the ALJ's decision.

I. BACKGROUND

[¶2] In 2012 the Workers' Compensation Board awarded Mr. Weiss partial incapacity benefits related to February 3, 2009, gradual shoulder and neck injuries. There was no dispute regarding Mr. Weiss's receipt of partial incapacity benefits

until Maine Soapstone filed a Petition to Terminate Benefit Entitlement on November 8, 2018. Nearly two years after the initial petition was filed, Mr. Weiss filed a Petition to Determine Permanent Impairment on October 19, 2020. A hearing was held on January 12, 2021.

[¶3] Partial incapacity benefits are subject to a durational limit of 520 weeks. *See* 39-A M.R.S.A. § 213(1)(A), (4) (setting a 260-week limit on partial incapacity benefit payments subject to extension); Me. W.C.B. Rule, ch. 2, § 2(5) (extending the durational limit to 520 weeks). Employees, however, are exempt from this cap if their injuries result in whole-body permanent impairment rated above a certain threshold percentage. 39-A M.R.S.A. § 213(1)(A), (2) (setting a 15% threshold and inviting the board to adjust the threshold through rulemaking). Mr. Weiss, who was injured in 2009, is subject to the 520-week cap unless his permanent impairment rating exceeds a 12% threshold. Me. W.C.B. Rule, ch. 2, § 1(4).[1] There was no disagreement that Maine Soapstone had paid Mr. Weiss more than 520 weeks of partial incapacity benefits. At issue was whether Mr. Weiss's percentage of permanent impairment exceeded 12%.

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[1] Mr. Weiss argues that the ALJ erred by requiring him to produce competent evidence of a 12% permanent impairment rating, rather than an 11.8% permanent impairment rating. The plain reading of Board Rule, ch. 2, § 1(4), sets the threshold for Mr. Weiss's date of injury to "in excess of 12%." It reads: "[t]he permanent impairment threshold for cases with dates of injury on or after January 1, 2006 and before January 1, 2013 is in excess of 12%." Mr. Weiss, who was injured on February 3, 2009, falls into this category. Accordingly, the ALJ did not err in determining that 12% was the applicable permanent impairment rating in the circumstances of this case.

[¶4] At the hearing, Maine Soapstone presented a permanent impairment opinion from Dr. William Boucher. After conducting a records assessment, Dr. Boucher opined that Mr. Weiss sustained 11% whole person permanent impairment due to the work injury. Mr. Weiss did not provide other evidence establishing a different percentage of permanent impairment.

[¶5] The ALJ issued a decree dated March 3, 2021, denying Mr. Weiss's petition and granting Maine Soapstone's petition. The ALJ denied Mr. Weiss's petition on the basis that Mr. Weiss failed to meet his initial burden to demonstrate that his permanent impairment rating exceeded the 12% threshold required for payment of partial incapacity benefit beyond the durational limit.

[¶6] In that same decree, the ALJ rejected Dr. Boucher's opinion, finding it unpersuasive because there were no "prior assessments in evidence, and especially because Dr. Boucher did not conduct an in person clinical evaluation," as contemplated by the 4th Edition of the Guides to the Evaluation of Permanent Impairment.[2]

[¶7] Despite having rejected Dr. Boucher's permanent impairment opinion, the ALJ granted Maine Soapstone's petition on the grounds that Mr. Weiss failed to meet his initial burden of production pursuant to *Farris v. Georgia-Pacific Corp.*,

[2] *See* Me. W.C.B. Rule, ch. 2 § 3(5) ("Permanent impairment shall be determined after the effective date of this rule by use of the American Medical Association's 'Guides to the Evaluation of Permanent Impairment,' 4th edition, copyright 1993.").

2004 ME 14 ¶ 17, 844 A.2d 1143 (holding that on an employer's petition, the employee must initially produce evidence sufficient to demonstrate that a genuine issue exists regarding whether their permanent impairment level exceeds the threshold for continued payment of partial incapacity benefits).

[¶8] Mr. Weiss filed a Motion for Further Findings of Fact and Conclusions of Law, which the ALJ granted to correct a clerical mistake regarding the date of the hearing. Otherwise, the ALJ did not alter the original decision. Mr. Weiss appeals.

II. DISCUSSION

A. Standard of Review

[¶9] 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." *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995). When a party requests and proposes additional findings of fact and conclusions of law, as was done in this case, the Appellate Division reviews "only the factual findings actually made and the legal standards actually applied" by the ALJ. *Daley v. Spinnaker Indus., Inc.,* 2002 ME 134, ¶ 17, 803 A.2d 446 (quotation marks omitted).

B. Burdens of Production and Proof

[¶10] Mr. Weiss contends that the ALJ erred by placing the burden of proof regarding permanent impairment on him. We disagree.

[¶11] On an employer's petition to terminate benefits based on the durational limit, the employer bears the ultimate burden to prove that an employee's permanent impairment level is below the statutory threshold. *Farris v. Georgia-Pacific Corp.*, 2004 ME 14, ¶ 17, 844 A.2d 1143. The employee, however, is initially "responsible for raising the issue of whole-body permanent impairment, and of presenting sufficient evidence to demonstrate that a genuine issue exists" with respect to whether the impairment exceeds the threshold. *Id.* ¶ 1. The Law Court summarized the respective burdens as follows:

> [W]hen the employee seeks to make the percentage of impairment an issue at the hearing, the employee must bear a burden of raising the issue of percentage of whole-body impairment, and of producing some evidence to persuade a reasonable fact-finder of the existence of a genuine issue concerning the percentage of impairment. The burden of production does not require that the employee *convince* the hearing officer on the ultimate issue of whole body permanent impairment, but merely that the employee *must produce competent evidence to suggest that the employee's whole body permanent impairment may be above the threshold for purposes of obviating the durational cap pursuant to section 213(1).*

Id. ¶ 16 (emphasis added). Once an employee meets that burden, the burden shifts to the employer to persuade the board that the employee's permanent impairment rating is, in fact, below the applicable threshold. *Id.* ¶ 17.

