Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 7, 2014

CLAIM NO. 201076894

ERIC E. POTEMPA PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

LOUISVILLE EXECUTIVE AVIATION
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

ALVEY, Chairman. Eric Potempa ("Potempa") seeks review of the opinion and order rendered August 16, 2013 by Hon. R. Scott Borders, Administrative Law Judge ("ALJ") dismissing his claim for benefits against Louisville Executive Aviation ("LEA") for multiple injuries sustained as a result of a scooter accident occurring on June 25, 2010. Potempa also

seeks review of the September 18, 2013 order overruling his petition for reconsideration.

On appeal, Potempa argues the 0% psychiatric impairment rating assessed by Dr. David Shraberg cannot constitute substantial evidence since it does not conform to the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Because the ALJ committed no error in finding Potempa's alleged psychiatric conditions unrelated to the effects of the June 25, 2010 accident based upon the opinion of Dr. Shraberg, and no contrary result is compelled, we affirm.

Potempa filed a Form 101 stating on June 25, 2010, he was involved in a motor vehicle accident ("MVA") when a driver of an automobile disregarded a stop sign and hit the Vespa scooter he was operating causing injuries to the following body parts: "Brain, head, psychological injury; neck, back, eyes, spine, urology injury, knee, depression, shoulder, tinnitus in ears, floaters in eyes and dental injury."

Potempa testified by deposition on April 25, 2013 and at the final hearing held June 24, 2013. The parties also submitted the transcript of Potempa's June 12, 2012 deposition taken in a companion civil action. At the time of the MVA, Potempa was the vice president of LEA, a private

plane terminal. Potempa testified that on June 25, 2010, he was returning to the office on his scooter after completing work-related errands when he was hit by another vehicle. The impact caused Potempa, who was wearing a helmet, to land on the ground twenty to thirty feet away. Potempa states he temporarily lost consciousness. He was taken by ambulance to the emergency room, and was released later the same day. Potempa attempted to return to work for a couple of months following the MVA, but was subsequently terminated on August 30, 2010. He has not worked since.

As a result of the MVA, Potempa alleged the following body parts were injured or affected: Neck, mid back, low back, right knee, right shoulder and arm, tinnitus, dental injuries including TMJ, vision problem including floaters in his eyes, urological problems, sexual dysfunction, memory loss, head injury, cognitive dysfunction, lack of concentration, depression, anxiety, headaches, and sleep disturbance. Potempa sought treatment from various physicians and ultimately underwent an anterior cervical discectomy and fusion at C5-6 by Dr. John Harpring on September 2, 2011. He also sought psychiatric care from Dr. Terry Hagan. Both parties filed records pertaining to treatment received by Potempa, including the September 2,

2011 operative report and the psychiatric treatment records of Dr. Hagan from November 2010 through April 2013.

In support of his claim, Potempa filed the November 14, 2012 neuropsychological evaluation report of Dr. Shannon Voor, Ph.D. Dr. Voor diagnosed mild traumatic brain injury with frontal lobe involvement and diffuse brain impairment, complicated by a psychological overlay. Dr. Voor opined the mild traumatic brain injury resulted from the June 25, 2010 MVA. Dr. Voor also diagnosed depressive disorder not otherwise specified and anxiety disorder not otherwise specified.

Potempa filed the neuropsychological report of Dr. Dennis Buchholz, Ph.D., who evaluated him on February 8, 2011 and March 7, 2011. Dr. Buchholz concluded Potempa shows evidence of mildly clinically significant cognitive impairment and diagnosed brain injury due to mild head trauma. He also noted Potempa is “quite depressed which undoubtedly exacerbates any symptoms of mild cognitive impairment he may experience.”

Potempa filed the November 13, 2012 neuropsychological evaluation report of Dr. Brandon Dennis, Psy.D, from the Frazier Rehab Institute. Dr. Dennis diagnosed traumatic brain injury with a brief loss of consciousness, late effects and depressive disorder not

otherwise specified. He recommended Potempa continue to follow up with his physicians for medical management, continue psychiatric services for his depression, continue to be more active, and maintain regular diet, exercise and sleep regimens.

