

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN S. PATTON and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Asheville, NC

*Docket No. 99-539; Submitted on the Record;
Issued April 13, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant was not entitled to partial disability compensation from October 3, 1991 through February 17, 1992.

This is the second time this case has been before the Board. Appellant, then a 38-year-old medical clerk typist, filed a claim on July 24, 1990 for an emotional condition which he alleged was causally related to an accepted back condition. The Office rejected the claim in decisions dated March 21, 1991 and April 20, 1992. In a prior appeal,¹ the Board set aside the Office's decision and remanded the case for a determination of whether the evidence of record substantiated appellant's contention that the employing establishment failed to comply with the physical restrictions imposed by his physician, thus implicating a compensable factor of employment.

On September 1, 1993 the Office accepted appellant's claim for aggravation of adjustment disorder. The Office paid appellant compensation for appropriate periods.

On June 12, 1998 appellant filed a claim for recurrence of disability. He sought disability compensation from October 3, 1991 through February 17, 1992, alleging that the employing establishment did not have work available within his physical restrictions, which caused an aggravation of his accepted adjustment disorder. Accompanying appellant's request was an October 3, 1991 work restriction evaluation from Dr. William B. Jones, Board-certified in internal medicine, which indicated appellant could work an eight-hour day within his physical restrictions.

In a letter dated August 23, 1998, appellant explained that he attempted to return to work from October 3, 1991 through February 17, 1992, but was not permitted to by the employing

¹ Docket No. 92-1850 (issued August 6, 1993).

establishment. He alleged that this denial of employment resulted in severe depression, anxiety, stress and headaches, which caused him to be hospitalized. Appellant specifically sought compensation for four additional hours per day during the claimed period, noting that he had been paid compensation based on four hours during that time.

Appellant submitted a June 12, 1998 statement from his former supervisor, Tom Galloway, who confirmed that appellant made several attempts to return to his job as supervisor in October 1991 following a fitness-for-duty examination with Dr. Jones at the behest of the Office. Mr. Galloway asserted that he was told by his managers that they could not return appellant to his usual job until they received a release from the Office, which had not resolved his paperwork at that time.

By letter dated July 9, 1998, the employing establishment advised appellant that “based on this statement from his former supervisor, we have determined you are due back-pay compensation from October 3, 1991 [through] February 16, 1992 in the amount of \$7,759.67 [including interest].”

In a letter dated July 15, 1998, the employing establishment stated:

“[Appellant] was compensated for part of this period utilizing the medical documentation on record. This equated to back pay for 4 hours per day from February 17 through March 16, 1992 and for 6 hours per day from March 17 through May 5, 1992. The only period unresolved is October 3, 1991 through February 16, 1992.

“This office received a statement (on July 7, 1998) from Mr. Tom Galloway, a former supervisor of [appellant’s] that indicates [appellant] did attempt to return to work during the period in question. In light of Mr. Galloway’s statement, we have determined [appellant] is now due additional back-pay for part-time hours of 4 hours per day (as annotated on CA-17 from Dr. [Wayne S.] Montgomery, [appellant’s] treating physician) from October 3, 1991 through February 16, 1992 in the amount of \$7,759.67....”

By decision dated September 14, 1998, the Office denied appellant’s claim for a recurrence of disability. The Office found that appellant did not submit medical evidence to support temporary total disability for the period claimed and noted that the employing establishment had agreed to pay him compensation for loss of wages based on his inability to perform light duty from October 3, 1991 to February 16, 1992. The Office found that this was the total amount of compensation to which appellant was entitled during this period.

The Board finds that this case is not in posture for decision.

In its September 14, 1998 decision, the Office found that appellant had not submitted evidence sufficient to establish a recurrence of disability from the period October 3, 1991 to February 16, 1992. Although appellant did file a claim for recurrence of disability, what he was actually claiming was additional compensation based on loss of wages. The Office noted that the employing establishment had acknowledged its inability to provide light duty for appellant during the claimed period. In fact, he was paid for four hours a day during this period by the

employing establishment. Appellant now seeks wage-loss compensation for the other four hours a day.

In that regard, Dr. Montgomery, a Board-certified orthopedic surgeon, indicated in a duty status form dated February 2, 1992 that appellant was only partially disabled and could work four hours per day, based on his December 23, 1991 examination. However, the Office referral physician, Dr. Jones, who is Board-certified in internal medicine, stated that, as of his examination of appellant on October 3, 1991, appellant was capable of working an eight-hour day within his physical restrictions. The employing establishment paid appellant compensation for four hours per day based on Dr. Montgomery's evaluation. His examination, however, took place after Dr. Jones' report dated October 3, 1991. Therefore, there is a conflict over whether appellant was capable of working four or eight hours a day during this period.

For this reason, the Board will remand the case to the Office for further consideration of appellant's claim that he is entitled to temporary total disability compensation based on an eight-hour workday from October 3, 1991 through February 16, 1992.

The February 13, 1999 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC
April 13, 2001

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member