

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BETTY M. REGAN and PEACE CORPS,  
Uzbekistan

*Docket No. 96-719; Submitted on the Record;  
Issued May 4, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on December 28, 1994.

In the present case, on July 1, 1993, the Office accepted that appellant sustained an employment-related post-concussion syndrome as a result of an April 23, 1993 head injury which occurred during the course of her federal employment. The accident occurred when appellant slipped and fell while jumping up to answer the telephone, striking her head against the concrete door casing.

In a report dated November 2, 1993, Dr. Richard H. Olmscheid, a Board-certified neurologist and appellant's attending physician, diagnosed appellant with bouts of subjective vertigo, nausea, headache and imbalance. He stated that while appellant could easily have experienced a mild concussion and suffered concentration difficulties associated with this, he suspected that her primary difficulty was a post-concussive vestibulopathy. Dr. Olmscheid recommended that appellant be given formal vestibular testing, an electromyogram, an electroencephalogram and x-rays of the cervical spine in order to fully determine the cause of her symptoms. An Office medical adviser agreed with Dr. Olmscheid's assessment, and recommended that appellant be referred to a second opinion physician for full vestibular testing. In a report dated December 17, 1993, Dr. Alfred J. Schroeder, the second opinion physician to whom appellant had been referred by the Office, stated that he felt appellant probably had a post-concussive syndrome, but that further evaluation and testing was needed before he could come to a more definite conclusion regarding appellant's condition. Appellant continued to receive compensation benefits and continued to submit periodic attending physician's reports (Form CA-20a) from Dr. A. Perry Hendin, an internist and her current treating physician.

In a report dated June 20, 1994, in response to the Office's request for an update on appellant's condition, Dr. Hendin stated that appellant was being treated for post-traumatic vertigo and post-concussion syndrome. He explained that appellant continued to have intermittent and unpredictable episodes of nausea, dizziness, vertigo and headache and was

currently totally disabled for all work due to these debilitating episodes. Dr. Hendin concluded that he believed appellant's disability would continue through August 17, 1994.

On August 10, 1994 appellant was examined by Dr. Craig K. Hertler, a Board-certified otolaryngologist, and Dr. Eugene Klecan, a Board-certified psychiatrist, to whom appellant had been referred by the Office for second opinion evaluations.<sup>1</sup> In his report dated August 10, 1994, Dr. Hertler listed his findings on physical examination and diagnosed post-concussion syndrome. Dr. Hertler explained this diagnosis stating:

“The diagnosis of post-concussion syndrome was made on clinical grounds. Laboratory testing is not always diagnostic of this condition. Laboratory testing for specific vestibular injury is significantly better, and the lack of any abnormalities on her ENG [electronystagmograph] once again would support the lack of any significant vestibular deficit. A neurologist may be able to comment further to explain why an individual may show continued symptoms in spite of normal laboratory studies. In general terms, older individuals recover more slowly from head injuries....

“From a vestibular standpoint, she is not disabled from work. Her primary care physician may have opinions regarding other issues that would effect her ability to return to work and/or specific limitations. I think it would be prudent that this individual avoid employment where she would be working on ladders or at high levels above the ground where a fall would produce serious injury.

“I am not aware of any treatment that would enhance this claimant's ability to return to work as no vestibular deficit was identified.”

In a report also dated August 10, 1994, Dr. Klecan stated that, while appellant's psychiatric treatment received from May to July of 1993 was indicated, reasonable and necessitated by the job injury and events related to the job injury, her adjustment was complete and no further psychiatric treatment was needed. The physician concluded that while appellant, by objective criteria, was already back to baseline, it was impossible to guess when she would report a return to her baseline subjective awareness of good health. Dr. Klecan also specifically addressed the Office's concerns with respect to appellant's accepted post-concussion syndrome,

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<sup>1</sup> On October 28, 1993 appellant filed a claim for occupationally-induced “stress.” Appellant later clarified, by letter dated January 12, 1994, that she never intended to file a separate claim for compensation for “stress” but rather was seeking authorization for further counseling to deal with the effects of her traumatic employment-related post-concussion syndrome. Accordingly, appellant's claims were subsequently combined.

whether appellant had any residuals of this accepted condition and whether this condition caused appellant to be disabled from work, stating:

“There is no objective evidence of residuals, except for her reports of episodic symptoms. No objective abnormality is usually found in post-concussion syndrome, apart from a plausible history. The diagnosis is usually made on history alone.

“Normal test results do not disprove post-concussion syndrome... However it is difficult to understand or explain her infrequent reports of bouts of dizziness and nausea, particularly when the episodes are said to cause days of weakness and generalized sick feeling. I do not think this is the usual thing with post-concussion syndrome, especially when alertness and subjective well-being is reportedly normal for a month uninterrupted. Dr. Olmscheid’s report of November 2, 1993 would seem to imply confirmation of the above, because he proposes looking elsewhere for a diagnosis to explain her symptoms (*i.e.*, to rule out vestibular problems)....

