

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SANDRA R. SHEPHERD and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Martinsburg, WV

*Docket No. 01-652; Oral Argument Held June 20, 2002;  
Issued August 13, 2002*

Appearances: *Kevin R. Little*, for appellant; *Jim C. Gordon, Jr. Esq.*, for the Director, Office of  
Workers' Compensation Programs.

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work; and (2) whether appellant has met her burden of proof to establish that she has a psychiatric or emotional condition causally related to her federal employment.

On February 11, 1994 appellant, then a 50-year-old computer operator, filed a claim alleging that on February 10, 1994 she sustained multiple injuries when she slipped and fell on the ice, striking her head on the ground. The Office accepted appellant's claim for contusions of the head, neck and left ankle, and subsequently expanded its acceptance to include post-traumatic headache syndrome, cerebral concussion and subluxation at C4-7. The Office paid appropriate compensation benefits.

On December 29, 1997 the employing establishment provided appellant with a job offer for a computer clerk position, based on the physical restrictions specified by her physicians. On January 8, 1998 appellant declined the offered position. In a letter dated January 15, 1998, the Office informed appellant that the position was suitable, informed her of the penalty provisions of the Federal Employees' Compensation Act and allowed 30 days for a response. By letter dated March 12, 1998, the Office informed appellant that her reasons for refusing the position were unacceptable and granted appellant an additional 15 days to accept the position. By decision dated April 4, 1998, the Office terminated appellant's wage-loss compensation benefits effective April 26, 1998 as she had refused a suitable position. Subsequent to an oral hearing, held at appellant's request, by decision dated April 20, 1999, the Office affirmed the prior termination as supported by the evidence in the record at the time of the Office's determination. The Office noted that subsequent to its decision, appellant had submitted new medical evidence which was sufficient to require further medical development on the issue of whether appellant had established that she developed an emotional or psychiatric condition causally related to her

employment injury. Accordingly, the Office hearing representative remanded the case for the Office to refer appellant to a second opinion specialist.

After a period of medical and factual development, by decision dated October 23, 2000 the Office denied appellant's claim for an emotional or psychiatric condition and denied modification of its prior determination that appellant had refused suitable work.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective April 26, 1998.

It is well settled that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>1</sup> As the Office in this case terminated appellant's compensation under 5 U.S.C. § 8106(c), the Office must establish that appellant refused an offer of suitable work. Section 8106(c) of the Act<sup>2</sup> provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee is not entitled to compensation. Section 10.517(a) of the applicable regulations<sup>3</sup> provides that an employee who refuses or neglects to work after suitable work has been offered or secured for the employee, has the burden of showing that such refusal or failure to work was reasonable or justified and shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation. To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.<sup>4</sup>

In this case, by letters dated December 26, 1996, the Office requested updated medical reports from appellant's treating physicians, Dr. Neil W. Crowe, Dr. Benjamin Rezba and Dr. Thomas P. Keenan, and asked each physician to comment on appellant's ability to return to a position as either a computer clerk or a computer operator. In a report dated January 9, 1997, Dr. Keenan, appellant's treating Board-certified ophthalmologist, stated that appellant continued to suffer from mild Fuch's endothelial dystrophy, but retained corrected visual acuity of 20/30 and could return to work with no restrictions. In a subsequent report dated December 3, 1997, Dr. Keenan again stated that appellant could work 8 hours a day as long as the position allowed 20/70 vision. In a report dated February 25, 1997, Dr. Crowe, appellant's treating Board-certified neurologist, diagnosed appellant as continuing to suffer from post-traumatic migraine headaches and mild right fourth nerve palsy, which also appeared to be posttraumatic, but stated that appellant could return to work eight hours a day as long as she was able to take breaks as needed.<sup>5</sup> In a report dated March 12, 1997, Dr. Rezba, appellant's treating Board-certified orthopedic surgeon, diagnosed cervical and thoracic strain and sprain, and stated that appellant

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<sup>1</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>2</sup> 5 U.S.C. § 8106(c)(2).

<sup>3</sup> 20 C.F.R. § 10.517(a).

