U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board
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In the Matter of RALPH C. SPIVEY and DEPARTMENT OF THE ARMY,
NATIONAL GUARD BUREAU, FORT PICKETT, Blackstone, VA

*Docket No. 01-263; Submitted on the Record;*
*Issued December 4, 2001*
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DECISION and ORDER

Before   DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI


The issues are:   (1) whether an overpayment of $827.29 occurred when appellant received compensation for temporary total disability while he was imprisoned from March 15 to 25, 2000; and (2) whether appellant sustained a recurrence of disability on or about April 25, 2000 that was causally related to his August 25, 1999 employment injury.

On August 25, 1999 appellant, then a 35-year-old electronics worker, sustained an injury at work while attempting to insert a safety pin in a fire extinguisher.  The fire extinguisher, from an M-1 tank, accidentally discharged on his right arm.  He was hospitalized for 11 days, during which time he underwent a skin graft.  The Office of Workers' Compensation Programs accepted his claim for an open wound to the right shoulder and upper arm, approved therapy and paid compensation for temporary total disability on the periodic rolls.

On March 13, 2000 appellant was committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 30 days for operating a motor vehicle after his license had been suspended pursuant to a conviction for driving under the influence, in violation of section 18.2-272 of the Code of Virginia.[1]

On July 6, 2000 the Office made a preliminary determination that an overpayment of $827.29 occurred because appellant received compensation benefits while in federal prison for the period March 15 to 25, 2000.  The Office also made a preliminary determination that appellant was without fault in the creation of the overpayment, as he would not likely have known that he was ineligible for compensation while imprisoned for a felony.

In a decision dated August 18, 2000, the Office finalized its preliminary determinations on fact of overpayment and fault.  The Office exercised its discretion not to waive the

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[1] VA. CODE ANN. § 18.2-272 (Michie 1980); *see also* 18 U.S.C. § 13 (Laws of States adopted for areas within federal jurisdiction).

overpayment because appellant failed to provide the financial information requested to assess his ability to pay the balance due.

The Board finds that no overpayment occurred when appellant received compensation for temporary total disability while he was imprisoned from March 15 to 25, 2000.

Section 8148(b)(1) of the Federal Employees' Compensation Act[2] provides as follows:

"Notwithstanding any other provision of this chapter (except as provided under paragraph (3)), no benefits under this subchapter or subchapter III of this chapter shall be paid or provided to any individual during any period during which such individual is confined in a jail, prison or other penal institution or correctional facility, pursuant to that individual's conviction of an offense that constituted a felony under applicable law."

The Office received a copy of a March 13, 2000 judgment in a criminal case by the United States District Court for the Eastern District of Virginia, Richmond Division, finding appellant guilty of violating section 18.2-272 of the Code of Virginia. The judgment did not specify whether a violation of this section was a felony.

Section 18.2-272 of the Code of Virginia,[3] entitled "Driving after forfeiture of license," provides in relevant part as follows:

"If any person so convicted shall, during the time for which he is deprived of his right so to do, drive or operate any motor vehicle, engine or train in this Commonwealth, he shall be guilty of a Class 1 misdemeanor."

Because the record fails to establish that the offense for which appellant was convicted "constituted a felony under applicable law," the Board finds that the penalty provision of section 8148(b)(1) of the Act does not apply. There is no basis in the record to support the Office's decision that an overpayment occurred when appellant received compensation for temporary total disability while he was imprisoned from March 15 to 25, 2000. The Board will therefore reverse the Office's August 18, 2000 decision on the issue of fact of overpayment.

On March 15, 2000 appellant was medically released to perform part-time limited duty, but he was unable to return to work at that time because of his incarceration. He returned to limited duty on April 19, 2000 and for a half day on April 20, 2000. Appellant took annual leave the next two workdays and was then removed from work on April 25, 2000 by his attending physician, Dr. Rao R. Ivatury.

On April 25, 2000 appellant filed a claim for compensation for disability beginning that date. The record contains evidence of a doctor's appointment on April 25, 2000 and an indication that appellant was removed from work by his doctor that day. Duty status reports support that appellant was totally disabled for work beginning April 25, 2000. On May 24 and

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[2] 5 U.S.C. § 8148(b)(1).

[3] *Supra* note 1.

June 1, 2000 the Office notified appellant of the evidence needed to establish his claim for compensation.

In a report dated June 16, 2000, Dr. Ivatury reported as follows:

"[Appellant] is a patient of mine due to an accident he sustained. I have done follow-up care on him for several months and feel that it would now be beneficial for him to see one of my colleagues Dr. Scott Graham. [Appellant] has already had one visit with Dr. Graham and they have discussed a possible surgery for him. If you have any questions please, feel free to contact my office."

In a decision dated June 26, 2000, the Office denied appellant's claim for compensation on the grounds that the evidence of record was insufficient to establish that the claimed recurrence was causally related to the accepted employment injury.

The Board finds that the evidence fails to establish that appellant sustained a recurrence of disability on or about April 25, 2000 that was causally related to his August 25, 1999 employment injury.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of his burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[4]

Appellant's August 25, 1999 employment injury totally disabled him for work. On March 15, 2000, however, his attending physician, Dr. Ivatury, released him to return to perform part-time limited duty. Appellant returned to part-time limited duty on April 19, 2000 but stopped work the following day and filed a claim for compensation for leave without pay beginning April 25, 2000. Although duty status reports support that he was totally disabled for work beginning April 25, 2000, the record contains no probative medical opinion evidence of a change in the nature and extent of appellant's injury-related condition such that he could no longer perform the part-time limited duty to which he returned on April 19, 2000. Nor does the record contain probative factual evidence of a change in the nature and extent of that part-time limited duty such that appellant could no longer perform such duty. Having failed to submit such evidence, appellant has not met his burden of proof. The Board will affirm the Office's June 26, 2000 decision denying his claim for compensation.

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[4] *Terry R. Hedman*, 38 ECAB 222 (1986).

The August 18, 2000 decision of the Office of Workers' Compensation Programs is reversed on the issue of fact of overpayment. The Office's June 26, 2000 decision is affirmed.

Dated, Washington, DC
December 4, 2001


David S. Gerson
Member



Willie T.C. Thomas
Member



A. Peter Kanjorski
Alternate Member