OPINION ENTERED: September 21, 2012

CLAIM NO. 201093230

GARY BLANKENSHIP PETITIONER

VS. **APPEAL FROM HON. JOSEPH W. JUSTICE, ADMINISTRATIVE LAW JUDGE**

SOUTHERN WATER AND SEWER DISTRICT
and HON. JOSEPH W. JUSTICE
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Gary Blankenship ("Blankenship") appeals the undated March, 2012, Opinion, Order, and Award, the May 18, 2012, Order ruling on Southern Water & Sewer District's ("Southern Water") petition for reconsideration, and the May 18, 2012, Order ruling on Blankenship's petition for reconsideration rendered by Hon. Joseph W. Justice, Administrative Law Judge ("ALJ").

The Form 101 alleges Blankenship sustained injuries on March 2, 2010, while working for Southern Water in the following manner:

> Plaintiff was working in his office upstairs, he came out of his office and started down stairs [sic], the stairs were wet and muddy from the snow and he slipped and fell down 13 or 14 stairs, hurting his neck and his back.

Blankenship alleged the following injuries: "neck and back, which has been complicated by anxiety and depression."

The December 7, 2011, benefit review conference ("BRC") order lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, exclusion for pre-existing disability/impairment.

In an undated opinion, order and award, regarding Blankenship's psychological injury claim, the ALJ determined as follows:

> The issue as to the psychological component is a much more difficult issue. Drs. Granacher and Ruth did psychological IMEs and made reports. These examinations and reports are from two well recognized authorities. The common thread that runs through the two reports is the issue of exaggeration and credibility. Credibility in voicing complaints and answers is a very key ingredient in [sic] psychological examination, as the physician does not have objective signs that they [sic] can evaluate, e.g., a

herniated disc. A psychological claim is very difficult for an ALJ to decide. The tests and procedures that the physicians use are generally foreign to the ALJ and to lawyers generally. Here two physicians have made detailed reports that are difficult for ALJ's [sic] to fully understand, and would have to have an understanding of the data elicited. So findings of exaggeration or over-reporting of symptoms weigh heavily in the balance of which physicians' report to accept. First, the fact that another physician has diagnosed depression and prescribed Zoloft is not determinative. This ALJ is familiar with reports of Dr. Granacher in which he has found depression and impairment, but stated that the claimant does not have restrictions for work. In this particular claim, Dr. Granacher does not place any restrictions on Plaintiff.

Dr. Ruth's report on September 9, 2011, talked about the psychiatric IME by Dr. Granacher. He said that plaintiff, during the examination, 'invalidated the MMPI-2-RF by marked [sic] over-**reporting** of psychiatric complaints. The findings were compatible with his over-reporting physical complaints and cognitive complaints in addition. Tests during that examination that were designed to assess the effort he put forth during assessment of his cognitive functioning demonstrated that he was not putting forth full effort. In fact, they revealed there was a very high probability that he was intentionally reporting incorrect answers to the test questions.' He then went on to say that 'findings during today's examination similarly are compatible with feigning. By history he reports a gain of weight

since the injury that he attributes to inactivity. He reported a gain of more than 20 pounds today, more than 25 pounds weight gain was reported to Dr. Granacher and he also reported a marked gain of weight to [sic] the injury to Dr. Henry Tutt, M.D., during his examination.' He said records document Plaintiff's weighing 234.5 pounds at the time of the injury, while his weight at the time of the examination was 232 pounds. He said, '[t]hree different and independent tests designed to assess psychiatric symptoms revealed marked symptom exaggeration.' He said, Mr. Blankenship minimized or denied pre-existing complaints to such an extent as to invalidate the assessment as to functional limitations. 'The findings then provide no objective evidence to support a history of psychiatric complaints but, on the other hand, markedly support a conclusion of feigning.' He said there was 'no evidence that Mr. Blankenship requires psychiatrically based restrictions.'

In further criticism of Dr. Granacher, he said that if Plaintiff's [sic] had indeed the psychiatric complaints described in Dr. Granacher's report, he would not have been at MMI at that time. Plaintiff's psychiatric treatment had consisted solely of a prescription of 50 mg. of Zoloft, [by Dr. Densler] which would not have been considered sufficient as he reported persisting symptoms. Dr. Ruth was also critical of Dr. Granacher's use of the AMA Guides. No physician has placed any psychiatric restrictions on Plaintiff's work.

