ROBERT O. CHAREST
(Appellee)

v.

HYDRAULIC HOSE & ASSEMBLIES, LLC
(Appellant)

and

THE HANOVER INSURANCE GROUP
(Insurer)

Argument held: February 8, 2023
Decided: June 26, 2023

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

[¶1] Hydraulic & Hose Assemblies (HHA) appeals from a decision of a Workers' Compensation Board administrative law judge (*Chabot, ALJ*) granting Robert Charest's Petition for Review and awarding him ongoing 100% partial incapacity benefits. The Law Court remanded this case to the board for additional proceedings after an appeal. HHA contends that the ALJ misinterpreted the Law Court's mandate, acted without statutory authority, and violated due process when he issued additional findings of fact and conclusions of law. HHA further argues that the ALJ erred when finding changed economic circumstances that overcame the res

judicata effect of a previous decree; and in failing to apply the retiree presumption in 39-A M.R.S.A. § 223.[1] We affirm the ALJ's decision.

I. BACKGROUND

[¶2] Robert Charest sustained a gradual, work-related low back injury while employed by HHA on April 27, 2001, and a work-related hernia injury on May 17, 2001. In August 2004, he petitioned for an award of compensation based on the two 2001 injuries and an additional injury that he alleged he sustained on June 25, 2004. On March 27, 2006, a board hearing officer (*Collier, HO*)[2] found that Mr. Charest had suffered a compensable, gradual low back injury on April 27, 2001, and a work-related hernia on May 17, 2001, but that no new injury had occurred on June 25, 2004. Mr. Charest was awarded ongoing partial incapacity benefits at the level of thirty-five percent. Mr. Charest began receiving Social Security old-age insurance benefits in 2003.

[¶3] On April 11, 2006, HHA made a weekly partial incapacity benefit payment. Six days later, HHA informed Mr. Charest that his incapacity benefits would be offset because he was receiving Social Security old-age insurance benefits.

[1] HHA asserts that ALJ Chabot erred in failing to apply 39-A M.R.S.A. § 223(1) to consider the effect of the presumption of earnings loss for retirees. However, HHA raises this issue for the first time on appeal. HHA did not raise the retirement presumption or section 223 as a defense to the claim for benefits. Issues raised for the first time on appeal are considered waived. *See Henderson v. Winslow*, Me. W.C.B. No. 17-46 ¶ 10 (App. Div. 2017). We therefore give no further consideration to this issue.

[2] Pursuant to P.L. 2015, ch. 297 (effective Oct. 15, 2015), Workers' Compensation Board hearing officers licensed to practice law are now designated as administrative law judges (ALJs). The 2006 decision of now-retired ALJ Collier was made before this change.

See 39-A M.R.S.A. §221(3)(A)(1) (requiring the reduction of weekly benefit payments by "[f]ifty percent of the amount of the old-age insurance benefits received or being received under the United States Social Security Act"). From that point forward, Mr. Charest received no additional direct payments as the entire amount of the ongoing lost wage benefit was offset by his Social Security benefits.

[¶4] Mr. Charest filed a Petition for Review on May 1, 2017, asserting that his incapacity had increased to total. On September 25, 2019, the board (*Collier, ALJ*) denied the petition on the basis that the statute of limitations had expired. The ALJ found that the insurer's most recent payment had been made on April 11, 2006, which was beyond the six-year statutory period. *See* 39-A M.R.S.A. § 306(2) (providing that, if an employer or insurer pays benefits within two years after the date of injury or the employer's required first report of injury, a party has "6 years from the date of the most recent payment" to file a petition). The Appellate Division affirmed that decision, and Mr. Charest appealed the to the Law Court.

[¶5] The Law Court reversed the Appellate Division and determined that the statute of limitations had not expired. The Court held that under section 221, Social Security old-age insurance benefits that fully offset wage loss benefits are considered workers' compensation payments made by the employer. *Charest v. Hydraulic Hose & Assemblies, LLC*, 2021 ME 17, ¶ 17, 247 A.3d 709. The Law

Court stated "the date of the most recent payment is the date of the most recent offsetting old-age Social Security benefit payment. 39-A M.R.S.[A.] §306(2)." *Id.*

[¶6] The Law Court remanded the case to the Appellate Division with the following mandate:

> Decision of the Workers' Compensation Appellate Division vacated. Remanded to the Appellate Division with instructions to vacate the decision of the administrative law judge and remand for further proceedings on the petition for review of incapacity.

