



lumbar strain. Appellant stopped work on May 9, 2002 and the Office paid appropriate compensation benefits.

In a medical report dated August 16, 2002, Dr. Nolon W. Jones, Jr., a Board-certified family practitioner, stated that appellant was allowed to return to work on August 19, 2002 with restrictions of no lifting and/or carrying over 20 to 40 pounds or working over 4 to 6 hours. He also indicated that appellant would need a 20 minute break every 2 hours. Appellant was offered a limited-duty position with the employing establishment as a part-time flexible distribution clerk, which became effective August 19, 2002 and he commenced working on August 20, 2002. The limited-duty offer indicated that appellant would not lift, carry, push or pull more than 40 pounds, would work 4 to 6 hours a day and that he would be given a 20 minute break every 2 hours.

On March 21, 2003 appellant filed a claim for a recurrence of disability commencing March 19, 2003. He indicated that on March 18, 2003 he experienced a severe lumbar spasm while performing his duties and had subsequent pain from his lower back to his legs. In support thereof, appellant submitted medical charts wherein Dr. Sherwin Siff, a Board-certified orthopedic surgeon, indicated that he had a lumbar spine examination on March 28, 2003 at which time Dr. Siff diagnosed lumbar strain, lumbar back pain and lumbar radiculopathy. The records indicate that this was due to his long-standing history of moderate severe low back pain and a magnetic resonance imaging scan was recommended. In a medical report dated April 18, 2003, Dr. Jones indicated that appellant had severe lumbar strain, that the original date of injury was May 9, 2002, that he sustained a recurrence on March 18, 2003, that the recurrence occurred while appellant was pushing and pulling equipment and that he was not released to work at this time because he needed to have two tests done. By letter dated May 8, 2003, the Office requested that appellant submit further information.

In a medical report dated April 18, 2003, Dr. Andres H. Keichian, a Board-certified neurologist, assessed appellant with lumbar strain and possible discogenic pain.

On April 30, 2003 Dr. Siff signed a note wherein he certified that appellant was able to return to work on May 1, 2003 with no lifting, bending, pushing or pulling objects weighing over 25 pounds.

In a letter received by the Office on June 4, 2003, appellant indicated that while performing his duties from February through March 18, 2003, he "reinjured or worsened" his lumbar strain injury and sought medical attention.

The record indicates that appellant earned \$578.77 per week when he was injured. The record also indicates that he earned \$592.00 per week when he returned to the limited-duty assignment.

By decision dated June 13, 2003, the Office found that appellant was employed as a part-time flexible distribution clerk for the employing establishment with wages of \$592.00 per week effective August 20, 2002 and that this position fairly and reasonably represented his wage-earning capacity as he had successfully been able to perform the duties for two months or more.

As his actual earnings met or exceeded the wages he held when injured, the Office determined that appellant was not entitled to compensation for wage loss.

By another decision dated June 13, 2003, the Office denied appellant's claim for a recurrence of total disability on March 19, 2003 as it found that he had not presented medical evidence sufficient to show that he was totally disabled from engaging in his modified-work assignment or that the modified-work assignment had been changed and no longer met the medically imposed restrictions.

After this decision, additional medical reports were submitted. In a medical report dated June 11, 2003 and received by the Office on June 16, 2003, Dr. Siff indicated that appellant had a lumbar radiculopathy and required physical therapy. In a May 12, 2003 note, Dr. Keichian indicated that he was complaining of pain over the right shoulder radiating to the right upper extremity in C8 distribution. He noted that the pain subsided 1 month ago, but had returned in the past 10 days.

By letter dated October 3, 2003, appellant's treating physician, Dr. Jones, indicated that appellant was requesting reconsideration. He indicated that appellant was referred to Dr. Siff in April 2003 and that it was recommended by Dr. Siff that appellant begin physical therapy. Dr. Jones also indicated that appellant was currently under his treatment for the "reoccurrence" of the injury of May 9, 2002.

