

**United States Department of Labor  
Employees’ Compensation Appeals Board**

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**FRANCISCA C. VELA, Appellant** )  
 )  
**and** )  
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**DEPARTMENT OF HOMELAND SECURITY,** )  
**BUREAU OF CUSTOMS & BORDER** )  
**PROTECTION, MIAMI INTERNATIONAL** )  
**AIRPORT, Miami, FL, Employer** )

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**Docket No. 04-1000  
Issued: October 27, 2004**

*Appearances:*  
*Francisca C. Vela, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On March 5, 2004 appellant filed a timely appeal from the Office of Workers’ Compensation Programs’ merit decision dated November 3, 2003, which denied recurrence of her disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether the Office properly determined that the issue presented was a recurrence of disability as of April 15, 2003.

**FACTUAL HISTORY**

On October 7, 1998 appellant, then a 33-year-old border patrol agent trainee, filed a traumatic injury claim (Form CA-1), alleging that on that date she injured her back when she lost her grip and fell to the ground while traversing the rope portion of a confidence course while in

the performance of duty. She stopped work on October 14, 1998. The Office accepted appellant's claim for lumbar fracture at L1-2 on December 28, 1998.

On July 6, 1999 the employing establishment offered appellant an office assistant position compatible with her permanent light-duty restrictions. She accepted the position and started on August 2, 1999.

By letter dated September 16, 1999, the Office advised appellant that her monetary compensation was being reduced effective August 2, 1999, due to the fact that she was reemployed as an office assistant with wages of \$544.87 per week. She was advised that she continued to be entitled to receive payment for medical expenses for treatment of her work-related condition. In a decision dated November 23, 1999, the Office adjusted appellant's compensation based on her actual earnings as an office assistant with wages of \$544.87 per week.<sup>1</sup>

On December 7, 2000 appellant notified the Office that she had accepted a new position in Miami, Florida as an immigration inspector with the Immigration and Naturalization Service.

By decision dated January 3, 2001, the Office advised appellant that as she had recently been reemployed it was reducing her monetary compensation based on her actual earnings as an immigration inspector.

On August 26, 2003 appellant filed a notice of recurrence of disability (Form CA-2a), requesting approval for medical treatment and that she had a recurrence on April 15, 2003. Appellant stated that she noticed that her recurrence began after being required to carry a loaded weapon, loaded magazines, handcuffs and baton on a daily basis and that she experienced pain and tension in her neck, with headaches and soreness in her lower back.

On September 18, 2003 the Office received a copy of a February 8, 1999 report from Dr. Daniel C. Valdez, a Board-certified orthopedic surgeon and appellant's treating physician. He advised that appellant had a Grade 1 L5-S1 spondylolisthesis that appeared stable.

By decision dated November 3, 2003, the Office denied appellant's claim for a recurrence of disability on April 15, 2003 on the grounds that the medical evidence of record failed to establish that her recurrence was causally related to the accepted October 7, 1998 employment injury.

### **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

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<sup>1</sup> By decision dated December 6, 1999, appellant received schedule awards for two percent impairment to both the right and left lower extremities.

wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>2</sup>

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."<sup>3</sup>

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.<sup>4</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>5</sup>

### ANALYSIS

The Office developed the evidence and determined that the issue presented was whether appellant had established a recurrence of disability on April 15, 2003. Under the circumstances of this case, however, the Board finds that the issue presented was whether the January 3, 2001 wage-earning capacity determination should be modified.

According to the evidence of record, appellant returned to work at the employing establishment on August 2, 1999 to an office assistant position within her restrictions. On December 7, 2000 appellant notified the Office that she had accepted a new position as an immigration inspector at the Immigration and Naturalization Service. She subsequently filed a notice of recurrence on August 26, 2003 stating that her position required her to carry a loaded weapon, magazines, handcuffs and a baton on a daily basis and she experienced pain in her neck and back. It is clear that the claim in this case was that appellant's condition had deteriorated such that she was having difficulty working in the new position, which had been compatible with her wage-earning capacity, for the foreseeable future. The Board has held 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 wage-earning capacity is warranted.<sup>6</sup>

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<sup>2</sup> See *Sharon C. Clement*, 55 ECAB \_\_\_\_ (Docket No. 01-2135, issued May 18, 2004).

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

<sup>4</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>5</sup> *Id.*

<sup>6</sup> See *Sharon C. Clement*, *supra* note 2. The Board notes that consideration of the modification issue does not preclude the Office from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination. *Id.* at n.10, slip op. at 5; *Cf. Elsie L. Price*, 54 ECAB \_\_\_\_ (Docket No. 02-755, issue July 23, 2003) (acceptance of disability for an extended period was sufficient to establish that modification of the wage-earning capacity determination was warranted).

As noted above, the Office's procedure manual directs the claims examiner to consider the criteria for modification when the claimant requests resumption of compensation for "total wage loss." This section of the procedure manual covers the situation when a claimant has stopped working, but the principle is equally applicable to a claim of increased disability.<sup>7</sup> The Board finds that the Office should have considered the issue of modification of the wage-earning capacity determination.

**CONCLUSION**

The Board finds that appellant's claim for compensation raised the issue of whether a modification of the January 3, 2001 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue.

**ORDER**

The decision of the Office of Workers' Compensation Programs dated November 3, 2003 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: October 27, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>7</sup> *Katherine T. Kreger*, 55 ECAB \_\_\_\_ (Docket No. 03-1765, issued August 13, 2004).