

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

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<b>RUBEN S. MARTINEZ, Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 05-1821</b>
	)	<b>Issued: December 6, 2005</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>WESTSIDE VETERANS ADMINISTRATION</b>	)	
<b>MEDICAL CENTER, Chicago, IL, Employer</b>	)	
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*Appearances:*  
Patty L. Wiggins, *pro se*  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
DAVID S. GERSON, Judge  
WILLIE T.C. THOMAS, Alternate Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On August 31, 2005 appellant filed a timely appeal of an Office of Workers' Compensation Programs' decision dated March 7, 2005 denying his claim for a recurrence of disability.<sup>1</sup> Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of the case.

**ISSUE**

The issue is whether the Office properly determined that the issue presented was a recurrence of disability as of September 18, 2003.

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<sup>1</sup> The Board notes that the decision was originally signed on February 18, 2005, but was later redated and mailed to appellant on March 7, 2005.

## **FACTUAL HISTORY**

On November 11, 1997 appellant, then a 53-year-old cook, filed a traumatic injury claim that was accepted for a fracture of the right fifth metacarpal. The claim was later expanded to include an aggravation of preexisting radiculopathy on the right and a herniated disc. Appellant returned to light duty on August 13, 1999. On April 25, 1999 appellant filed a second traumatic injury claim alleging injuries to his back and right leg.<sup>2</sup> On March 13, 2000 appellant accepted a light-duty assignment.

By decision dated May 5, 2000, the Office determined that appellant's actual earnings of \$532.00 per week as a hotel clerk fairly and reasonably represented his wage-earning capacity. The Office reduced appellant's wage-loss compensation based on his actual earnings.

In a letter dated March 18, 1997, Dr. Richard I. Abrams, a Board-certified internist, stated that appellant was experiencing a worsening of symptoms. He indicated that a current magnetic resonance imaging (MRI) scan report revealed severe central spinal canal narrowing at the L4-5 level and foraminal narrowing at L4-5 bilaterally. Appellant stopped working on September 18, 2003. In a letter dated December 2, 2003, Dr. Abrams stated that appellant had been unable to work due to his condition since September 18, 2003.

On December 11, 2003 appellant submitted a claim for compensation for the period December 3, 2003 through January 9, 2004. By letter dated January 16, 2004, the Office advised appellant that the May 5, 2000 wage-earning capacity decision would remain in effect unless he could establish that the decision was made in error; that his condition had changed; or that he had been vocationally rehabilitated. The Office advised appellant to submit evidence of a worsening of his condition and medical evidence relating his current condition to his work-related condition.

By decision dated March 3, 2004, the Office denied appellant's claim for compensation for the period December 3, 2003 through January 9, 2004, on the grounds that there was no medical evidence demonstrating a change in the nature and extent of appellant's work-related conditions or job duties and no explanation presented relating appellant's current condition to his original injury.

Appellant submitted claims for compensation for total disability after January 10, 2004.<sup>3</sup> By letter dated March 19, 2004, the Office informed appellant that his claims for compensation could not be considered because he had failed to present medical evidence establishing a change in the nature and extent of his accepted conditions.

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<sup>2</sup> The evidence of record does not reflect the conditions for which appellant's April 25, 1999 claim was accepted; however, an October 6, 2003 letter from the Office indicates that the injury was accepted for aggravation of displaced lumbar disc and thoracic neuritis and fracture of the right metacarpal bone.

<sup>3</sup> Appellant submitted claims for the periods from: March 12 through April 12, 2004; April 18 through May 13, 2004; July 16 through August 16, 2004; August 16 through September 16, 2004; September 16 through October 16, 2004; October 16 through November 16, 2004; November 16 through December 16, 2004; and December 16, 2004 through January 16, 2005.

By letter dated March 18, 2004, appellant requested an oral hearing. At the November 30, 2004 hearing, the hearing representative identified the issue in the case as to whether appellant's accepted condition has worsened to the point that he is no longer capable of performing in the limited-duty job.

In a decision dated February 18, 2005, an Office hearing representative affirmed the March 3, 2004 decision. He stated that appellant "is alleging a recurrence of total disability in that in September 2003, he was no longer able to perform in the limited[-]duty program clerk job he had worked since March 2000." The hearing representative found that appellant had not met his burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability.

### **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.<sup>4</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>5</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>6</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>7</sup>

### **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 September 18, 2003. Under the circumstances of this case, however, the Board finds that the issue presented was whether the May 5, 2000 wage-earning capacity determination should be modified.

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<sup>4</sup> See *Sharon C. Clement*, 55 ECAB \_\_\_\_ (Docket No. 01-2135, issued May 18, 2004).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Katherine T. Kreger*, 55 ECAB \_\_\_\_ (Docket No. 03-1765, issued August 13, 2004).

<sup>6</sup> See *Katherine T. Kreger*, *supra* note 5. See also *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>7</sup> *Id.*

According to the evidence of record, appellant returned to his light-duty assignment on March 13, 2000. Dr. Abrams indicated that appellant was experiencing a worsening of symptoms. He indicated that a current MRI scan report revealed severe central spinal canal narrowing at the L4-5 level and foraminal narrowing at L4-5 bilaterally and that appellant had been unable to work due to his condition since September 18, 2003. It is clear that the claim in this case was that appellant could not work in the light-duty position, the position that the Office determined had represented his wage-earning capacity. 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 wage-earning capacity is warranted.<sup>8</sup>

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. In this case, appellant submitted evidence of worsening of his condition that allegedly prevented him from working in the light-duty position. 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 May 5, 2000 wage-earning capacity decision was warranted. The case will be remanded for an appropriate decision on this issue.

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<sup>8</sup> See *Katherine T. Kreger*, *supra* note 5.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 7, 2005 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: December 6, 2005  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

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