STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 23-0017
Decision No. 24-7

RITA T. OUELLETTE
(Appellee)

v.

NORTHERN LIGHT
EASTERN MAINE MEDICAL CENTER
(Appellant)

and

EASTERN MAINE GROUP WORKERS' COMPENSATION TRUST
(Insurer)

Argued: February 7, 2024
Decided: May 9, 2024

PANEL MEMBERS: Administrative Law Judges Stovall, Chabot, and Knopf

Majority: Administrative Law Judges Chabot and Stovall
Dissent: Administrative Law Judge Knopf

BY: Administrative Law Judge Chabot

[¶1] Northern Light Eastern Maine Medical Center (EMMC) appeals a decision of a Workers' Compensation Board administrative law judge (*Rooks, ALJ*)[1] determining that the employee, Rita Ouellette, was entitled to varying levels of incapacity benefits due to work-related injuries incurred on January 27, 2006, and August 16, 2012. EMMC contends the ALJ erred in determining that (1) the retiree presumption in 39-A M.R.S.A. § 223 no longer applied when Ms. Ouellette's Social Security retirement benefits converted to Social Security disability benefits; (2) Ms.

[1] A hearing was held on October 5, 2022, before ALJ Pelletier. ALJ Pelletier subsequently retired prior to issuing a decree, and this matter was transferred to ALJ Rooks who issued a decision based upon the record by agreement of the parties.

Ouellette did not refuse a bona fide offer of reasonable employment or that she refused such an offer with good and reasonable cause, *see* 39-A M.R.S.A. § 214(1); and (3) Ms. Ouellette sustained certain incapacity levels over three distinct periods without competent supporting evidence.[2] We conclude that the ALJ's findings regarding incapacity levels for three identified periods are unclear and are therefore inadequate for appellate review. We vacate that portion of the decision and remand the case for additional findings on the issue of incapacity levels. In all other respects, we affirm the decision.

I. BACKGROUND

[¶2] Ms. Ouellette worked as a nurse at EMMC. She sustained a work-related injury to her left knee and left wrist on January 27, 2006, when she slipped on ice and fell in the entryway to the operating room at EMMC. On May 26, 2006, she underwent a left knee arthroscopy, which did not alleviate her left knee pain. After a series of steroid and Synvisc injections, she underwent a second left knee surgery on March 20, 2012.

[2] EMMC also argues that the ALJ erred in failing to apportion responsibility between the two dates of injury. The issue of the percentage of responsibility to be assigned to each date of injury (for whatever purpose) was not raised until after the ALJ's decision was issued, in EMMC's Proposed Findings of Fact and Conclusions of Law. By failing to make the argument in a timely fashion, EMMC did not give Ms. Ouellette or the ALJ a fair opportunity to respond to it. Accordingly, EMMC has waived that issue on appeal, and we do not address it further. *See Morey v. Stratton*, 2000 ME 147, ¶¶ 8-10, 756 A.2d 496 (emphasizing "the importance of bringing the specific challenge to the attention of the trial court at a time when the court may consider and react to the challenge"); *Waters v. S.D. Warren Co.*, Me. W.C.B. 14-26, ¶¶ 17-18 (App. Div. 2014) (affirming determination that that the employer had forfeited consideration of an argument raised perfunctorily and for the first time in response to a position paper because it did not give opposing counsel fair notice of the issue).

[¶3] On August 16, 2012, Ms. Ouellete stepped into a pothole in a parking lot at EMMC and fell, causing a left ankle fracture for which she underwent surgery on April 14, 2014. She continued to treat for the left knee and ankle and worked for EMMC on modified duty until April 1, 2016. EMMC paid wage loss and medical benefits to Ms. Ouellette until she went out of work. She underwent a total left knee replacement in June 2022.

[¶4] Ms. Ouellette began receiving Social Security retirement benefits on April 1, 2016, her last day of work. The Social Security retirement benefits converted to Social Security disability benefits on September 1, 2016.