The ALJ was persuaded by Dr. Ruth in assigning 0% whole person psychiatric impairment and no work restrictions

> from a psychiatric standpoint, and the ALJ so finds.

In his petition for reconsideration, Blankenship asserted, among numerous other arguments, the ALJ erred by relying on "insubstantial" evidence as put forth by Dr. Ruth. By order dated May 18, 2012, Blankenship's petition for reconsideration was denied.

On appeal, Blankenship asserts the ALJ's determination of a 0% impairment rating for the psychological condition was erroneous as Dr. Ruth's opinions do not constitute substantial evidence. Blankenship asserts as follows: "Dr. Granacher's opinion is the only impairment rating compliant and is the only substantial evidence upon which a determination of permanent impairment can be made." We affirm.

In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion regarding every element of his or her claim. Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). In order to sustain that burden, a claimant must put forth substantial evidence in support of each element. Id. This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict. Id. Kentucky law holds when the party with the burden of proof before

the ALJ is unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that 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). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, and substance of the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). An ALJ may even reject unrebutted medical testimony, so long as he adequately sets forth his rationale for doing so. *See* Commonwealth v. Workers' Compensation Board of Kentucky, 697 S.W.2d 540 (Ky. App. 1985); Collins v. Castleton Farms,

Inc., 560 S.W.2d 830 (Ky. App. 1977). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the ALJ's decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Our task on appeal is to determine whether substantial evidence supports the ALJ's decision dismissing the psychological injury claim.

The ALJ relied upon the September 9, 2011, medical report of Dr. Douglas Ruth rendered after he examined Blankenship. Dr. Ruth opined, in part, as follows:

> Findings during today's examination similarly are compatible with feigning. By history he reports a gain of weight since the injury that he attributes to inactivity. He reported a gain of more than twenty pounds today, more than twenty-five pounds weight gain was reported to Dr. Granacher and he also reported a marked gain of weight to Henry Tutt, M.D., during his examination. However, records document his weighing 234.5 pounds at the time of the injury, while his weight today is 232 pounds. On each of those examinations he falsely reported a weight gain, describing it as evidence of his inactivity due to the injury.

Regarding an impairment rating, Dr. Ruth stated as follows:

According to the Fifth Edition of the AMA *Guides*, Table 14-1 on Page 363 in Chapter 14, Mr. Blankenship has a Class 1 permanent psychiatric impairment rating.

According to the Second Edition of the *Guides*, Table 1 on Page 220 in Chapter 12, he has a Class one or a zero percent (0%) psychiatric impairment rating.

Dr. Granacher at the conclusion of his psychiatric examination reported a ten percent psychiatric impairment rating. However, this rating was determined in error. If Mr. Blankenship had indeed suffered the psychiatric complaints described in Dr. Granacher's report he would not have been at a state of maximum medical improvement then. His psychiatric treatment had consisted solely of a prescription of 50 mg. of Zoloft, which would not have been considered sufficient as he reported persisting symptoms. In fact, Dr. Granacher indicated that he was likely to have an increase in the dose in the near future (which did not occur). That an increased dose would be needed would also serve as evidence of his not being at the state of maximum medical improvement.

Further, Dr. Granacher's report reveals that he used the mechanism in the sixth edition of the AMA Guides in determining his impairment rating. That edition of the Guides has specifically been disapproved for use in the Commonwealth of Kentucky.

More importantly, Dr. Granacher's examination also reveals that Mr. Blankenship provided an inaccurate history and displayed marked evidence

> of symptom exaggeration during that examination.

Dr. Ruth's report constitutes substantial evidence in support of the ALJ's determination to dismiss Blankenship's claim for income and medical benefits for the alleged psychological injury.

Lastly, we note Blankenship, in his appeal, makes much of the differences and contradictions between the opinions of Dr. Granacher and Dr. Ruth. An example is as follows:

> Moreover, according to Dr. Granacher's testimony regarding Gary's psychological test results performed by Dr. Ruth, Dr. Ruth's test results indicate a valid test, without evidence of symptoms magnification and/or malingering, and which indicate an anxious, depressed man.

When "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). The ALJ properly exercised this discretion, which will not be disturbed.

Accordingly, the ALJ's dismissal of Blankenship's claim for income and medical benefits for an alleged psychological injury in the undated March, 2012, Opinion,

Order, and Award, the May 18, 2012, Order ruling on Southern Water's petition for reconsideration, and the May 18, 2012, Order ruling on Blankenship's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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