Potempa filed the April 12, 2013 psychiatric report and the April 12, 2013 Form 107-I medical report of Dr. Hagan. In the psychiatric report, Dr. Hagan noted he is a board certified psychiatrist with a prior career in neurosurgery, and has treated Potempa since November 23, 2010. Dr. Hagan noted the following diagnoses documented in his treatment records:

> Axis I: Cognitive Disorder secondary to brain injury, Mood disorder due to brain injury, Anxiety disorder due to brain injury.
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> Axis II: No diagnosis.
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> Axis III: Brain injury, Cervical disc pain due to MVA, Knee sprain, Rotator cuff injury, Lumbar sprain and disc disease
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> Axis IV: Disability, pain
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> Axis V: GAF 50

Dr. Hagan concluded Potempa “had a brain injury, resulting in cognitive impairment, and emotional instability and anxiety.” Dr. Hagan concluded Potempa is unable to perform

the skills required of his previous job, and his disability is permanent.

Pursuant to the 5th Edition of the AMA Guides, Dr. Hagan assessed a 28% impairment rating for Potempa's cervical spine, with an additional 8% for persistent pain. He assessed a 7% impairment rating for Potempa's lumbar spine. Based upon the 2nd Edition of the AMA Guides, Dr. Hagan assessed a 75% psychological impairment rating. Hagan further noted "The sum of percentages discussed above for cervical and lumbar spine and for psychological add up to 118%. . . . Based upon the cumulative disability, he should be considered 100% disabled."

The majority of Dr. Hagan's Form 107-I refers to the April 12, 2013 psychiatric report, but states Potempa's injuries caused his complaints and assigns a 100% impairment rating. Dr. Hagan also notes Potempa has not yet reached medical maximum improvement ("MMI"). The Form 107-I reflects Potempa retains the physical capacity to return to the type of work performed at the time of injury and he is restricted to flexible hours and activity.

LEA submitted the June 13, 2013 psychiatric report of Dr. Walter Butler who evaluated Potempa at its request. Dr. Butler diagnosed somatization disorder, depressive disorder NOS, anxiety disorder NOS, personality disorder

NOS, workplace injury on June 25, 2010, and second head injury in May 2012. Dr. Butler concluded Potempa sustained mild cognitive impairments as a result of the work-related June 25, 2010 MVA and non-work-related May 2012 head injury.

Pursuant to the 5th Edition of the AMA Guides, Dr. Butler assessed a 14% cognitive impairment, of which he attributed 7% to the June 25, 2010 MVA. In addition, he assessed an additional 8% impairment for emotional impairments originating from the neurological impact of the two concussive injuries, 4% of which is attributable to the MVA. Therefore, Butler assessed a total 10% impairment rating for the June 25, 2010 workplace traumatic brain injury. Pursuant to the 5th and 2nd Editions of the AMA Guides, Dr. Butler assessed a 7.5% psychological impairment rating, attributing 4% to the MVA.

Dr. Butler opined there are no psychiatric conditions arising from the June 25, 2010 MVA preventing Potempa from resuming gainful employment. He recommended Potempa continue taking Cymbalta as prescribed by Dr. Hagan for his depression and anxiety, which are only partially related to the MVA. Dr. Butler also critiqued the opinions of Dr. Hagan, including his assessment of impairment.

Finally, LEA submitted the December 15, 2010 neuropsychiatric report of Dr. David Shraberg, who evaluated

Potempa at its request. Dr. Shraberg noted Potempa appeared hostile and angry, and abruptly left the office due to a headache. He opined Potempa's neuropsychiatric complaints are purely psychogenic in nature and do not warrant an impairment rating. He concluded Potempa at worst had transitory loss of consciousness at the time of the accident with normal neurological and neurodiagnostic tests and no evidence of amnesia. He also opined the nature of his concussion is inconsistent with his present complaints of significant memory and concentration problems. He stated Potempa suffers from a functional disorder based upon psychosocial factors unrelated to a physical injury generated by the MVA.