By decision dated January 15, 2004, the Office reviewed appellant's reconsideration request concerning the denial of his claim for recurrence of total disability commencing March 19, 2003 on the merits and denied modification of the previous decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8115(a) of the Federal Employees' Compensation Act<sup>1</sup> provides that in determining compensation for partial disability, "the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity."<sup>2</sup> The Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days<sup>3</sup> and the Office may determine wage-earning capacity retroactively after the claimant has stopped work.<sup>4</sup> Actual earnings will be presumed to fairly and reasonably represent wage-earning capacity only in the absence of contrary evidence.<sup>5</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 5 U.S.C. § 8115(a).

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Employment: Determining Wage-earning Capacity*, Chapter 2.814.7a (April 1995); see *William D. Emory*, 47 ECAB 365 (1996).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Employment: Determining Wage-earning Capacity*, Chapter 2.814.7(e) (April 1995).

<sup>5</sup> See *Mary Jo Colvert*, 45 ECAB 575 (1994).

### **ANALYSIS -- ISSUE 1**

In the present case, appellant was a part-time flexible distribution clerk at the time of his May 9, 2002 employment injury. The record further reveals that he stopped work on the date of injury, May 9, 2002. Appellant's position went into effect on August 19, 2002 and he returned to work on August 20, 2002 as a part-time flexible distribution clerk at a salary greater than his date-of-injury salary. As stated *supra*, Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent appellant's wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days.<sup>6</sup> As appellant held this job from August 19, 2002 to March 18, 2003, he successfully worked for over 60 days and the Office could proceed to determine whether these earnings represented appellant's wage-earning capacity.

In preparation for his return to limited-duty work, appellant was assigned restrictions by his physician, Dr. Jones. As stated by Dr. Jones, appellant was not allowed to lift or carry over 40 pounds. He also limited appellant to working 4 to 6 hours a day and indicated that he needed a 20 minute break every 2 hours. The limited-duty offer specifically indicated that he would not lift, carry, push or pull more than 40 pounds, that he would work only 4 to 6 hours a day and that he would get a 20 minute break every 2 hours, as per his physician's instructions. As the requirements of the limited-duty offer were identical to the restrictions as set forth by Dr. Jones, as appellant had successfully completed this job for more than 60 days without known or apparent difficulty and as there is no persuasive evidence that he could not perform the job, the Office properly determined that his actual wages represented his wage-earning capacity.

As appellant was paid more on the limited-duty job, \$592.00 per week, than the \$578.77 per week of the job he held when injured, the Board finds that the Office properly determined that such employment fairly and reasonably represented his wage-earning capacity and, as he had no loss of wage-earning capacity, he was not entitled to compensation for wage loss.

### **LEGAL PRECEDENT -- ISSUE 2**

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that an employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this 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.<sup>7</sup>

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<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.7(e) (April 1995).

<sup>7</sup> *Wilfredo Carrillo*, 50 ECAB 99 (1998).

**ANALYSIS -- ISSUE 2**

Appellant has not met his burden of proof to establish that he established a recurrence of total disability due to his accepted injury. No medical evidence of record provides rationalized medical support for the fact that he could no longer perform his limited-duty position. Dr. Siff indicated that appellant had lumbar strain, lumbar back pain and lumbar radiculopathy and required physical therapy, but he did not state that he was disabled. Similarly, Dr. Keichian indicated that appellant was complaining of pain, but did not indicate that he was disabled. Dr. Jones did indicate that appellant was disabled and that it was related to his May 9, 2002 injury; however, he did not explain why appellant could not return to the limited-duty assignment that he was working at the time of his alleged recurrence.

As appellant failed to submit a rationalized medical opinion indicating that he could no longer perform his limited-duty assignment and as he submitted no evidence indicating a change in the duties of his limited-duty assignment, the Office properly found that he had not established a recurrence of total disability on or after March 19, 2003.

**CONCLUSION**

The Board finds that the Office properly determined that appellant's wage-earning capacity was fairly and reasonably represented by his actual earnings as a part-time flexible distribution clerk and properly determined that he did not sustain a recurrence of total disability resulting from his accepted May 9, 2002 work injury on and after March 19, 2003.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated January 15, 2004 and June 13, 2003 are hereby affirmed.

Issued: January 12, 2005  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member