



performance of duty when she struck her head on a scanning device. The Office accepted her claim for medical treatment only.<sup>1</sup> On September 2, 2003 appellant sustained another low back injury in the performance of duty while lifting bags.<sup>2</sup> On September 19, 2003 she sustained an injury when, under the influence of medications for her accepted employment injuries, she lost her balance on an escalator and fell. The Office accepted appellant's claim for cervical and lumbar strains, C5-6 small central extruded disc herniation and concussion with loss of consciousness.<sup>3</sup> She was also diagnosed with preexisting cervical and lumbar degenerative disc disease. Appellant did not return to work. The Office authorized an anterior C5-6 discectomy and fusion, which was performed on March 28, 2005.

On July 8, 2005 Dr. Jon D. Donshik, appellant's orthopedic surgeon, reported that appellant remained out of work. He was to see her back in follow-up in three weeks. On July 11, 2005 Dr. Donshik completed a work capacity evaluation indicating that appellant could work with restrictions for four hours a day. He stated that appellant needed a sedentary position which restricted appellant to no twisting, bending, stooping, squatting, kneeling or climbing.

On July 12, 2005 the employing establishment offered appellant a limited-duty assignment for four hours a day. Duties included attending meetings prior to and after the shift, with meetings lasting between 15 and 45 minutes. The employee could sit or stand while attending these meetings. Duties also included monitoring exit lanes. The employee would be required to sit or stand, as necessary, at the passenger exit lane to ensure only authorized personnel enter the security checkpoint from the exit location. The employee would not be required to stop any passengers from entering though the exit lane, but would simply monitor the exit lane visually. This task would last about three and a half hours a day. Physical restrictions matched those reported by Dr. Donshik.

The Office sent Dr. Donshik a copy of the job offer and inquired whether appellant was capable of performing the duties. On August 17, 2005 he responded that appellant could return to work so long as she adhered to "light duty previously outlined."

On August 18, 2005 the Office advised appellant that the offered position was suitable, with duties and physical limitations provided by her attending physician. The Office informed appellant that the position was currently available and that she had 30 days either to accept the offer or provide an explanation for refusing it. The Office notified appellant of the penalty under 5 U.S.C. § 8106(c)(2).

Appellant replied on September 12, 2005 that she had developed problems with her heart, that she was seeing a psychiatrist, that she was having trouble with her medication, that she was hospitalized for depression and anxiety, and that a neuropsychologist advised her it would not be a good idea for her to return to work yet. She stated that she presently did not feel well enough to return. Appellant had a lot of pain in her back and legs. She stated she was drowsy and not

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<sup>1</sup> OWCP File No. 062090148.

<sup>2</sup> OWCP File No. 062095872.

<sup>3</sup> OWCP File No. 062096617.

very alert most of the time from taking so much medication and that she did not feel it would be good, for herself or for others, to return to work.

Appellant submitted a report from Dr. Rhonda Q. Freeman, a clinical neuropsychologist, who examined her on August 2 and 3, 2005. Dr. Freeman related her findings and noted significant psychiatric symptomatology, including auditory hallucinations, depression and anxiety. Appellant reported developing claustrophobia, symptoms of post-traumatic stress disorder and stuttering. She reported considering suicide on several occasions. Appellant reported difficulty with coping, irritability and sleep. Dr. Freeman reported that on neuropsychological measures, appellant's verbal fluency, category fluency, visual incidental memory, sustained attention and reasoning were impaired. She concluded that appellant presented with an atypical profile, "which may more closely match the presence of psychopathology and inconsistent effort perhaps secondary to medications, rather [than] the effects of a concussion." Given her uncertainty, Dr. Freeman deferred a cognitive diagnosis and offered a principal diagnosis of mood disorder, not otherwise specified, which she described as significant. She then addressed appellant's work status: "[Appellant] is encouraged to remain on leave from work; maintain regular treatment with her psychiatrist to reduce her symptoms, and have her physicians review her medications to address her complaint of functioning 'in a fog' and side effects."