Dr. Shraberg diagnosed pseudodementia (factitious illness), hysterical versus psychogenic, versus depressive pseudodementia, rule out malingering, symptom magnification, moped versus car accident with soft tissue injuries and complaints of chronic pain, basis uncertain and possible mild concussion, recovered. He found no need for further treatment for an undocumented traumatic brain injury. He also stated the following:

> Mr. Potempa presently presents in such a dramatic manner that is so extreme from the nature of the accident with his near miss answers, inconsistent and incongruous memory losses that this

> examiner concludes that based on his 30 years experience (sic) as a neurologist and psychiatrist that his present complaints cannot be based upon a traumatic brain injury or any type of concussive injury that would explain such behaviors. Mr. Potempa had to leave the office due to his headaches and feeling discomfort after being offered some simple psychological tests to document his reporting style and medical behavioral issues that may be impacting his present condition. This response is so extreme and so inconsistent with a man that drove back and forth to Lexington, KY today and underwent two exams that it is, in my professional opinion, purely psychogenic and part of an extreme symptom magnification complex generated by either financial, psychosocial, and/or psychogenic issues unrelated to any mechanism of the injury regenerated by the accident of June 25, 2010.
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> Mr. Potempa has 0% permanent neuropsychiatric impairment utilizing Chapters 13, 14, and 18 of the Fifth Edition AMA Guidelines, in my professional opinion.[1]

In his opinion rendered August 16, 2013, the ALJ dismissed Potempa's claim for benefits for the following problems since he did not present credible medical evidence substantiating his complaints of problems with his vision,

[1] The December 9, 2010 report by Dr. Henry Tutt, the May 28, 2013 report by Dr. Ronald Fadel and the February 10, 2011 physician review report by Dr. Russell Travis were also submitted by LEA. The above reports only address Potempa's alleged physical injuries, which are not before this Board on appeal, and therefore will not be summarized.

right knee, shoulder, tinnitus, dental, urinary, low testosterone, hormonal changes and sleep disturbance. The ALJ found Potempa failed in his burden of proving he suffered a work-related lumbar spine injury as a result of the June 25, 2010 MVA, finding the opinions of Drs. Travis, Tutt and Fadel most persuasive. The ALJ found Drs. Fadel and Tutt were correct in diagnosing nothing more than an axial sprain/strain injury to the cervical spine as a result of the June 25, 2010 MVA, which should have long since resolved, and warranted a 0% impairment rating. However, the ALJ found persuasive the opinions of Drs. Travis, Tutt and Fadel in concluding the cervical fusion was unreasonable, unnecessary or unrelated to Potempa's June 25, 2010 work-related injuries. The ALJ dismissed Potempa's claim for additional benefits as a result of his cervical spine injury.

In assessing Potempa's closed head injury claim, the ALJ specifically found Potempa not credible, believing he embellished his symptoms and complaints. The ALJ concluded Potempa did not meet his burden in proving he sustained a closed head injury as a result of the MVA based upon the opinions of Drs. Shraberg, Tutt, Butler, and Travis and dismissed his claim for benefits. None of the above findings were appealed by Potempa.

Regarding Potempa's claim of psychological injuries arising from the effects of the June 25, 2010 MVA, the ALJ stated as follows:

> In regard to the Plaintiff's claim that he suffers from psychological injury, the Plaintiff testified that he has problems with coping, depression, anxiety disorder, emotional problems including bouts of crying. In support of this claim he has submitted proof from Dr. Hagan, his treating psychiatrist, who diagnosed him as having a mood disorder due to brain injury, and anxiety disorder due to brain injury. Dr. Hagan believes his psychological problems were causally related to the June 25, 2010, motor vehicle accident and that as a result he retains a 75% psychiatric impairment pursuant to the AMA Guides.
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> In addition, the Plaintiff submitted proof from Dr. Voor, who opined that the Plaintiff suffers from moderate to severe depression with anxiety with periodic thought disorganization. The Plaintiff also presented proof from Dr. Buchholtz, who felt the Plaintiff suffered from depression. The Plaintiff argues that as a result of his psychological condition that he is incapable of working.
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> The Defendant Employer argues that Plaintiff has not met his burden of proving that he suffered psychological injury as a result of the June 25, 2010 motor vehicle accident.
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> In support of this position, Defendant Employer submitted proof from Dr. Butler who diagnosed the Plaintiff as having a somatization disorder, depressive disorder NOS, anxiety disorder NOS, and personality disorder NOS. Dr. Butler

felt that his depression may in part be due to the motor vehicle accident June 25, 2010, but that this did not prevent him from working. Dr. Ballard disagreed with Dr. Hagan's assessment of impairment and felt that he had little understanding of the AMA Guides.