“Her disability has been subjective and not verifiable by objective measurements. It is difficult to view episodic subjective symptoms occurring once a month or less as constituting a true disability. I could identify no specific limitations or disabilities, except that per her reporting she must remain in bed for days at a time on an occasional basis. Subjectively, of course, she is anxious as she approaches the possibility of claim closure and the uncertainties of finding employment at age 66.

“No specific treatment is indicated or would be reasonably expected to help.”

In a letter dated September 2, 1994, Dr. Hendin commented on the reports of Drs. Hertler and Klecan, stating that he had no particular or specific disagreement with either physician, in that post-concussion syndrome/post-concussive vertigo remained a clinical diagnosis. He concluded that, unfortunately, appellant remained unable to pursue gainful employment, given her continuing unpredictable episodes of sudden onset nausea and vertigo and their essentially disabling effects at occurrence.

On November 22, 1994 the Office issued a notice of proposed termination on the grounds that the weight of the medical evidence established that appellant had no continuing disability causally related to her accepted employment injury. By decision dated December 28, 1994, the Office terminated appellant’s entitlement to medical benefits and wage-loss compensation.

Subsequent to the Office’s decision, appellant submitted additional medical evidence. In a March 2, 1995 report from Robert J. Peterka, Ph.D., Technical Director of the Clinical Vestibular Laboratory, Dr. Peterka noted that appellant had a history of having sustained a head injury in 1993 when her head hit the edge of a cement stair. Dr. Peterka performed a complete array of vestibular tests and explained the results, some of which he noted were abnormal, in great detail. In an unsigned chart note, Dr. Hendin, whose name is typed at the bottom of the note, commented on the results of the vestibular testing, noting that the oculomotor screening, positional, caloric and motor coordination tests were normal, while the Hallpike, rotation and sensory organization tests suggested vestibular dysfunction. In a letter dated March 22, 1995,

from Dr. Olmscheid, the physician summarized appellant's symptoms of vertigo and instability, noting that they first appeared after a head injury in 1993 and had persisted since that time. Dr. Olmscheid reviewed the results of the clinical vestibular laboratory testing and stated that the results were compatible with a condition termed benign paroxysmal positional vertigo, a disorder which can be associated with minor head trauma. He stated that he was referring appellant to physical therapy, in hopes that the condition could be resolved, but that failing this approach, he would refer appellant to additional specialists.

In a decision dated April 17, 1995, the Office determined that the evidence submitted in support of appellant's request for reconsideration lacked probative value and was therefore insufficient to warrant reopening the case for further merit review.<sup>2</sup>

Appellant subsequently requested reconsideration of the Office's decision and submitted additional medical evidence in support of her request. In a letter dated April 27, 1995, Dr. Hendin confirmed that the previously submitted chart note was his and resubmitted a signed copy of the note. In addition, the physician noted that the results of the vestibular testing showed that appellant's symptoms came from the same side of her head injured in the employment-related fall and further fit the clinical syndrome described by both himself, Dr. Olmscheid and Dr. Peterka.

On August 21, 1995 the Office forwarded Dr. Hendin's March 13 and April 27, 1995 reports to an Office medical adviser for further review. In a report dated August 22, 1995, the Office medical adviser recommended that the case record and vestibular laboratory report be reviewed by Dr. B. Richard Levinthal, an otolaryngologist, to determine whether the studies supported the contention that appellant had evidence of residual middle ear damage as a result of the accepted injury. Accordingly, the Office forwarded the case file, a statement of accepted facts and a list of issues to be addressed to Dr. Levinthal for a second opinion.

In a report dated September 21, 1995, Dr. Levinthal reviewed the relevant medical evidence of record, including the results of the vestibular testing, and stated that while he was not entirely familiar with all of the specific tests performed, it was certainly possible that two of the tests, the posturography and rotational test, indicated some dysfunction of the vestibular labyrinth. Dr. Levinthal added that the Dix-Hallpike test abnormality shown by Dr. Peterka, although not found during clinical examination by Drs. Schroeder or Hertler, was consistent with

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<sup>2</sup> The Office specifically found that, as the chart note was unsigned and of unknown origin; the vestibular testing was completed by Dr. Peterka, who is not a physician under the Federal Employees' Compensation Act, inaccurately characterized appellant's accepted injury as having occurred when appellant struck her head on a cement stair; and Dr. Olmscheid's report did not discuss whether or how the diagnosed benign paroxysmal positional vertigo was due to appellant's 1993 accepted injury, the newly submitted medical evidence was of no probative value.

the diagnosed benign postural vertigo. Dr. Levinthal further explained, however, why he did not believe appellant had benign paroxysmal vertigo, stating:

“Again, based on the material in the file, I would think the spells that are described at this time, could best be explained by vestibular hydrops, although I feel it is possible but not probable that this would have been related to the previous injury. It is possible that the finding of nystagmus on a recent Dix-Hallpike test may have been induced by a previous head injury, but again it is uncommon for benign paroxysmal nystagmus to persist more than six months and in any case that does not fit with her present incapacitating symptoms. Whether or not her symptoms may be caused by ‘post-concussive CNS syndrome’ I think would be best determined by a neurologist, but for the aforementioned reasons, I do not think there is a vestibular labyrinthine injury which will explain her current symptoms and which can be attributed to the accident on April 23, 1993.”