Accordingly, the Appellate Division vacated the ALJ's decision and remanded the case to the ALJ for proceedings consistent with the Law Court's decision.

[¶7] After holding a conference with the parties and allowing additional argument, ALJ Collier issued a new decree addressing the merits of the Petition for Review. ALJ Collier found that although Mr. Charest remained under restrictions for the 2001 low back injury, he did not provide comparative medical evidence showing that his medical circumstances had changed since the 2006 decree. *See Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 7, 837 A.2d 117. He noted that Dr. Mesrobian, who had examined Mr. Charest pursuant to 39-A M.R.S.A. § 207, could not conclude Mr. Charest's ongoing symptoms were related to the 2001 work injury.

[¶8] The ALJ did determine, based on the testimony of vocational expert Kathleen Wong, that Mr. Charest's economic circumstances had changed, and therefore proceeded to revisit the 2006 decree. Ms. Wong provided evidence that Mr. Charest has no employability within the general labor market and found that

"[t]he fact that he has been out of the competitive labor market for the past 14 years is a huge barrier and when you couple that with his age [at the time of the evaluation] of 79.6, it becomes an insurmountable barrier." However, the ALJ found that Mr. Charest's decrease in earning capacity was not causally related to the 2001 low back injury, but instead, to events and circumstances that occurred subsequently.

[¶9] Thereafter, Mr. Charest filed a timely Motion for Further Findings of Fact and Conclusions of Law and proposed additional findings. *See* 39-A M.R.S.A. § 318. ALJ Collier retired from the board before addressing the motion. On February 9, 2022, the board notified the parties that the motion would be considered by an alternate ALJ, and they would be notified once a new ALJ was assigned. Without additional notice, however, the case was referred to ALJ Chabot, who granted the motion and issued additional findings on March 24, 2022.

[¶10] ALJ Chabot agreed that Mr. Charest had established changed economic circumstances. He further concluded based on the evidence considered and the facts found by ALJ Collier, that the Petition for Review should be granted. Mr. Charest was awarded 100% partial incapacity benefits because he remained under restrictions from the 2001 work injury and he established that his earning capacity had decreased in part due to his work restrictions, citing *Belanger v. Miles Mem. Hosp.*, Me. W.C.B. No. 17-23 (App. Div. 2017). HHA filed this appeal.

II. DISCUSSION

A. Standard of Review

[¶11] The role of the Appellate Division "is limited to assuring that the [ALJ's] 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) (quotation marks omitted). When a party requests and proposes additional findings of fact and conclusions of law, as in this case, "we review 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. Procedural Issues

[¶12] HHA argues that the ALJ exceeded the Law Court's mandate, infringed on its right to due process, and lacked statutory authority to issue additional findings of fact and conclusions of law in this case. Specifically, HHA asserts that ALJ Chabot acted arbitrarily when he issued additional findings of fact and conclusions of law because he had no opportunity to hear testimony or assess the credibility of the witnesses; the parties had not been informed that a new ALJ had been assigned to the case and were not provided an opportunity to discuss how the

case should proceed; and the ALJ essentially issued a "surprise" decision. We find no reversible error.

[¶13] HHA contends the Law Court's mandate, referring to "*the* administrative law judge," (emphasis added) required the case to be remanded to the ALJ who heard the evidence, and the reference to "further proceedings" required that a conference and potentially an additional hearing be held to update the record. We disagree.

[¶14] First, ALJ Collier, having retired, was unavailable to address the motion for findings. Second, regarding the direction for "further proceedings," the merits of the Petition for Review had been fully litigated by the parties, and ALJ Chabot had before him all the evidence from that litigation. Additionally, ALJ Chabot found no new facts. ALJ Collier found as fact that Mr. Charest continued to be incapacitated in part because of the 2001 work injury. He also found that Mr. Charest's earning capacity had decreased since the prior decree. ALJ Chabot came to a different conclusion based on the facts as found in ALJ Collier's decree.

