

sprain and disc herniation at L4-5. The Office paid her appropriate compensation for total disability. Appellant has not returned to work with the employing establishment.

On January 19, 1998 appellant began full-time employment as a telephone solicitor with AAA Auto Club, at the hourly rate of \$5.75. The Office issued a formal wage-earning capacity determination on March 23, 1998, finding that appellant's position with AAA Auto Club reflected her wage-earning capacity. In a letter dated July 30, 1998, appellant advised the Office that the job was a seasonal position, which ended on August 30, 1998.

By letter dated January 12, 1999, appellant informed the Office that she had begun working with the Burlington Coat Factory as of October 30, 1998, as a sales associate for 40 hours per week.

In a report dated October 29, 2001, Dr. Kazi Hassan, Board-certified in anesthesiology, stated that appellant's job was aggravating her back pain to such an extent that she needed to reduce her work hours. Dr. Hassan related that appellant had indicated that walking, bending, stooping and lifting caused her severe pain. He noted that, although appellant enjoying working at Burlington Coat Factory, she related that prolonged standing, walking or any kind of lifting in her job severely aggravated her back pain. Dr. Hassan recommended that appellant cut back to working only 20 to 25 hours per week.

On April 11, 2002 appellant filed a Form CA-2a claim for benefits, alleging that she sustained a recurrence of disability on November 2, 2001 which was causally related to her accepted conditions.

By decision dated April 22, 2002, the Office denied appellant compensation for a recurrence of her accepted low back conditions. The Office found that appellant failed to submit medical evidence sufficient to establish that the claimed condition or disability as of November 2, 2001, which was caused or aggravated by the accepted conditions. The Office found that the employment factors identified as the cause of disability were not the result of the condition found to be suitable by the Office.

By letter dated May 1, 2002, appellant's attorney requested an oral hearing, which was held on October 29, 2002.

By decision dated January 27, 2003, an Office hearing representative set aside the April 22, 2002 Office decision, finding that a March 23, 1998 wage-earning capacity decision was incorrect because it was based on appellant's position with AAA Auto Club, a seasonal position and appellant had not been a seasonal worker while employed with the employing establishment. The hearing representative stated that the Office should have reduced appellant's compensation based on actual earnings until her seasonal employment with the AAA Auto Club ended, at which time she should have received compensation for total disability until she became reemployed. The hearing representative further found that the Office should have issued a wage-earning capacity determination with regard to the Burlington Coat Factory, including a finding as to whether the job was suitable. The hearing representative therefore instructed the Office, on remand, to issue a wage-earning capacity decision based on her sales associate position with the Burlington Coat Factory. Once the Office made a determination regarding appellant's wage-

earning capacity, it could then determine whether appellant had continuing disability and/or had suffered a recurrence of disability.

By decision dated June 6, 2003, the Office based appellant's wage-earning capacity decision on her actual earnings with the Burlington Coat Factory.

By decision dated June 9, 2003, the Office denied the claim for a recurrence of disability. The Office stated that the Federal (FECA) Procedural Manual at Chapter 2, 1500.3,¹ stipulates that a recurrence of disability does not include a work stoppage caused by a condition which results from a new injury, even if it involves the same part of the body previously injured or by renewed exposure to the causative agent of a previously suffered occupational disease. The Office noted that appellant had claimed a recurrence of her work-related disability while employed with the Burlington Coat Factory, not from factors of her federal employment.

By letter dated June 19, 2003, appellant's attorney requested an oral hearing, which was held on March 9, 2004. Appellant testified at the hearing that she was forced to stop working at the Burlington Coat Factory in April 2003, because she could no longer perform her work duties.

In a report dated October 23, 2003, Dr. Hassan stated that appellant continued to experience low back pain and advised that appellant had stopped working at the Burlington Coat Factory because she was unable to load and unload boxes of merchandise. He advised that appellant was unable to walk, bend, stoop or lift. In a November 21, 2003 report, Dr. Hassan reiterated his previously stated opinions that appellant's activities of prolonged bending, stooping and lifting caused severe pain and that she was forced to quit working at the Burlington Coat Factory because of her ongoing back pathology.

By decision dated May 3, 2004, an Office hearing representative affirmed the June 9, 2003 Office decision.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.²

The Office's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance, the CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."³

¹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(2)(e) (January 1995).

² See *Katherine T. Kreger*, 55 ECAB _____ (Docket No. 03-1765, issued August 13, 2004).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁵

ANALYSIS

In this case, the Office developed the evidence and determined that the issue presented was whether appellant had established a recurrence of disability on November 2, 2001. Under the circumstances of this case, however, the Board finds that the issue presented was whether the March 23, 1998 wage-earning capacity determination should be modified.

According to the evidence of record, appellant sustained an employment-related low back injury on January 31, 1995. Her claim was accepted by the Office for lumbar strain and herniated disc at L4-5. Appellant did not return to work with the employing establishment, but found seasonal employment with AAA Auto Club, working full time as a telephone solicitor at the hourly rate of \$5.75. Appellant began working with the Burlington Coat Factory on October 30, 1998 and on April 11, 2002 filed a claim for recurrence of disability as of November 2, 2001, when she was still working with the Burlington Coat Factory.⁶ Therefore, the Office continued to compensate appellant based on the March 23, 1998 loss of wage-earning capacity determination. This determination remained in effect at the time appellant filed her April 11, 2002 notice of recurrence.

In its April 22, 2002 decision, the Office did not consider whether appellant established a basis for modification of the March 23, 1998 loss of wage-earning capacity determination. Instead, the Office identified the issue as whether appellant established a recurrence of disability. This constituted error on the part of the Office. Both the Office's procedural manual and the Board precedent provide that when a wage-earning capacity determination has been issued and appellant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if modification of the Office's loss of wage-earning capacity decision is warranted.⁷ The Office therefore should have considered whether appellant established a basis for modification of the March 23, 1998 wage-earning capacity determination.

The Board further finds that the Office's June 6, 2003 wage-earning capacity determination was incorrect, as the Office based its finding on appellant's actual earnings with the

⁴ *Sue Sedgwick*, 45 ECAB 211 (1993).

⁵ *Id.*

⁶ A recurrence of disability means, among other things, an inability to work when a light-duty assignment made a specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force). 20 C.F.R. § 10.5(x) (1999).

⁷ *Katherine T. Kreger*, *supra* note 2; *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

Burlington Coat Factory, where appellant was no longer working due to her claimed injury. Therefore, the Office's wage-earning capacity determination is set aside.

CONCLUSION

The Board finds that appellant's April 11, 2002 notice of recurrence raised the issue of whether modification of the Office's March 23, 1998 wage-earning capacity determination was warranted. As the Office did not properly adjudicate this issue, the case will be remanded for an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the March 23, 1998 decision of the Office of Workers' Compensation Programs' be set aside and the case remanded for further action consistent with this decision of the Board.

Issued: August 4, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board