<sup>4</sup> *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

<sup>5</sup> In a follow-up report dated March 9, 1998, Dr. Crowe did not discuss appellant's ability to work.

could work eight hours a day as long as she was able to change positions as frequently as needed, *i.e.*, be able to go from sitting, standing or walking to another activity and did not perform work requiring at or above shoulder work for prolonged periods. Dr. Rezba further restricted appellant from lifting over 25 pounds occasionally and over 12 pounds repeatedly, and from working around high-speed machinery or at unprotected heights or climbing ladders or stairs on a frequent basis.<sup>6</sup> He further stated that he had reviewed the job descriptions and that while appellant could fully perform the computer clerk position, with its physical demands described as some periods of standing, walking and sitting and no lifting over 9 pounds, the computer operator position, which requires extended periods walking, standing, bending, stretching or stooping or carrying heavy loads of paper, tapes or cards weighing up to 70 pounds, or pushing carts weighing up to 200 pounds, required modification. Dr. Rezba stated that, if these duties could be avoided, appellant could perform the job.<sup>7</sup> In addition to the reports requested by the Office, appellant submitted reports dated September 24 and December 4, 1997, from Dr. Steven A. Newman, her treating Board-certified ophthalmologist and neurological surgeon, who stated that appellant had a congenital cornea condition which could cause some mild blurred vision, but that her sight was correctable with glasses to 20/25 and 20/30. Dr. Newman further found minimal right hyperdeviation, compatible with a mild right fourth nerve palsy, which was conceivably related to her accident and a potential cause for her double vision, but found no explanation for appellant's reported blackouts. With respect to appellant's ability to function from a neuroophthalmic point of view, Dr. Newman stated that this would be determined mainly on what appellant's visual complaints were. He noted that, if she complained of double vision, it would be possible to resolve the double vision through corrective eyewear, closing one eye or eye muscle surgery.

The computer clerk position offered by the employing establishment specified that work would be performed in an office setting, would require no work above the shoulder level for any sustained period of time and would allow appellant to change positions as frequently as needed, going from a sitting, standing or walking position to another activity. The offer further stated that appellant would not be required to lift more than 12 pounds, would not have to work around high speed machinery and would not be required to work at unprotected heights or climb ladders or stairs on a frequent basis. The job offer further provided that the position was available January 12, 1998. The Office properly found the computer clerk position offered by the employing establishment was well within appellant's work restrictions as specified by her treating physicians and, therefore, constituted suitable work.

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<sup>6</sup> In an accompanying form report, Dr. Rezba further specified that appellant could sit up to 3 hours per day, stand up to 2 hours a day and walk up to 3 hours a day, as long as she did not perform each of these activities for more than 30 minutes at a time. He also stated that appellant could reach for one-half hour per day at or above the shoulder, could push or pull 2 hours a day for no more than 15 minutes at a time, bend for 1 hour a day for no more than 10 minutes at a time, stoop for 3 hours a day for no more than 15 minutes at a time and perform fine manipulation for 8 hours a day.

<sup>7</sup> The record contains several additional reports from Dr. Rezba's office, including a May 9, 1997 form report which indicates that appellant cannot work. The Office sought clarification from Dr. Rezba, however, and in a report dated July 31, 1997, he stated that the prior form had been completed in error by a member of his staff and reiterated that appellant could perform the duties of a computer clerk or of a computer operator if the position was modified in accordance with the restrictions previously delineated.

Appellant refused the position stating that it was not medically suitable. She asserted that she continued to have migraine headaches and blackout spells, causing her vision to go from blurred to total darkness and resulting in the revocation of her driving license and her inability to drive. Appellant further stated that she was also being treated for seizures. Finally, she stated that the computer clerk position description was outdated and actually required strenuous physical labor which she was unable to perform. In support of her refusal, appellant submitted a copy of a 1996 position description for computer clerk, which contained strenuous physical demands. The Board notes, however, that the December 29, 1997 job offer clearly delineates the physical demands appellant would be expected to perform as a computer clerk and the fact that the general description of the position is more strenuous is irrelevant to suitability of the specific position offered to appellant. In addition, appellant failed to submit any probative medical evidence in support of the contention that she is unable to perform the duties of the offered position. Therefore, appellant's reasons for refusing the position were not acceptable and the Office properly terminated her wage-loss compensation based on her refusal to accept a suitable work position.

With respect to whether appellant has met her burden of proof to establish that she has a psychiatric or an emotional condition causally related to her federal employment injury, the Board finds that this issue is not in posture for a decision due to an unresolved conflict in the medical evidence.

