TINA V. BOUCHARD
(Appellee)

v.

CENTRAL MAINE MEDICAL CENTER
(Appellant)

and

FUTURECOMP
(Insurer)

Conference held: February 11, 2021
Decided: July 29, 2022

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

[¶1] Central Maine Medical Center (CMMC) appeals from a decision of a Workers' Compensation Board administrative law judge (*Chabot, ALJ*) granting Tina Bouchard's Petition for Award and awarding ongoing partial incapacity benefits for a February 27, 2018, right upper extremity injury. CMMC asserts that the ALJ erred by (1) finding that the opinion of the independent medical examiner (IME) was ambiguous with respect to the duration of the effects of her work injury and concluding that the effects of the work injury continue; and (2) finding, in the alternative, that there was clear and convincing evidence contrary to the interpretation of the IME's opinion urged by CMMC. We affirm the decision regarding the first issue and conclude that the second issue is therefore moot.

I. BACKGROUND

[¶2] Tina Bouchard has worked for CMMC for over twenty years performing cardiac ultrasounds. Holding the ultrasound transducer (which is the size of a microphone) in her right hand, she reaches her right arm around the patient and twists her wrist to manipulate the transponder and perform the testing. Each test of a patient takes 45-60 minutes.

[¶3] On February 27, 2018, Ms. Bouchard's right hand "froze up" while performing an ultrasound. She submitted an injury report after completing the patient's exam. Ms. Bouchard had experienced prior right wrist and thumb pain, for which she had received medical treatment three months earlier. Before the February 27, 2018, injury, Ms. Bouchard worked eight hours per day five days per week, performing eight or more exams each day. Since July 1, 2018, she has worked four days per week seeing six patients per eight-hour shift.

[¶4] As part of the litigation process, Ms. Bouchard saw Dr. Matthew Donovan for an independent medical examination pursuant to 39-A M.R.S.A. § 312. In his report, Dr. Donovan diagnosed the source of her symptoms as right thumb CMC arthritis and right radial neuritis. Dr. Donovan wrote that Ms. Bouchard's work activities aggravated her underlying CMC arthritis significantly. The doctor opined that Ms. Bouchard should be under restrictions limiting her days of work per week and scans per day to allow her to continue working. The doctor noted that "[b]ased

on today's physical, exam, it is my opinion Ms. Bouchard is at baseline condition." Further, Dr. Donovan opined that because of Ms. Bouchard's restrictions and the natural progression of CMC arthritis, in the future she "may well" experience a "flare up of her symptoms independent of work activities."

[¶5] The ALJ accepted the opinion of Dr. Donovan that Ms. Bouchard's work activities on February 27, 2018, aggravated her underlying right CMC arthritis in a significant manner, and caused her right radial neuritis. *See* 39-A M.R.S.A. § 201(4). The ALJ construed the IME's opinion that Ms. Bouchard was now at her "baseline" condition as unclear as to whether it meant her pre-injury condition or her new, post-injury condition. Because the IME opined that future flares of symptoms may be related to the natural progression of arthritis, the ALJ inferred that her *current* restrictions (limiting Ms. Bouchard's hours) are due to the work injury and constitute her baseline.

[¶6] In the alternative, the ALJ found that, even if the IME's opinion meant that Ms. Bouchard had returned to her pre-injury condition, the record contained clear and convincing evidence to the contrary citing ongoing restrictions, Ms. Bouchard's use of splinting at night, and Ms. Bouchard's complaints of worse pain than before her injury date. The ALJ thus granted the petition and awarded Ms. Bouchard partial incapacity benefits based on the difference between her pre-injury average weekly wage and her earnings for reduced work hours.

[¶7] CMMC filed a Motion for Further Findings of Fact and Conclusions of Law pursuant to 39-A M.R.S.A. § 318, which the ALJ denied. CMMC appealed.

II. DISCUSSION

[¶8] CMMC contends that the ALJ erred when construing the IME's medical finding that Ms. Bouchard had returned to "baseline" to mean her new, post-injury condition, rather than her pre-injury condition. CMMC argues that the term "baseline" has a standard meaning in workers' compensation cases in relation to an employee's condition following a work-related aggravation of a preexisting condition—signaling the endpoint of compensability—and that the ALJ was required to adopt the IME's finding regarding her return to baseline with this meaning, pursuant to 39-A M.R.S.A. § 312(7).[1] We disagree with this contention.

[¶9] When an ALJ is confronted with potentially ambiguous language in an IME's opinion, "it is incumbent on the [ALJ] to consider the larger context in which those statements are offered to construe the intent of the examining physician." *Tardiff v. AAA N. New England, Inc.*, Me. W.C.B. No. 18-11, ¶ 13 (App. Div. 2018) (quoting *Oriol v. Portland Housing Auth.*, Me. W.C.B. No. 14-35, ¶ 12 (App. Div.