[¶5] Ms. Ouellette filed Petitions for Award and for Payment of Medical and Related Services for both dates of injury. On March 21, 2022, she underwent an independent medical examination with Dr. Richard Mazzei pursuant to 39-A M.R.S.A. § 312. Dr. Mazzei opined that although Ms. Oullette had a preexisting degenerative condition in her left knee, the January 2006 work-related incident significantly aggravated that condition. Dr. Mazzei also opined that Ms. Ouellette's August 2012 left ankle injury was work-related, and that the subsequent treatment and surgeries resulted from both work injuries. Dr. Mazzei also found that prolonged standing, walking, and her excess weight would tend to aggravate her knee and ankle conditions, but Ms. Ouellette could work in a part-time, sedentary nursing position. Despite a conflicting opinion from Dr. Curtis, who evaluated Ms. Ouellette pursuant

to 39-A M.R.S.A. § 207, the ALJ adopted Dr. Mazzei's medical findings and granted Ms. Ouellette's petitions.

[¶6] The ALJ found, however, that Ms. Ouellette had voluntarily terminated active employment on April 1, 2016, and was receiving nondisability pension benefits at that time. Thus, under the retiree presumption, she did not have a loss of earning capacity when she retired. 39-A M.R.S.A. § 223. However, the ALJ further concluded that the retiree presumption no longer applied after her Social Security retirement benefits converted to disability benefits on September 1, 2016. The ALJ thus awarded no wage loss benefits from April 1, 2016, to August 31, 2016, and periods of total and partial incapacity benefits thereafter, until the date of her total knee replacement (for which EMMC's liability remains open).

[¶7] EMMC filed a Motion for further Findings of Fact and Conclusions of Law, which the ALJ denied. EMMC appeals.

II. DISCUSSION

A. Retirement Presumption

[¶8] "The retiree presumption is designed to assist fact-finders in determining when an employee who has reached or neared the conclusion of his or her working career will remain eligible to receive workers' compensation benefits." *Downing v. Dep't of Transp.*, 2012 ME 5, ¶ 8, 34 A.3d 1150 (quoting *Costales v. S.D. Warren Co.*, 2003 ME 115, ¶ 7, 832 A.2d 790). "Pursuant to that presumption, an employee

who 'terminates active employment' and is receiving nondisability retirement benefits is presumed to have no loss of earnings or earning incapacity as a result of a compensable injury." *Downing*, 2012 ME 5, ¶ 8; 39-A M.R.S.A. § 223.[3]

[¶9] EMMC first argues that the evidence is insufficient to establish that Ms. Ouellette's Social Security retirement benefits converted to disability benefits on September 1, 2016. EMMC points to testimony that the conversion may have occurred in 2017. Ms. Ouellette, however, testified that the Social Security retirement benefits converted to disability benefits on September 1, 2016. This is competent evidence that supports the ALJ's finding. *See Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995); The ALJ was within her authority to choose between conflicting versions of the facts. See *Mailman's Case*, 118 Me. 172, 177, 106 A. 606, 608 (1919).

[¶10] EMMC next argues that once the retirement presumption was applied, it could only be rebutted with proof that Ms. Ouellette had a total physical inability

[3] Title 39-A M.R.S.A. § 223(1) provides:

> **Presumption**. An employee who terminates active employment and is receiving nondisability pension or retirement benefits under either a private or governmental pension or retirement program, including old-age benefits under the United States Social SecurityAct, 42 United States Code, Sections 301 to 1397f, that was paid by or on behalf of an employer from whom weekly benefits under this Act are sought is presumed not to have a loss of earnings or earning capacity as the result of compensable injury or disease under this Act. This presumption may be rebutted only by a preponderance of evidence that the employee is unable, because of a work-related disability, to perform work suitable to the employee's qualifications, including training or experience. This standard of disability supersedes other applicable standards used to determine disability under this Act.

to work, citing *Costales*, 2003 ME 115, ¶¶ 12-13, 832 A.2d 790; *Pendexter v. Tilcon of Me., Inc.*, 1999 ME 34, ¶ 13, 724 A.2d 618 (Me. 1999).

