

By decision dated April 8, 2003, the Office determined that appellant's actual earnings in the light-duty position since March 25, 2002 fairly and reasonably represented his wage-earning capacity. The Office found that appellant had no loss of wage-earning capacity.

On April 24, 2003 appellant filed a recurrence of disability claim for continuation of pay/compensation (Form CA-2a) for the period April 5 to 26, 2003. He also filed a claim for compensation (Form CA-7) for the period April 27 to May 27, 2003. Appellant returned to work on May 28, 2003 at four hours per day. An attending physician, Dr. Nicholas Checkles, indicated in a December 9, 2003 report that appellant was disabled from April 2 to May 28, 2003, and he had released appellant to light duty at four hours per day on May 28, 2003.

The record indicates that appellant again stopped working on November 10, 2003 and returned to work on December 17, 2003; he filed CA-7 forms for the periods of total and partial disability.

By decision dated December 17, 2003, the Office denied the claim for a recurrence of disability as of April 5, 2003. The Office found that appellant had not submitted sufficient medical evidence to establish the claim.

Appellant filed CA-2a forms for disability as of January 24 and February 2, 2004. There is also a Form CA-2a filed on June 15, 2004 with no specific date of recurrence of disability noted. Appellant also filed CA-7 forms for intermittent periods of disability.

By decision dated November 22, 2004, an Office hearing representative affirmed the December 17, 2003 decision. The hearing representative found that the medical evidence did not establish a recurrence of disability for the periods claimed.

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.¹

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."²

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

¹ See *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

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

rehabilitated, or the original determination was, in fact, erroneous.³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁴

ANALYSIS

In the present case, the Office determined that the issue was a recurrence of disability on or after April 5, 2003. Appellant filed claims for compensation, including CA-2a forms and CA-7 forms, for periods of total and partial disability. The record, however, indicates that on April 8, 2003 the Office determined that appellant's wage-earning capacity was represented by his actual earnings in a light-duty position since March 25, 2002. When appellant subsequently claimed periods of disability, the Office must evaluate the evidence to determine if modification of the wage-earning capacity is warranted.⁵ As noted above, appellant's entitlement to compensation is based on the wage-earning capacity determination and it remains undisturbed until modified.

The Office did not address the issue of modification of the wage-earning capacity determination. The hearing representative noted that a wage-earning capacity decision had been issued, but did not consider the issue of modification. The case will be remanded to the Office for an appropriate decision on this issue.

CONCLUSION

The Board finds that appellant's claims for compensation raised the issue of whether a modification of the April 8, 2003 wage-earning decision was warranted and the case must be remanded for a proper decision on the issue presented.

³ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁴ *Id.*

⁵ *See Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004). 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.*; *see also Sharon C. Clement*, *supra* note 1.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 22, 2004 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: July 12, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member