STEPHEN W. FARRAR
(Appellee)

v.

TATE & LYLE AMERICAS, INC.
(Appellant)

and

GALLAGHER BASSETT SERVICES, INC.
(Administrator)

Conference held: September 20, 2023
Decided: November 9, 2023

PANEL MEMBERS: Administrative Law Judges Sands, Hirtle, and Smith
BY: Administrative Law Judge Smith

[¶1] Tate & Lyle Americas, Inc., appeals from a decision of a Workers' Compensation Board administrative law judge (*Chabot, ALJ*) denying Tate & Lyle's Petitions to Determine Extent of Permanent Impairment and to Terminate Benefit Entitlement and granting Stephen Farrar's Petition for Payment of Medical and Related Services. Tate & Lyle contends the ALJ erred as a matter of law regarding (1) whether Mr. Farrar met his initial burden of production on the issue of permanent impairment (PI), and (2) whether Tate & Lyle established that Mr. Farrar had reached maximum medical improvement (MMI). We affirm the decision.

I. BACKGROUND

[¶2] Stephen Farrar injured his right ankle while working for Tate & Lyle on December 10, 2012, when he fell on an icy walkway. As a result of this injury, Mr. Farrar underwent several surgeries. Tate & Lyle has consistently paid incapacity benefits since the date of injury.

[¶3] Tate & Lyle filed Petitions to Determine Extent of Permanent Impairment and to Terminate Benefit Entitlement, seeking to establish that Mr. Farrar's PI level was below that required for continued ongoing partial benefit payments beyond 520 weeks.[1] Mr. Farrar filed a Petition for Payment of Medical and Related Services, seeking to compel Tate & Lyle to pay for an ankle surgery to remove a bone fragment recommended by his treating surgeon, Dr. Gregory Pomeroy, which would delay an eventual total ankle replacement. A hearing took place before ALJ Pelletier on June 15, 2022. ALJ Chabot issued a decision on January 11, 2023,[2] denying Tate & Lyle's petitions and granting Mr. Farrar's petition. The ALJ determined that Mr. Farrar had not reached MMI, and that the proposed surgery to remove the bone fragment was a reasonable and proper medical

[1] The PI threshold applicable to the 2012 date of injury is 12%. Me. W.C.B. Rule, ch. 2, § 1(4). The durational limit for partial incapacity payments involving PI that does not exceed the threshold is 520 weeks. 39-A M.R.S.A. § 213; Me. W.C.B. Rule, ch. 2, § 2. There is no dispute that Tate & Lyle has paid more than 520 weeks of partial incapacity benefits.

[2] ALJ Pelletier retired after the hearing but before issuing a decision. A decision was issued by ALJ Chabot after a conference and by stipulation of the parties.

service. *See* 39-A M.R.S.A. § 206. Tate & Lyle filed a Motion for Further Findings of Fact and Conclusions of Law, which the ALJ denied. This appeal followed.

II. DISCUSSION

A. Burden of Production

[¶4] Tate & Lyle contends that the ALJ committed reversible error by implicitly determining that Mr. Farrar met his burden of production because Mr. Farrar did not submit evidence that could potentially establish that his PI level exceeded the 12% threshold or that he had not reached MMI, citing *Weiss v. Soapstone Company, Inc.,* Me. W.C.B. No. 22-12, ¶ 13 (App. Div. 2022). We disagree.

[¶5] On an employer's petition to terminate benefits based on the durational limit, the employer bears the ultimate burden to prove that an employee's PI level is below the statutory threshold. *Farris v. Georgia-Pacific Corp.*, 2004 ME 14, ¶ 17, 844 A.2d 1143. The employee, however, is initially "responsible for raising the issue of whole-body permanent impairment, and of presenting sufficient evidence to demonstrate that a genuine issue exists" with respect to whether the employee's PI exceeds the threshold. *Id*. at ¶ 1. Once an employee meets that burden, the burden shifts to the employer to persuade the board that the employee's PI rating is, in fact, below the applicable threshold. *Id.* at ¶ 17.

[¶6] "'Permanent impairment' means any anatomic or functional abnormality or loss existing after the date of [MMI] that results from the injury." *Id.* at § 102(16). "Maximum Medical Improvement" is "the date after which further recovery and further restoration of function can no longer be reasonably anticipated, based upon reasonable medical probability." 39-A M.R.S.A. § 102(15).