On September 19, 2005 the Office notified appellant that it considered her reasons for refusing the offered position and found them to be unacceptable. The Office noted that appellant's attending neurologist, together with a second-opinion psychiatrist, had released her to work in 2004. The Office found that Dr. Freeman's opinion was of diminished probative value because she did not provide detailed reasoning in support of her opinion. The Office notified appellant that she had 15 days to accept the job offer and that it would not consider any further reasons for refusal.

Appellant replied on September 27, 2005 that she did not feel mentally stable enough to return to work. She stated that she presently could not function in any job, that she had chronic pain in her legs and back, and that she suffered from bad headaches and terrible mood swings. She stated that she was depressed and very emotionally wrecked. Appellant explained that she was not refusing the job offer, she just could not do it. She listed her medications.

On September 24, 2005 Dr. Virginia M.V. Buki, a Board-certified psychiatrist, reported as follows: "[Appellant] has been my patient since September 22, 2005. She has been diagnosed with [m]ajor [d]epression with psychotic features and [g]eneralized [a]nxiety [d]isorder. I do n[o]t consider she is in a state of mind that allows her to work. Her prognosis is reserved at this time."

In a decision dated October 12, 2005, the Office terminated appellant's monetary compensation for refusing an offer of suitable work. The Office noted that it did not authorize Dr. Freeman or Dr. Buki to provide medical services for appellant, and that these physicians did not provide objective findings or medical rationale to support their opinions. The Office found that the weight of the medical evidence rested with Dr. Donshik's recent release to work and with the physicians who saw appellant in 2004.

Appellant requested an oral hearing before an Office hearing representative, which was held on September 21, 2006. In a decision dated December 29, 2006, the hearing representative affirmed the termination of appellant's monetary compensation. He noted that medical evidence in 2004 established no cognitive condition due to the work injury or otherwise, and that Dr. Freeman deferred a cognitive diagnosis. The hearing representative noted that psychological and psychiatric reports in 2004 showed that appellant was able to return to work, and that Dr. Freeman did not address this evidence. He found that Dr. Freeman's opinion was vague and unrationalized. The hearing representative noted that she did not mention the part-time limited-duty job offer. In view of these deficiencies, he found that the evidence failed to establish that appellant was disabled from performing the duties of the job offer due to a psychiatric or emotional condition. The hearing representative further found that Dr. Buki's opinion was of diminished probative value because she reported no factual or medical background, no findings on examination and no rationalized opinion to support disability for work.

### **LEGAL PRECEDENT**

Section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for her is not entitled to compensation.<sup>4</sup> The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.<sup>5</sup> To justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.<sup>6</sup>

### **ANALYSIS**

The clear weight of the medical evidence establishes that physically, based on her accepted orthopedic conditions, appellant is capable of performing the duties of the offered position. Dr. Donshik, the attending orthopedic surgeon, released appellant to return to part-time work with restrictions. The employing establishment offered a position based on these restrictions. The Office sent a copy of the job description to Dr. Donshik for his review, and he responded that appellant could perform the duties as previously outlined. There is no current medical evidence to the contrary. Notwithstanding her continued complaints of pain, the Board finds that appellant's effective refusal of the offered employment was not justified on physical or orthopedic grounds.

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<sup>4</sup> 5 U.S.C. § 8106(c)(2).

<sup>5</sup> *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

<sup>6</sup> *Glen L. Sinclair*, 36 ECAB 664 (1985).

Psychologically and psychiatrically, the evidentiary picture is different. The Office observed that medical evidence from 2004 supported appellant's capacity to return to at least modified duty. But a year later the evidence turned to the contrary. Appellant saw Dr. Freeman, a clinical neuropsychologist, on August 2 and 3, 2005. Dr. Freeman diagnosed a significant mood disorder and encouraged appellant to remain off work. Appellant also saw Dr. Buki, a psychiatrist, on September 22, 2005. Dr. Buki diagnosed major depression with psychotic features and a generalized anxiety disorder. She reported that appellant was in a state of mind that did not allow her to work. With both her neuropsychologist and psychiatrist reporting that she could not or should not return to work, the question becomes whether this evidence justified appellant's refusal of the offered position.