The Defendant Employer also submitted proof from Dr. Tutt, who felt that the Plaintiff exhibited symptoms of fictitious behavior. The Defendant Employer submitted proof from Dr. Shraberg who diagnosed the Plaintiff as having pseudodementia (factitious illness) hysterical versus psychogenic, versus depressive pseudodementia, rule out malingering, and symptom magnification. Dr. Shraberg was of the opinion that Plaintiff was not suffering from any psychological problems attributable to the physical injuries sustained in the June 25, 2010, motor vehicle accident.

In this specific instance, the Administrative Law Judge relies in part on his observations of the Plaintiff at the Final Hearing. The Administrative Law Judge did not find the Plaintiff to be a credible witness, and in fact believes that he was embellishing his symptoms and/or malingering. In so finding, the Administrative Law Judge relies upon a[sic] finds persuasive the opinion of Dr. Shraberg and finds that Plaintiff has not met his burden of proving that he suffered psychological injuries as a result of the transient physical injuries suffered from the June 25, 2010, motor vehicle accident.

The Administrative Law Judge did not find the opinions of Dr. Buchholtz, Dr. Voors, Dr. Dennis, or Dr. Hagan to be persuasive. In fact, the opinions of Dr. Hagan are found to be somewhat incredulous. It appears that the doctors

> who opined in regard to the psychological condition the Plaintiff is allegedly suffering from is work-related, are derived from the subjective complaints of the Plaintiff. As previously stated, the Administrative Law Judge did not find the Plaintiff to be a credible witness. Therefore, the Plaintiff's claim for Worker's Compensation benefits for an alleged psychological condition causally related to the effects of the June 25, 2010, motor vehicle accident shall be dismissed.

Potempa filed a petition for reconsideration asserting the same arguments he now raises on appeal regarding the ALJ's reliance on Dr. Shraberg's opinion. He argues since the ALJ rejected Dr. Hagan's opinion, he must accept Dr. Butler's 4% psychological impairment rating and award benefits accordingly. He also asserted other arguments not relevant to this appeal. The ALJ overruled Potempa's petition on September 18, 2013 as a re-argument of the case merits.

On appeal, Potempa only takes issue with the ALJ's alleged reliance on Dr. Shraberg's opinion regarding his psychiatric or neuropsychological impairment rating. He asserts Dr. Shraberg assessed a 0% psychiatric impairment utilizing only the 5th Edition of the AMA Guides, and did not reference any use of the 2nd Edition. Therefore, since Dr. Shraberg utilized the wrong edition of the AMA Guides,

his opinion cannot constitute substantial evidence pursuant to Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149 (Ky. App. 2006). Likewise, Potempa argues it was arbitrary, capricious, or an abuse of discretion for the ALJ to rely upon Dr. Schaberg's opinion over either Drs. Hagan's or Butler's opinions who both "correctly utilized the 2nd Edition of the [AMA Guides]." He asserts the ALJ should have adopted either the 4% impairment rating assessed by Dr. Butler or the 75% impairment rating assessed by Dr. Hagan, and award benefits accordingly.

Since Potempa, the party with the burden of proof regarding work-relatedness, extent and duration of any alleged psychological disability, was unsuccessful before the ALJ, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence which is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). We conclude there was no such evidence.

The ALJ, as fact-finder, is the sole judge of the weight and inferences to be drawn from the evidence and

determines the quality, character, and substance of the evidence. *See* Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence. *See* Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Where the evidence is conflicting, the ALJ may choose whom or what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). Although an opposing party may note evidence supporting a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

We find no merit in Potempa's argument Dr. Shraberg's opinion is invalid because it does not conform to the AMA Guides. We first note the ALJ did not address, nor was required to address, the issue of psychological impairment since he found Potempa's alleged condition unrelated to the effects of the June 15, 2010 MVA based upon Dr. Shraberg's opinion. Importantly, Potempa does not appeal this finding. In the August 16, 2013 opinion, the ALJ, after reviewing the proof submitted by each party regarding Potempa's alleged psychological condition and noting his personal observations of the claimant during the final hearing, stated as follows:

> In so finding, the Administrative Law Judge relies upon a[sic] finds persuasive the opinion of Dr. Shraberg and finds that Plaintiff has not met his burden of proving that he suffered psychological injuries as a result of the transient physical injuries suffered from the June 25, 2010, motor vehicle accident.
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> . . . .
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> Therefore, the Plaintiff's claim for Worker's Compensation benefits for an alleged psychological condition causally related to the effects of the June 25, 2010, motor vehicle accident shall be dismissed.