[¶7] The ALJ did not explicitly assess whether Mr. Farrar met a burden of production on the issue of PI or MMI. Instead, the ALJ concluded that Tate & Lyle's failure to meet its burden of proof on the issue of MMI was dispositive of the motions to establish PI and to terminate benefits, citing *Strout v. Blue Rock Industries,* Me. W.C.B. No. 16-37, ¶¶ 16-19 (App. Div. 2016).[3] Essentially, the ALJ viewed the issue of MMI as threshold issue that is part of the employer's burden of proof.

[¶8] Neither the Law Court nor the Appellate Division has unambiguously held that when *Farris* applies, MMI is a threshold issue with the burden of persuasion allocable to the employer that would obviate an assessment of the

[3] An Appellate Division panel majority held in *Strout* that because the employer did not meet its burden to prove that the employee had reached MMI, the ALJ did not need to evaluate whether the employee established changed circumstances sufficient to address whether PI from a mental sequela could be added to a previously established PI level for an underlying physical injury. Me. W.C.B. No. 16-37, ¶¶ 16-18. The *Strout* case is of limited precedential value here because the case presented a different issue in a different procedural posture. Although the panel majority viewed the employer's burden to establish MMI as a threshold issue in the case, the decision did not address whether the employee had any burden of production on the issue of MMI under *Farris*, 2004 ME 14, ¶ 17. Further, the *Strout* holding may be undermined by the Law Court's subsequent decision in *Bailey v. City of Lewiston*, 2017 ME 160, ¶¶ 16-17, 168 A.3d 762, which held that res judicata bars parties from seeking an increase or decrease of a previously established PI rating.

employee's burden of production. In any event, we do not need to address whether it was error to decide the case as the ALJ did.

[¶9] Mr. Farrar produced Dr. Pomeroy's records, which alone would provide a sufficient basis for a finding that he had not reached MMI. The ALJ found persuasive both Dr. Pomeroy and Dr. Flanigan's medical findings that Mr. Farrar had not reached MMI. This finding was based on a higher standard of proof (on a more probable than not basis) than would be required to meet a burden of production (requiring evidence that if believed, would provide a sufficient basis for a finding in the employee's favor, *see Jensen v. S.D. Warren Co.*, Me. W.C.B. No. 17-26, ¶ 16 (App. Div. 2017)). Having applied a more stringent burden, we conclude that any failure on the part of the ALJ to assess whether Mr. Farrar met a burden of production constitutes harmless error because it is highly probable that it had no effect on the outcome of the case. *See Estate of Sullwold v. The Salvation Army*, 2015 ME 4, ¶¶ 17-18, 108 A.3d 1265; *see also Midland Fiberglass v. L.M. Smith Corp*., 581 A.2d 402, 403-04 (Me. 1990) (holding that alleged "error should be treated as harmless if the appellate [body] believes it highly probable that the error did not affect the judgment" (quotation marks omitted)).

B. Maximum Medical Improvement

[¶10] Tate & Lyle next contends that the ALJ erred when determining that it did not meet its burden to prove that Mr. Farrar had reached MMI. Tate & Lyle

asserts that Dr. Flanigan's medical opinion (that even if Mr. Farrar underwent ankle arthroscopy or an open surgery to remove a bone fragment in his ankle his PI level would remain at 2%) establishes that further recovery and restoration of function can no longer be reasonably anticipated. We disagree.

[¶11] The ALJ credited that portion of Dr. Flanigan's deposition testimony in which he acknowledged that surgery to remove a bone fragment from the ankle would be intended to reduce Mr. Farrar's level of pain, which in turn would likely improve function. The ALJ also credited Dr. Pomeroy's opinion that ankle surgery could reduce Mr. Farrar's pain and improve his condition. The opinions of both doctors constitute competent evidence that supports a finding that further recovery and restoration of function could reasonably be anticipated and thus, Mr. Farrar had not reached MMI.

[¶12] Although there is evidence in the record from Dr. Flanigan that may have supported a conclusion that MMI had been reached, the ALJ, as the fact-finder and sole judge of the credibility of witnesses, was well within his discretion to choose between conflicting versions of the facts. Thus, we find no error in the ALJ's assessment regarding MMI. *See, e.g., Saucier v. Cianbro Corp.,* Me. W.C.B. No. 19-18, ¶ 16 (App. Div. 2019).

III. CONCLUSION

[¶13] The ALJ's factual findings are supported by competent evidence, the decision involved no reversible 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. *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.

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