The Board finds that appellant's refusal was justified. The Office found that Dr. Freeman did not provide "detailed" reasoning in her six-page narrative report, but she did provide extensive findings on examination and testing. Her summary was thorough, and her reason for deferring a cognitive diagnosis was clear. Her opinion that appellant should remain on leave from work appears consistent with her findings and diagnosis. Although she did not discuss the duties of the offered position, Dr. Freeman reported that appellant's visual incidental memory, sustained attention and reasoning were impaired. These impairments appear to be directly relevant to a position that requires visual monitoring of a passenger exit lane for three and a half hours to ensure only authorized personnel enter the security checkpoint from the exit location.

The Board finds that Dr. Freeman's opinion is sufficiently probative to justify appellant's refusal of the offered position. It is immaterial whether the Office authorized Dr. Freeman to provide psychological services. Appellant relied on the advice of her physician, and her physician provided a rationalized narrative report. There was no current psychological or psychiatric opinion to the contrary. Dr. Buki's opinion was equally clear and supportive, but it lacked the findings and narrative discussion found in Dr. Freeman's report. As appellant refused the offered position with justification, the Board finds that Office did not meet its burden of proof to terminate monetary compensation under section 8106(c)(2) of the Act. The Board will reverse the Office's December 29, 2006 decision and remand the case for appropriate reinstatement of compensation.

### **CONCLUSION**

The Board finds that the Office has not met its burden to justify the termination of appellant's monetary compensation under 5 U.S.C. § 8106(c)(2).

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 29, 2006 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 11, 2007  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge, concurring:

I join in the finding of the majority that the Office of Workers' Compensation Programs did not meet its burden of proof to terminate appellant's compensation benefits under section 8106.

The record reflects that appellant was referred by the Office for examination to Dr. Henry M. Storper, a Board-certified psychiatrist. In a November 8, 2004 report, Dr. Storper reviewed appellant's history of injury and noted her treatment for possible postconcussion syndrome. On mental status examination, he described appellant's thought processes as normal but noted her frustration about difficulties with her job and workers' compensation. Dr. Storper noted that her thought processes were generally logical and well organized with some obsessive ruminations noted. He advised that appellant had no suicidal ideation. Appellant's recent and remote memory was generally intact with no indication of any auditory or visual hallucinations, delusions or paranoid ideation. Dr. Storper diagnosed a mixed adjustment disorder and post-concussion syndrome. He noted that appellant was capable of performing all of her activities of daily living and that she was not undergoing current active psychiatric or mental health treatment. Dr. Storper opined that appellant's diagnosed condition was not related to her December 8, 2002 injury but related to the 2003 employment injury. From a work perspective, he advised that appellant had no psychological work limitations due to residuals of her concussion and advised that she was capable of performing light duty, subject to medical clearance due to her accepted orthopedic conditions.

As noted in the majority opinion, appellant was treated by Dr. Freeman, a clinical psychologist. In August 2005, she noted symptoms such as auditory hallucinations, depression

and anxiety. Based on her examination, Dr. Freeman listed a principal diagnosis of mood disorder, not otherwise classified and noted that appellant remained disabled pending regular psychiatric treatment. In a September 24, 2005 report, Dr. Buki stated that she had recently treated appellant as a patient since September 22, 2005. She diagnosed major depression with psychotic features and a generalized anxiety disorder. Dr. Buki found that appellant was unable to return to work.

The evidence reveals a conflict in medical opinion between Dr. Storper and Drs. Freeman and Buki as to whether residuals of appellant's concussion disable her from performing limited-duty work. As this conflict arose prior to the October 12, 2005 termination of compensation, I join in finding that the Office did not meet its burden of proof.

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board