BRENDA CAPITAN
(Appellant)

v.

NEWPAGE PAPER
(Appellee)

and

SEDGWICK CMS
(Administrator)

Conference held: September 21, 2017
Decided: April 2, 2019

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

[¶1] Brenda Capitan appeals from a Workers' Compensation Board administrative law judge's (*Knopf, ALJ*) decision denying her Petitions for Restoration and for Review related to a 2008 bilateral carpal tunnel injury and a 2009 shoulder injury. The ALJ denied Ms. Capitan's petitions by application of the retirement presumption in 39-A M.R.S.A. § 223 (2001). We affirm the decision.

[¶2] Ms. Capitan worked at the NewPage paper mill for over thirty years, performing jobs that included cleaning paper machines, janitorial work, and work in the quality assurance lab. She officially retired from NewPage in December of 2011, and began to receive a non-disability pension. Shortly thereafter she started receiving Social Security retirement benefits, retroactive to January 1, 2012.

[¶3] In her last days at NewPage, Ms. Capitan performed modified janitorial work and work in the quality assurance lab. She had some work restrictions due to her work injuries. At the time of her retirement, however, she was working full-time and no doctor had taken her out of work. After retirement, she went to work for a different employer as a driver, for which she received mileage reimbursement, but she quit after a short period.

[¶4] The retirement presumption in section 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 . . . 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 a compensable injury or disease under this Act. This presumption may be rebutted only by a preponderance of the 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.

[¶5] Ms. Capitan contends the record shows that she retired because she could no longer perform her work duties due to her work injuries; thus, she asserts that the ALJ erred when determining that she "terminate[d] active employment" when she retired. She contends this is supported by the opinion of Dr. Bradford who, having examined her one year after she submitted her retirement papers, opined that "the culmination of her multiple sites with orthopedic problems [was] consistent with her decision to retire."

[¶6] However, the ALJ found that at the time of her retirement, Ms. Capitan was performing full-time work consistent with the work she had been performing for several years before her retirement, and that although she was working with some restrictions, no doctor had taken her out of work. Dr. Bradford's later-in-time opinion could have possibly foreclosed work during that period, but the evidence shows that Ms. Capitan *did work* up until her retirement. *See Hallock v. NewPage Corp.*, Me. W.C.B. No. 16-6, ¶ 14 (App. Div. 2016). Thus, the ALJ did not err when concluding that Ms. Capitan terminated active employment when she retired. *See Bowie v. Delta Airlines, Inc.*, 661 A.2d 1128, 1131 (Me. 1995) (holding that the performance of light duty work at the time of retirement constituted "active employment" for purposes of applying the retiree presumption); *Wing v. NewPage Corp.*, Me. W.C.B. No. 16-5, ¶ 13 (App. Div. 2016) ("Because [the employee] was working at his job when he retired, the ALJ did not err when concluding that he was actively employed and thus, when applying the retirement presumption."); *Perry v. Mead Westvaco*, Me. W.C.B. No. 17-29, ¶ 2 (App. Div. 2017) (performing customary work duties until the time of retirement constitutes active employment).

[¶7] Moreover, the ALJ found that Ms. Capitan failed to rebut the presumption with evidence that she was unable to perform work suitable to her qualifications. *See* 39-A M.R.S.A. § 223(1).

[¶8] There is competent evidence to support the ALJ's factual findings, and the ALJ applied the appropriate legal standards to those facts. *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 (Supp. 2018).

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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