[¶15] At a minimum, due process requires notice and an opportunity to be heard. *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (stating the constitutional right to be heard "is a basic aspect of the duty of government to follow a fair process"). HHA was provided with notice that a different ALJ would decide the Motion for Findings and

did not object. HHA had ample time and opportunity but did not file a response to Mr. Charest's motion with the board. *See* Me. W.C.B. Rule, ch. 12, § 1(2) ("Except as specifically provided in the Maine Workers' Compensation Act of 1992 or in these rules, any party opposing a motion or wishing to respond to another party's submission must file a response not later than 21 days after the filing of the motion.")

[¶16] Although informing the parties of the new ALJ's assignment and holding a conference may have been a preferred course, we conclude that no reversible procedural error occurred in this case, and that HHA had both notice that a new ALJ would be appointed and an opportunity to respond to the motion for findings.

C. Statutory Basis for Deciding a Motion for Findings After a Remand

[¶17] HHA contends that the proper procedural course in this matter was a direct appeal pursuant to 39-A M.R.S.A. § 321-B, rather than a motion for findings pursuant to 39-A M.R.S.A. § 318. HHA asserts that the decision after remand, which ALJ Collier characterized as "further findings consistent with the Law Court's decision," constituted additional findings of fact pursuant to section 318. Thus, it argues, ALJ Chabot lacked statutory authority to address the motion. We disagree.

[¶18] ALJ Collier's 2019 decision denying the Petition for Review on the basis of the statute of limitations had been vacated. The decision after remand represented the first time the merits of the Petition for Review were addressed. ALJ

Collier's decision on remand was the appropriate subject of a motion for additional findings under section 318.

D. Change in Economic Circumstances

[¶19] HHA contends that ALJ Chabot erred when finding a change in economic circumstances sufficient to overcome the res judicata effect of the previous decision. We disagree.

[¶20] "[V]alid and final decisions of the Workers' Compensation Board are subject to the general rules of res judicata and issue preclusion, not merely with respect to the decision's ultimate result, but with respect to all factual findings and legal conclusions that form the basis of that decision." *Grubb,* 2003 ME 139, ¶ 9 (citations omitted). Therefore, "[I]n order to prevail on a petition to increase or decrease compensation in a workers' compensation case when a benefit level has been established by a previous decision, the petitioning party must first meet its burden to show a 'change of circumstances' since the prior determination, which may be met by either providing 'comparative medical evidence,' or by showing changed economic circumstances." *Id*. ¶ 7.

[¶21] ALJ Chabot concluded that Mr. Charest established a change in his economic circumstances because he has been out of the competitive labor market for well over a decade, he is of advanced age, he remains under work-related restrictions, and he continues to suffer disability from preexisting knee and

psychological conditions. The combination of these factors persuaded ALJ Chabot that Mr. Charest is unemployable. These types of factors are relevant to an employee's ability to earn, and thus to his economic circumstances. *See, e.g., Tucker* v. *Assoc. Grocers of Me., Inc.*, 2008 ME 167, ¶ 9, 959 A.2d 75 (determining that despite job loss occurring before the consent decree was entered, the employee's unanticipated unemployment for a prolonged period after the consent decree constituted a change in economic circumstances); *see also Strout* v. *Blue Rock Indus.*, Me. W.C.B. No. 16-37, ¶ 22 (App. Div. 2016) (affirming determination that loss of part-time, post-injury employment constituted a change in economic circumstances).

[¶22] An employee's post-injury earning capacity is established based on multiple factors. Age, educational background, intelligence, work experience, and vocational training are proper considerations when determining what jobs are available to the employee and thus, what the employee is able to earn after being injured at work. See *Morse v. Fleet Fin. Group*, 2001 ME 142, ¶ 9, 782 A.2d 769. The ALJ's assessment that Mr. Charest has carried his burden of proving a change in economic circumstances and that his earning capacity has decreased is supported by the record, is not irrational, and does not misconceive or misapply the law. Accordingly, we find no error.

III. CONCLUSION

[¶23] ALJ Chabot's factual findings are supported by competent evidence, the decision involved no misconception of applicable law and the application of the law to the facts was neither arbitrary nor without rational foundation. Accordingly, we affirm the decision.

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.

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