[¶11] In *Pendexter*, the employee had retired at age 55, received a nondisability pension, and remained out of work for roughly two years. 1999 ME 34, ¶ 2. He went back to work full time thereafter, and injured his back, rendering him completely unable to work for four months. *Id.* ¶ 2. He returned to work until a nonwork-related condition rendered him disabled. *Id.* ¶ 3. A hearing officer determined that the employee was precluded by the retiree presumption from receiving benefits, except for the four-month period during which he was totally incapacitated from work. *Id.* ¶ 5. The employee argued that the retirement presumption did not apply to him because he had returned to active employment. *Id.* ¶ 7. The Law Court, however, affirmed the hearing officer and stated, "Decisions of this Court and the courts of Michigan have interpreted the term 'active employment' to refer to the employment at the time of the employee's original retirement." *Id.* ¶ 8. Thus, the Court found that the presumption still applied to him even though he had returned to work. *Id*. ¶ 9. The Law Court additionally held a return to work does not rebut the presumption. *Id.* ¶¶ 9-10.

[¶12] The ALJ in this case held that the retirement presumption did not apply after the Social Security retirement benefits converted to Social Security disability benefits because a fundamental statutory requirement—receipt of a nondisability

pension—no longer existed. As discussed above, the retirement presumption applies to an employee who (1) terminates active employment and (2) is receiving nondisability pension or retirement benefits. Although Ms. Ouellette had terminated active employment, she was not receiving a nondisability pension or retirement benefits as of September 1, 2016. "Pursuant to this provision, the Legislature does not allow the recovery of both workers' compensation and retirement benefits." *Downing*, 2012 ME 5, ¶ 9.

[¶13] This case is notably distinguishable from *Pendexter*. In *Pendexter* the Court specifically found that although the employee returned to work, he still had terminated active employment, and thus the retirement presumption still applied. 1999 ME 34, ¶ 9. In this case, one prong of the retirement presumption, the employee receiving nondisability pension or retirement benefits, was not applicable as of September 1, 2016. We therefore find the ALJ's finding that the retirement presumption no longer applied when Ms. Ouellette's retirement benefits converted to disability benefits to be supported by the evidence and involves no misconception of applicable law.

B. Refusal of Suitable Employment

[¶14] EMMC next contends the ALJ should have determined that Ms. Ouellette refused a bona fide offer of reasonable employment without good and

reasonable cause when she went out of work on April 1, 2016, because the work was within her capacity and she requested no accommodations to her duties.

[¶15] An employee who "receives a bona fide offer of reasonable employment from the previous employer or another employer," and who "refuses that employment without good and reasonable cause" is not entitled to receive wage loss benefits "during the period of refusal." 39-A M.R.S. § 214(1)(A). Cases governed by 39-A M.R.S. § 214(1)(A) are analyzed under a two-part test: (1) whether the offered employment was "reasonable" pursuant to section 214(1)(5), and if so, (2) whether the employee had good and reasonable cause to refuse the employment. *Ladd v. Grinnell Corp.*, 1999 ME 76, ¶ 7, 728 A.2d 1275 (Me. 1999). "It is left to the sound discretion of the factfinder to carefully examine the facts and circumstances of each case to determine what is good and reasonable cause in any given situation." *Thompson v. Claw Island Foods*, 1998 ME 101, ¶ 19, 713 A.2d 316. Voluntary resignation from post-injury employment may constitute refusal of reasonable employment. *Holt v. S.A.D. No. 6*, 2001 ME 146, ¶¶ 7, 8, 782 A.2d 779.

[¶16] Title 39-A M.R.S. § 214(5) defines reasonable employment as follows:

> "Reasonable employment," as used in this section, means any work that is within the employee's capacity to perform that poses no clear and proximate threat to the employee's health and safety and that is within a reasonable distance from that employee's residence. The employee's capacity to perform may not be limited to jobs in work suitable to the employee's qualification and training.

