

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY WATSON and DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE, Anchorage, AK.

*Docket No. 02-1564; Submitted on the Record;
Issued November 27, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusing an offer of suitable work.

On April 20, 1995 appellant, then a 47-year-old maintenance worker filed a notice of traumatic injury and claim for compensation (Form CA-1) alleging that he injured his neck while stringing a wire cable to a suspension bridge 75 feet above the ground. According to appellant, he jerked his head violently and was only grazed by the cable, but he immediately experienced severe headaches and pain in his neck. Due to the remote location in Alaska, appellant had to wait four days before snow shoeing to where he could receive medical care.

In a November 5, 1996 decision, the Office accepted appellant's claim for postconcussive syndrome and aggravation of a preexisting cervical disease and later syrinx.

Appellant did not lose any work from the incident.

In April 27, 1997 letters, the Office approved appellant's treatment for panic adjustment disorder and dysautonomia and traumatic brain injury.

In a July 25, 1997 report, Dr. Kathleen Bell indicated that she was treating appellant for anxiety attacks and nausea.

In a February 23, 1998 report, Michelle Toshima, a clinical psychologist, indicated that appellant's anxiety attacks are particularly acute when traveling or otherwise in crowded areas.

In an April 1, 1998 report, Dr. John H. Hamm, Board-certified in psychiatry and neurology and a second opinion referral physician, diagnosed appellant with a history of panic disorder, in partial remission, generalized anxiety disorder of moderate severity and depression secondary to the anxiety disorder. He recommended that appellant remain on his treatment program that included psychological as well as physical rehabilitation.

On August 26, 1998 appellant filed a Form CA-1 alleging that he aggravated his back condition doing heavy lifting. He stopped working at that time.

In an October 19, 1999 decision, the Office accepted the claim for an aggravation of his cervical disc disease. The claims were combined for efficient administration.

In a March 9, 1999 report, Dr. Michael Friedman, a psychiatrist and second opinion referral physician, diagnosed appellant with chronic and recurrent depression, panic disorder and personality disorder. He indicated that the April 15, 1995 incident was the “straw that broke the camels back” regarding appellant’s psychological condition. Dr. Friedman also indicated that appellant suffered no residuals. Though, the Office had provided Dr. Friedman with three job descriptions he did not comment on the suitability of them although he did say appellant was capable of some type of work.

In a March 19, 1999 report, Dr. Clifford Roberson, a neurosurgeon and second opinion referral physician, diagnosed appellant with preexistent cervical spondylosis, acute cervical sprain and cervical syrinx (both secondary to the April 15, 1995 accepted injury). He found no evidence of postconcussion syndrome. Dr. Roberson indicated that appellant could do a desk job, including one as a visitor use assistant position. He further found that it would be difficult for appellant to perform physical labor due to his back condition.

The job description for visitor use assistant included the fact that there was “mental stress and physical fatigue due to high volume of personal contact” associated with the position.

In an April 8, 1999 letter, the employing establishment offered appellant the position of visitor use assistant that the Office had found suitable and advised him of his procedural rights and the penalties for refusing an offer of suitable work.

In an April 28, 1999 letter, Dr. Susan Hunter Joerbs, a neurologist and appellant’s treating physician, indicated that appellant could not perform the visitor use assistant position because of its requirement for extended standing and the high volume of personal contact and mental stress would exacerbate his conditions.

In an April 22, 1999 letter, Dr. Toshima, indicated that appellant could not perform the offered position because the high volume of work in the public sector with large crowds would put him at risk of relapsing anxiety and panic type symptoms. She also indicated that appellant was upset by the administration of his claim.

In an undated letter received by the Office on April 29, 1999, appellant indicated that, on advice from his legal and medical counsel, he would neither accept nor decline the job offer.

In a May 3, 1999 report, Dr. Toshima disagreed with Dr. Friedman’s report arguing that characterizing the April 15, 1995 accepted incident as “the straw that broke the camel’s back” was incorrect because appellant had no history of psychological problems prior to the incident. She argued that postconcussive syndrome often leads to emotional dysregulation including difficulty dealing with crowds and confinement and not just emotion related to the incident and that the offered job would put appellant at risk for anxiety attacks.

In a May 12, 1999 decision, the Office informed appellant that it did not find his reasons for refusing acceptable and would terminate his compensation if he did not accept the offered position within 15 days.

In a June 15, 1999 letter, the Office terminated appellant's compensation for refusing an offer of suitable work.

Appellant requested a hearing.

In a November 24, 1999 decision, the hearing representative reversed the termination.

In a January 7, 2000 letter, the Office sent the job description to Dr. Friedman and asked if appellant could perform this job.

In a January 13, 2000 letter, Dr. Friedman wrote: "[f]rom a psychiatric standpoint, [appellant] would be able to work as a [v]isitor [u]se [a]ssistant. I see no reason for restrictions with this position."

In a February 15, 2000 letter, the employing establishment reoffered the visitor use assistant position to appellant that the Office deemed suitable.

In a February 22, 2000 letter, appellant again refused to accept or decline the position.

In a March 27, 2000 letter, Dr. Toshima wrote that appellant could not perform the offered position due to his panic attacks and anxiety disorder. She wrote that appellant was successful in graduate school after they carefully chose his course of study. Dr. Toshima indicated that appellant studied landscape architecture because it was independent, solitary work with flexible hours. She further wrote that appellant had difficulty making presentations and he was selected as class vice president, a honorary position, because of his high performance in school, not after campaigning for the position.

In an April 21, 2000 letter, the Office notified appellant that his reason for refusing the position was insufficient.

In a May 10, 2000 decision, the Office terminated appellant's compensation for refusing an offer of suitable work.

Appellant requested a hearing.

In an October 11, 2001 decision, the hearing representative affirmed the termination.

The Board finds that there is a conflict in the medical evidence between the government physician, Dr. Friedman and appellant's physician, Dr. Hunter-Joerns and Dr. Toshima regarding whether appellant could perform the position of visitor use assistant.¹

In her April 28, 1999 report, Dr. Hunter-Joerbs, appellant's treating physician indicated that appellant could not perform the offered position due to the extended standing and the mental stress and physical fatigue associated with the high volume of personal contact.

In her March 27, 2000 report, Dr. Toshima also opined that appellant could not perform the job of visitor use assistant because of his ongoing conditions of panic disorder and anxiety attacks. She pointed out that appellant had trouble with school presentations and was susceptible to panic and anxiety attacks when in confined spaces and around large groups. Dr. Toshima further indicated that appellant chose his graduate studies in landscape architecture because the work would be solitary, independent and have flexible hours.

The Office relied on the opinion of Dr. Friedman, who wrote in his January 13, 2000 decision, that he saw no reason why appellant could not perform the offered position. In his March 9, 1999 report, Dr. Friedman diagnosed appellant with chronic and recurrent depression, panic disorder and personality disorder. He indicated that the April 15, 1995 incident was the "straw that broke the camels back" regarding appellant's psychological condition. Yet, Dr. Friedman also indicated that appellant suffered no residuals, an inconsistent position.

The Board finds that, since the Office relied on the reports of Dr. Friedman to terminate appellant's compensation benefits without having resolved the existing conflict, the Office has failed to meet its burden of proof in terminating appellant's benefits.²

¹ Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "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." 5 U.S.C. § 8123(a). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence. *William C. Bush*, 40 ECAB 1064, 1975 (1989).

² See *Gail D. Panton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989).

The decision of the Office of Workers' Compensation Programs dated October 11, 2001 is reversed.

Dated, Washington, DC
November 27, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member