As noted by the Office hearing representative, subsequent to the Office's April 4, 1998 decision, appellant submitted additional medical evidence including several reports from Dr. Bradley Soule, her treating Board-certified psychiatrist, to whom she had been referred by Dr. Crowe for psychiatric consultation. In a July 14, 1998 report, Dr. Soule reported his findings on examination and testing and stated that diagnostically, appellant's condition was best described as an organic affective disorder, "meaning that she has a depression which is an outgrowth of a head injury." He further stated that he was deeply suspicious that appellant also has subtle brain damage, and recommended psychotherapy, medication and neuropsychological testing. In a follow-up report dated February 3, 1999, Dr. Soule stated that appellant's condition was consistent with that of a post-concussive syndrome which has turned into a more or less permanent organic brain syndrome, which has included headaches, memory lapses and depression. He further noted that appellant had to withdraw from work because of her inability to cope in a cognitive sense and stated that it was his strong opinion that her organic brain syndrome and depression are a direct outgrowth of her work-related injury of February 10, 1994. Dr. Soule concluded that appellant was disabled due to this injury and was still in need of psychiatric treatment and neuropsychological testing, probably followed by cognitive rehabilitation.

Pursuant to the Office hearing representative's order of remand, on July 6, 1999 the Office referred appellant, together with a statement of accepted facts and a list of questions to be resolved, to Dr. James Bakhtiar, a Board-certified psychiatrist, for a second opinion examination. In a report dated September 1, 1999, Dr. Bakhtiar listed his findings on examination and testing and diagnosed mood disorder, cognitive disorder, amnesic disorder and anxiety disorder, all due to a closed head injury which was the direct result of appellant's employment-related fall. He concluded that appellant was currently totally disabled, would probably never return to her former position and required additional evaluation, treatment and rehabilitation.

On September 15, 1999 the Office learned that appellant's treating physician, Dr. Soule, had retired and that prior to his examination of appellant, Dr. Bakhtiar had assumed Dr. Soule's practice. Therefore, at the time of Dr. Bakhtiar's examination, he was actually appellant's new treating physician. Accordingly, the Office informed appellant that a new second opinion would be scheduled.

On April 20, 2000 appellant was evaluated by Dr. Joseph A. Jurand, a Board-certified psychiatrist. In a report dated April 21, 2000, Dr. Jurand reviewed appellant's history of injury, examined and evaluated appellant, and stated that his mental examination yielded entirely normal results, with no indication of psychosis, disorientation, delirium or dementia. He noted that appellant did not present herself as an obviously depressed person in any way, was clearly taking care of business and organizing herself excellently and if she had any depression, anxiety or panic, it was in good remission. Dr. Jurand concluded:

"The diagnosis by her history would appear to be depression, not otherwise specified and anxiety, not otherwise specified. I do not find evidence of a psychiatric PTSD [post-traumatic stress disorder] syndrome and I will refrain commenting on the neuralgic issues of post-concussive syndromes since I assume this to be a neurological issue [rather] than a psychiatric issue. I see no evidence before me [of] any cognitive disorder or difficulty thinking and organizing thoughts. I see no evidence of amnesic disorder in front of me. As indicated above any mood disorder seems to be in remission."

On an accompanying work capacity evaluation form, Dr. Jurand indicated that appellant could work approximately four hours a day, and, after vision surgery, could probably work eight hours a day.

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>8</sup>

In the present case, appellant's treating physicians, Dr. Soule and Dr. Bakhtiar, opined that appellant suffers from several disabling psychiatric conditions which are causally related to her February 10, 1994 employment injury; however, the Office referral physician, Dr. Jurand, found no evidence of depression, anxiety, panic, cognitive disorder or amnesic disorder.

The Board finds that the reports of appellant's treating physicians, Drs. Soule and Bakhtiar, and the Office referral physician, Dr. Jurand, are of approximately equal value, and are in conflict on the issue of whether appellant has any psychiatric or emotional conditions causally related, either directly, or through aggravation, acceleration or precipitation, to her February 10, 1994 employment injury. This requires resolution by referral to a Board-certified impartial medical specialist, accompanied by a statement of accepted facts and the complete case record, for a rationalized medical opinion addressing this issue.

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<sup>8</sup> *Gertrude T. Zakrajsek (Frank S. Zakrajsek)*, 47 ECAB 770 (1996).

Consequently, the October 23, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed in part and set aside in part, and this case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC  
August 13, 2002

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member