[¶17] The ALJ found that the position Ms. Ouellette left at EMMC was within her physical capacity at the time and within a reasonable distance of her residence, but did not constitute a bona fide offer of continued employment because the work posed a threat to her health and safety. This was based on Ms. Ouellette's testimony that her condition was getting progressively worse, and the work was negatively impacting her health. The ALJ further found that even if the job offer was reasonable, Ms. Ouellette had good and reasonable cause for refusing it based on her testimony that her symptoms were progressively worsening and significantly affecting her activities of daily living.

[¶18] We find no error. The ALJ's factual findings are supported by competent evidence, and the decision falls within the reasonable bounds of the ALJ's sound discretion. *See Ladd*, 1999 ME 76, ¶ 11; *see also Henderson v. Lucas Tree Experts*, Me. W.C.B. No. 16-28, ¶¶ 11-12 (App. Div. 2016).

C. Incapacity Levels

[¶19] EMMC contends the ALJ erred when assessing Ms. Ouellette's earning capacity during three time periods. For the periods from September 1, 2016, through October 16, 2016 (period 1), and from March 21, 2022, through June 1, 2022 (period 3), the ALJ found that Ms. Ouellette could work twenty hours per week at minimum

wage, based on Dr. Mazzei's findings.[4] For the period from October 17, 2016, to March 20, 2022 (period 2), the ALJ determined that Ms. Ouellette was totally incapacitated from work, based on M-1 reports from Ms. Ouellette's treating physicians. EMMC contends it was error for the ALJ to disregard Dr. Mazzei's opinion that Ms. Ouellette had partial incapacity during period 2, in favor of the M-1 reports. Ms. Ouellette argues that Dr. Mazzei's opinion, dated March 21, 2022, was prospective only, and thus inapplicable during period 2. However, this argument does not explain why the ALJ adopted Dr. Mazzei's opinion regarding period 1.

[¶20] EMMC requested additional findings of fact and conclusions of law, including on the issue of Ms. Ouellette's incapacity level for the three separate periods. The ALJ was under an affirmative duty pursuant to 39-A M.R.S.A. § 318 to issue additional findings if the original findings do not provide an adequate basis for appellate review. *See Coty v. Town of Millinocket*, 444 A.2d 355, 357 (Me. 1982); *Malpass v. Philip J. Gibbons*, Me. W.C.B. No. 14-19, ¶ 18 (App. Div. 2014). An ALJ's decision may be considered inadequate for appellate review when the findings

[4] EMMC also asserts that for the periods of partial incapacity it was error to find that Ms. Ouellette's earnings were limited to minimum wage when Ms. Ouellette had been working in a modified nursing position when she left work and she had twenty years of nursing experience. To the extent on remand the ALJ finds any period of partial incapacity, we find no error in imputing a minimum wage-earning capacity. It is apparent from the decision that the ALJ properly considered several factors to determine earning capacity, including age, work experience, and specific physical limitations. *See Morse v. Fleet Fin. Group*, 2001 ME 142, ¶ 9, 782 A.2d 769 (stating that an employee's post-injury earning capacity is established based on multiple factors, including age, educational background, intelligence, work experience, vocational training.); *Martin v. George C. Hall & Sons, Inc.*, Me. W.C.B. No. 21-27, ¶ 9 (App. Div. 2021 *en banc*) (same).

are inconsistent or unclear. *Spear v. Town of Wells*, 2007 ME 54, ¶¶ 13, 16, 922 A.2d 474 (remanding for additional findings when it was unclear whether the hearing officer treated the injury as a preexisting condition or a subsequent nonwork injury); *Derrig v. Fels Co.*, 1999 ME 162, ¶¶ 1, 8, 747 A.2d 580 (remanding for clarification of inconsistent findings regarding a gradual injury). The ALJ's findings with respect to incapacity are unclear and potentially inconsistent. Accordingly, we remand the case for additional findings on that issue.

III. CONCLUSION

[¶21] Because we find the ALJ's findings regarding periods of incapacity to be unclear, we remand for additional findings on that issue. With regard to the remaining issues, the ALJs 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., 669 A.2d at 158.