Because the ALJ found Potempa's alleged psychological condition not causally related to the effects of the June 25, 2010 MVA, he was not required to find which psychological impairment he found the most persuasive.

Assuming, *arguendo*, the ALJ in fact relied upon Dr. Schaberg's assessment of psychological impairment in his opinion and order on reconsideration, we find no error. In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 210 (Ky. 2003), the Kentucky Supreme Court explained the assessment of impairment ratings and the proper interpretation of the AMA Guides are medical questions solely within the province of medical experts. *See also* KRS 342.0011(11)(a), (35) and (36); and KRS 342.730(1)(b). For that reason, an ALJ is not authorized to arrive at an impairment rating by independently interpreting the AMA

Guides. George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Rather, the proper interpretation of the AMA Guides and assessment of an impairment rating pursuant to the AMA Guides are medical questions reserved only to medical witnesses. Kentucky River Enterprises v. Elkins, supra; Lanter v. Kentucky State Police, 171 S.W.3d 45, 52 (Ky. 2005). Therefore, while an ALJ may elect to consult the AMA Guides in assessing the weight and credibility to be accorded an expert's impairment assessment, as finder of fact, he is never required to do so. George Humfleet, supra. Moreover, authority to select an impairment rating assigned by an expert medical witness rests with the ALJ. *See* KRS 342.0011 (35) and (36); Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001).

In the case *sub judice*, the ALJ found Potempa was not a credible witness and relied upon Dr. Shraberg's opinion. In his report, Dr. Shraberg noted Potempa's overall mental status examination was consistent with a functional disorder based upon psychosocial factors unrelated to a physical injury generated by the accident, and not a credible neuropsychiatric impairment. Likewise, Dr. Shraberg found Potempa's responses "purely psychogenic and part of an extreme symptom magnification complex generated by financial, psychosocial, and/or psychogenic

issues unrelated to any mechanism of the injury generated by the accident of June 25, 2010." He then assessed a 0% neuropsychiatric impairment rating "utilizing Chapters 13, 14 and 18 of the Fifth Edition AMA Guidelines."

Potempa's reliance upon Jones v. Brasch-Barry General Contractors, supra is misplaced. In Jones, a physician admitted during cross-examination, the claimant's injury fell within the parameters of one category of impairment but placed him in a higher category, explaining the AMA Guides were flawed and served no more than guidelines. In his report, Dr. Shraberg stated the 0% impairment rating he assessed was based upon the AMA Guides. In his report, Dr. Shraberg did not state he disregarded the AMA Guides in assessing an impairment rating as did the physician in Jones v. Brash-Barry General Contractor's, supra. We also note Dr. Shraberg's use of the AMA Guides was not impeached by any other medical witness, nor did counsel opt to take his deposition to question him further on his use of the AMA Guides. Rather, Dr. Shraberg's report amounts to a conflicting opinion upon which the ALJ could rely.

Finally, Dr. Shraberg was not required to reference the 2nd Edition of the AMA Guides since he concluded Potempa's psychological condition was unrelated

to the MVA. Chapter 14 of the 5th Edition of the AMA Guides addresses mental and behavior disorders, and provides five classes of impairments ranging from no impairment to extreme impairment. However, the 5th Edition of the AMA Guides does not provide numerical impairment ratings. Rather, one is required to consult the 2nd Edition of the AMA Guides to reach a numerical impairment rating. *See* Transportation Cabinet, Department of Highways v. Barry Poe, 69. S.W.3d 60 (Ky. 2002) and Knott County Nursing Home v. Wallen, 74 S.W.3d 706 (Ky. 2002). Since Dr. Shraberg concluded Potempa's neuropsychiatric complaints are purely psychogenic in nature, do not warrant a credible impairment and are unrelated to the MVA, he was not required to consult the 2nd Edition of the AMA Guides to obtain an impairment rating.

For the reasons stated above, the August 16, 2013 opinion and order rendered by Hon. R. Scott Borders, Administrative Law Judge, and the September 18, 2013 order overruling Potempa's petition for reconsideration are hereby **AFFIRMED.**

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON A ANDREW DRAUT
471 WEST MAIN ST, STE 400
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

HON JUDSON F DEVLIN
1315 HERR LANE, STE 210
LOUISVILLE, KY 40222

ADMINISTRATIVE LAW JUDGE:

HON R SCOTT BORDERS
8120 DREAM STREET
FLORENCE, KY 41042