MELANIE NORTON
(Appellee)

v.

AON SERVICE CORPORATION
(Appellant)

and

SEDGWICK CLAIMS MANAGEMENT SERVICES
(Insurer)

Argued: September 30, 2021
Decided: October 5, 2022

PANEL MEMBERS: Administrative Law Judges Knopf, Pelletier, and Stovall
BY: Administrative Law Judge Pelletier

[¶1] Aon Service Corporation appeals from a decision of a Workers' Compensation Board administrative law judge (*Chabot, ALJ*), denying its Petition for Review of Incapacity regarding Melanie Norton's established March 1, 2006, work-related injury. Aon contends that the ALJ erred when determining that Aon did not meet its burden to establish a change in circumstances since the previous decree. We disagree and affirm the decision.

[¶2] On March 1, 2006, Ms. Norton injured her neck in an automobile accident while traveling as a salesperson for Aon's insurance business. She also suffered mental sequela in the form of depression and PTSD resulting from the accident. In 2012, the board issued a decree awarding benefits for total incapacity

based upon the combination of physical and mental disabilities related to the work injury.

[¶3] In 2015, Aon petitioned for review of the total incapacity payment scheme. In that round of litigation, two independent medical examiners (IMEs) appointed pursuant to 39-A M.R.S.A. § 312, an orthopedic surgeon and a psychiatrist, opined on the issue of changed circumstances since the 2012 decree. Dr. Barkin, the psychiatrist, found that Ms. Norton's mental disability stemmed from an underlying borderline personality disorder that was not significantly worsened by the work injury. Because causation had been established by the 2012 decree, however, Dr. Barkin's opinion was not adopted.

[¶4] Dr. Donovan, the orthopedist who examined Ms. Norton with respect to the neck injury, found that the physical effects of the work injury had ended and that any current disability was not work related, but his opinion was rejected for failing to undertake a comparative medical analysis. The 2015 decree left total incapacity benefits in place due to the res judicata effect of the 2012 decision. *See Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 9, 837 A.2d 117.

[¶5] In the decree currently on appeal, Doctors Barkin and Donovan examined Ms. Norton again. Both stated that their opinions had not changed since their initial exam in 2014. Doctors Barkin and Donovan again found that Ms. Norton's current disability was not work-related.

[¶6] In a decree issued on March 26, 2021, the ALJ concluded that the IMEs' opinions were not based upon a change of circumstances and for this reason were insufficient to overcome the res judicata effect of the prior decrees. He further found that the other evidence in the record was insufficient to meet Aon's burden of proof.

[¶7] On appeal, Aon urges the Appellate Division to find that Ms. Norton has regained earning capacity based upon the following "changes in circumstances since the 2015 decree": (1) Ms. Norton no longer treats with her osteopath; (2) medical records support the conclusion that Ms. Norton's prescription medications for her psychological condition are more helpful now than in 2015; and (3) both Dr. Barkin and the treating psychiatric nurse practitioner have stated that Ms. Norton's mental condition may benefit from becoming employed. Essentially, Aon invites the board to undertake the comparative medical analysis itself and conclude that Ms. Norton is no longer totally disabled by the effect of the work injury.

[¶8] Pursuant to *Grubb*, to increase or decrease a compensation benefit level established by a previous decision, the petitioner must first show a change of circumstances since the previous decree. *Id*. at ¶ 7. This burden may be met by either providing comparative medical evidence or by showing changed economic circumstances. *Id*.

[¶9] Administrative law judges are not medical experts. The comparative medical analysis must be made by expert medical witnesses, not by the board. *See*

Van Horn v. Hillcrest Foods, Inc., 392 A.2d. 52, 54 (Me. 1978) (stating that a claim of changed medical condition can be established only by adducing expert medical testimony that bears directly on the comparison of the employee's former and present disability). While the comparison may be made by a different physician, the opinion of the earlier physician on whom the board relied must be assumed to be correct. *Id.* at 54-55. Based on that assumption the second physician must provide their opinions of change of condition. *Id.*

[¶10] The ALJ did not err in determining that Aon failed to meet its burden to demonstrate a change of circumstances by comparative medical evidence. Ms. Norton's physical and mental conditions have been established as work-related and found to be totally incapacitating pursuant to 39-A M.R.S.A. § 212 since the 2012 decision. At this juncture, because Aon failed to prove a change in circumstances by comparative medical evidence, all medical factual findings in 2012 and 2015 are "final [and] binding on the parties, even if erroneous." *Moore v. City of S. Portland*, 2004 ME 49, ¶ 10, 845 A.2d 1163.

[¶11] Additionally, we find no merit in Aon's contention that it has demonstrated changed economic circumstances based upon a labor market survey. Pursuant to 39-A M.R.S.A. § 213, the partial incapacity statute, post-injury earning capacity is based upon an employee's physical capacity to earn wages and the availability of work within the employee's restrictions. *Dumond v. Aroostook Van*

Lines, 670 A.2d. 939, 941 (Me. 1996). Because Aon did not meet its burden to show that Ms. Norton has regained a partial physical work capacity, she remains entitled to total incapacity benefits despite any availability of work in the labor market.

[¶12] In conclusion, the evidence relied on by the ALJ is competent to support his conclusion that Ms. Norton remains entitled to benefits for total incapacity under section 212. *See Pomerleau v. United Parcel Serv.,* 464 A.2d 206, 209 (Me. 1983). Further, the decision involved no misconception of applicable law and the application of the law to the facts was neither arbitrary nor without rational foundation. *See Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995).

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, ch. 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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