The entry is:

> The case is remanded for additional findings of fact and conclusions of law on the issue of Ms. Ouellette's incapacity levels. In all other respects, the decision is affirmed.

Administrative Law Judge Knopf, dissenting

[¶22] Because I conclude that the retiree presumption in 39-A M.R.S.A. § 223 continues to apply despite the conversion of Ms. Ouellette's Social Security benefits to disability benefits, I dissent.

[¶23] EMMC argues that once the retirement presumption was applied, it could only be rebutted with proof that Ms. Ouellette had a total physical inability to work, citing *Costales v. S.D. Warren Co.*, 2003 ME 115, ¶ 10, 832 A.2d 790; *Pendexter v. Tilcon of Me., Inc.*, 1999 ME 34, ¶ 13, 724 A.2d 618 (Me. 1999). According to EMMC, proof that Ms. Ouellette was no longer receiving a nondisability pension does not rebut the retiree presumption and therefore does not trigger reinstatement of benefits. In my view, this argument has merit.

[¶24] Application of the retiree presumption is triggered at the time of the employee's original retirement. *Pendexter*, 1999 ME 34, ¶ 10. Two statutory requirements must be met: (1) the employee must have terminated active employment, and (2) must be receiving a nondisability pension. 39-A M.R.S.A. § 223. The Law Court held in *Pendexter* that once applied, the presumption does not become inapplicable if the employee returns to work, *Pendexter*, 1999 ME 34, ¶ 9, but only when an employee has established the sole statutory requirement for rebuttal: "that the employee is unable, because of a work-related disability, to perform work suitable to the employee's qualifications, including training or

experience." 39-A M.R.S.A. § 223(1); *Pendexter*, 1999 ME 34, ¶ 13; *see also Downing v. Dep't of Transp.*, 2012 ME 5, ¶ 10, 20, 34 A.3d 1150 (remanding for additional findings on the issue whether the employee rebutted the retiree presumption for a discrete period after terminating active employment). The Court reasoned in *Pendexter* that allowing the employee to rebut the presumption with proof that he had returned to "would, in effect, create a second means of rebutting the retiree presumption when the statute only provides one." 1999 ME 34, ¶ 9.

[¶25] The presumption, once applied, does not automatically become inapplicable even when the first statutory criterion—termination of active employment—is no longer satisfied (i.e., an employee who had terminated active employment later returns to work). The majority would conclude, however, that the presumption automatically becomes inapplicable when the second statutory criterion—receipt of a nondisability pension—is no longer satisfied. Although the Law Court has not had occasion to speak on this issue, the Court has plainly stated that once the presumption has been applied, the only way to rebut the presumption is pursuant to the mechanism for rebuttal provided in the statute. *Pendexter,* 1999 ME 34, ¶ 9; *Downing*, 2012 ME 5, ¶ 10. The Law Court has emphasized the unique nature of the retiree presumption, stating that when an employee seeks to have the presumption removed, the focus is on the "employee's ability to perform work." *Costales*, 2003 ME 115, ¶ 8. The Court stated:

> In establishing the retiree presumption, the Legislature used language that is noticeably different from language used to determine whether an otherwise active employee is eligible for benefits. Specifically, an employee seeking to overcome the retiree presumption must demonstrate that he is "unable, because of a work-related disability, to perform work suitable to the employee's qualifications, including training or experience." 39-A M.R.S.A. § 223(1). Thus, the focus is on the employee's ability to perform work. Significantly, the Legislature provided that "this standard of disability supersedes other applicable standards used to determine disability under this Act." *Id*.

Id.

[¶26] Ms. Ouellette has not established by a preponderance of the evidence that she "is unable, because of a work-related disability, to perform work suitable to [her] qualifications, including training or experience." 39-A M.R.S.A. § 223. Accordingly, I would conclude that the retiree presumption continues to apply, and I would vacate the decision insofar as it awards incapacity benefits.

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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