[1] Title 39-A M.R.S.A. § 312(7) provides:

> The board shall adopt the medical findings of the independent medical examiner unless there is clear and convincing evidence to the contrary in the record that does not support the medical findings. Contrary evidence does not include medical evidence not considered by the independent medical examiner. The board shall state in writing the reasons for not accepting the medical findings of the independent medical examiner.

2014)). Ambiguity may exist in an IME's report or testimony when it is "susceptible of more than one meaning." *Thurlow v. Rite Aid of Me., Inc.*, Me. W.C.B. No. 16-23, ¶¶ 13, 14 (App. Div. 2016).

[¶10] The term "baseline" is not defined in the Workers' Compensation Act. The term "pre-injury baseline" is commonly read in workers' compensation decisions to mean a return to the condition or level of symptoms experienced before the work injury. An ALJ's finding that an employee has returned to pre-injury baseline generally ends entitlement to benefits under the Act. However, the bare term "baseline" has been used to refer to both a pre-injury status and a post-injury status. *See Sanders v. Seaside Nursing Home*, 2004 ME 135, ¶ 13, 861 A2d 1283 (holding that a finding that the employee returned to baseline several days after an allergic reaction ended entitlement to benefits under the Act); *Myrick v. Champion Int'l Corp.*, Me. W.C.B. No. 93-102 (App. Div. 1993) (relying on a post-injury baseline to determine current earning capacity). The term "baseline" is, accordingly, susceptible to more than one meaning and is thus ambiguous as used by the IME in Ms. Bouchard's case.

[¶11] The Appellate Division has addressed ambiguity in IME reports or testimony in prior cases. In *Thurlow*, for example, the issue was whether the ALJ was required to adopt the IME's findings regarding the restrictions on the number of hours the employee was able to work after her injury. Me. W.C.B. No. 16-23, ¶ 10.

Because the IME used the words "she *has been restricted* to 18 hours," the ALJ observed "that it is not clear whether [the IME] is describing an historical fact or whether he is advising what should occur in the future." *Id.* ¶ 13.

[¶12] The Appellate Division panel agreed that the statement in the IME's report was susceptible of more than one meaning and concluded that the ALJ did not reject the IME's finding, but instead interpreted the statement as insufficient to establish an ongoing restriction to eighteen hours per week. *Id.* ¶ 14. Because the ALJ interpreted an ambiguous statement in the IME's report, rather than reject it, the panel concluded that clear and convincing contrary evidence was not required to support the ALJ's findings under section 312(7). *Id.*

[¶13] In *Dionne v. Sam's Italian Foods*, Me. W.C.B. No. 13-12, ¶ 7 (App. Div. 2013), an Appellate Division panel affirmed a finding by the hearing officer that the effects of an aggravation injury had not ended despite the IME's medical finding that the employee had returned to "baseline." In that case, the IME had testified in his deposition that the employee had returned to baseline as of September 2011. *Id.* The employer had argued that the hearing officer was required to adopt the finding in the IME's report that the effects of the employee's injury had ended as of that date. *Id.* However, because the IME also testified that the employee might need future surgery due to the preexisting condition or the natural progression of the

underlying disease, the panel determined that the hearing officer was not bound by section 312(7) to make a finding of fact that the work injury had resolved. *Id.*

[¶14] In this case, the IME stated both that (1) Ms. Bouchard's underlying condition was significantly aggravated by work activity, and (2) Ms. Bouchard "is at baseline condition." The ALJ found the term "baseline" to be ambiguous in context and inferred that Ms. Bouchard's current condition is causally connected to the work-related aggravation injury for the following reasons: the IME also found that Ms. Bouchard continued to be under restrictions; the IME did not state that the aggravation injury had resolved; and the IME opined that future flare-ups (as opposed to her current condition) would likely be attributed to the natural progression of her underlying CMC arthritis.

[¶15] While another ALJ may have interpreted the IME's report differently, the ALJ acted appropriately by looking to the larger context to construe the IME's statement that Ms. Bouchard was at baseline condition. We find no error in the ALJ's interpretation of the IME's report. Moreover, section 312 did not require the ALJ to adopt the IME's finding with the meaning suggested by CMMC. Because the ALJ adopted the IME's opinion, we need not consider whether there was "clear and convincing" evidence to the contrary. *Smith v. Hannaford Brothers Co.*, 2008 ME 8, ¶ 6, 940 A.2d 1079.

III. CONCLUSION

[¶16] The ALJ's factual findings are supported by competent evidence in the record, and the ALJ neither misconstrued nor misapplied the law when granting Ms. Bouchard's Petition for Award. *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.

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.

Attorney for Appellant:
Cara L. Biddings, Esq.
ROBINSON KRIGER & McCALLUM
12 Portland Pier
Portland, ME 04101

Attorney for Appellee:
Christopher J. Cotnoir, Esq.
Workers' Compensation Board
EMPLOYEE ADVOCATE DIV.
71 State House Station
Augusta, ME 04333-0071