In a decision dated October 3, 1995, the Office reviewed appellant’s claim on its merits and determined that the weight of the medical evidence of record, as represented by the report of Dr. Levinthal, did not establish that appellant had any medical condition related to her accepted work injury and, therefore, was not sufficient to warrant modification of the prior decision.

The Board finds that the Office has not met its burden of proof to terminate appellant’s compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>3</sup> After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>4</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>5</sup> To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>6</sup>

The Board finds that the reports of Drs. Hertler, Klecan and Levinthal are not sufficiently conclusive to justify the Office’s initial termination of appellant’s compensation benefits. As stated above, in order to terminate appellant’s compensation benefits, the Office must rely on a medical report which provides medical rationale explaining why there is no longer a causal relationship between appellant’s current complaints and her employment injury. With respect to the opinions of Drs. Klecan and Hertler, whose opinions formed the basis of the Office’s initial December 28, 1994 termination, although Dr. Klecan stated that, with the exception of episodic symptoms, appellant had no objective evidence of residuals, and that in turn her disability was subjective and not verifiable by objective measurements, Dr. Klecan also clearly stated that

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<sup>3</sup> *Mohamed Yunis*, 42 ECAB 325 (1991).

<sup>4</sup> *Id.*

<sup>5</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>6</sup> *Id.*

post-concussion syndrome does not usually manifest itself through objective abnormality, that normal test results do not disprove post-concussion syndrome and that this diagnosis is usually made by history alone. Similarly, Dr. Hertler confirmed that laboratory testing is not always diagnostic of post-concussion syndrome and stated that a neurologist might be able to further explain why an individual may show continued symptoms in spite of normal laboratory studies. Therefore, the lack of objective evidence of residuals of appellant's accepted employment injury cannot properly form the basis of the Office's decision to terminate appellant's compensation benefits. Although Dr. Hertler stated that appellant was not disabled for work from a purely vestibular standpoint, he specifically noted that appellant's primary care physician may have opinions regarding other issues that would effect her ability to return to work and/or specific limitations, and added that it would be prudent that this individual avoid employment where she would be working on ladders or at high levels above the ground where a fall would produce serious injury. Therefore, as neither Dr. Hertler nor Dr. Klecan opined that there was no longer a causal relationship between appellant's current complaints and her employment injury, but instead stated only that appellant did not appear to have a purely vestibular disability, and as both physicians confirmed that the lack of objective test results does not negate the existence of post-concussion syndrome, the opinions of Drs. Klecan and Hertler are insufficient to discharge the Office's burden of proof to justify the termination of appellant's compensation benefits.

Finally, the opinion of Dr. Levinthal, whose report formed the basis of the Office's October 3, 1995 denial of modification, is also insufficiently conclusive to support the Office's termination of appellant's benefits, as the physician's opinion, that he did not believe appellant had a vestibular labyrinthine injury which would explain her current symptoms and could be attributed to the accident on April 23, 1993, was tempered by his opinion that it was "certainly possible" that vestibular testing indicated some dysfunction of the vestibular labyrinth, by his agreement that the Dix-Hallpike test abnormality shown by Dr. Peterka was consistent with the diagnosed benign postural vertigo and his opinion that the question of whether or not appellant's symptoms may be caused by her accepted post-concussion syndrome would be best determined by a neurologist. The Board has found that an opinion which is equivocal in nature<sup>7</sup> or lacking in adequate medical rationale is of limited probative value.<sup>8</sup> Given that the reports of Drs. Hertler, Klecan and Levinthal are inconclusive and equivocal on the issue of whether appellant continues to suffer from residuals of her accepted employment injury, the Office has not met its burden of proof to establish that appellant had no disability or residuals due to the April 23, 1993 employment injury after December 28, 1994, the date that it terminated her compensation benefits.

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<sup>7</sup> See *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956).

<sup>8</sup> *George Randolph Taylor*, 6 ECAB 986, 988 (1954).

The decision of the Office of Workers' Compensation Programs dated October 3, 1995 is hereby reversed.<sup>9</sup>

Dated, Washington, D.C.  
May 4, 1998

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>9</sup> Given the Board's disposition of the merit issue of the present case, it is not necessary to consider the nonmerit issue of whether the Office, in its April 17, 1995 decision, properly denied appellant's request for merit review.