[¶12] By the time the record closed, Mr. Weiss failed to have a permanent impairment examination completed. Instead, Mr. Weiss produced records from Back in Motion Physical Therapy reflecting an initial evaluation and a "To Whom It May Concern" letter from a physician at Northern Light Health. Neither of these providers, however, assessed permanent impairment for Mr. Weiss. Instead, one provider stated that he did not feel comfortable giving such an assessment, and the other indicated that he did not perform permanent impairment assessments.

[¶13] Based on this record, the ALJ's determination that Mr. Weiss failed to produce competent evidence that would have met his burden of production does not constitute reversible error. Because he did not meet the burden of production, the burden never shifted back to the employer. *Compare Jensen v. S.D. Warren Co.*, Me. W.C.B. No. 17-26, ¶ 16 (modifying decision and granting employer's petition upon determining that evidence of a 5% permanent impairment rating due to a physical injury, plus evidence that the employee suffered from depression due to that injury, was insufficient to meet employee's burden of production without an opinion establishing that impairment from the depression had pushed the permanent impairment rating above the threshold) *with Sapranova v. Marriott Hotels,* Me. W.C.B. No. 19-33, ¶ 16 (App. Div. 2019) (concluding that doctor's opinion that employee suffered 17.5% permanent impairment was sufficient to meet employee's

burden of production despite the doctor contradicting that opinion at deposition, thus shifting burden of proof to employer.)

[¶14] Mr. Weiss also contends that he was not provided an opportunity to produce evidence regarding permanent impairment. Specifically, he argues that many factors prevented him from producing such evidence including inclement weather, illness, and unreasonable circumstances surrounding a section 312 examination.

[¶15] The ALJ found that Mr. Weiss was given the opportunity to have an independent medical examiner assess permanent impairment pursuant to 39-A M.R.S.A. § 312, but did not go through with the examination. Despite being aware that permanent impairment was a crucial issue in the litigation for at least two years, Mr. Weiss failed to offer a permanent impairment opinion prior to the close of evidence. The ALJ's ruling that Mr. Weiss failed to meet his burden of production is supported by competent evidence in the record and is consistent with applicable law.

C. Further Findings

[¶16] Mr. Weiss argues that the ALJ erred when failing to make additional findings of fact and conclusion of law and by relying mainly on *Leo v. American Hoist & Derrick Co.*, 438 A.2d 917 (Me. 1981). We find no merit to this contention.

[¶17] When a decree is issued by an ALJ and a party disagrees with the result, the aggrieved party has the opportunity to file a Motion for Further Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318, along with proposed additional findings. This option allows the aggrieved party to submit to the ALJ for consideration different findings that align with their view of the case. The Act states that when the ALJ receives a request for such findings, the ALJ "may find the facts specially and state separately the conclusions of law and file the appropriate decision if it differs from the decision filed before the request was made." 39-A M.R.S.A. § 318. The Act, therefore, permits the ALJ to issue additional findings of fact if warranted, or rely on the original decree if it is sufficient. As the appellate body, our role is to "to determine whether competent evidence supports the [ALJ]'s decision and whether [the] decree is based either upon a misapprehension of fact or a misapplication of law to the facts." *Dufault v. Midland-Ross of Canada, Ltd.*, 380 A.2d 200, 203 (Me. 1977).

[¶18] The *Leo* case, cited by the ALJ, stands for the principle that when the original decree provides an adequate foundation for review by the appellate body, the ALJ is not required to provide further or more detailed findings. 438 A.2d at 926-27. Here, the ALJ's original decree provides an adequate foundation for appellate review on all issues raised by Mr. Weiss, having allowed the appellate division to ascertain the basis of the ALJ's decision. *See Lokken v. York Hosp.*, Me. W.C.B. No.

22-9, ¶ 7 (App. Div. 2022). Therefore, we disagree with Mr. Weiss's contention that the ALJ misapplied the law when relying upon *Leo v. American Hoist & Derrick Co.*[3]

III. CONCLUSION

[¶19] The ALJ's factual findings are supported by competent evidence, and the application of the law is neither arbitrary nor without a rational foundation. Therefore, we affirm the ALJ's decision.

The entry is:

The administrative law judge's decision is affirmed.

[3] In his reply brief, Mr. Weiss relies upon language in the Law Court's 2004 *Farris* decision to argue that he should be paid incapacity benefits while his motion for further findings and appeal have been pending. The Law Court quoted from 39-A M.R.S.A. § 205(9)(B)(2)(1999) in *Farris* when describing the obligation to pay incapacity benefits pending appeal. The Legislature acted in 2011 and amended the text of 39-A M.R.S.A. § 205(9)(B)(2) so that employers under the Workers' Compensation Act are no longer required to continue paying incapacity benefits after a decision from an ALJ, even if that decision is followed by a motion for further findings of fact and conclusions of law or an appeal. P.L. 2011, c. 647, § 2. We thus find no support for Mr. Weiss's argument on this point.

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.

Appellant:
Jerome Weiss
P.O. Box 177
Westfield, ME 04787

Attorney for Appellee:
Travis C. Rackliffe, Esq.
Tucker Law Group
P.O. Box 696
Bangor, ME 04402-0696