

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

C.Y., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, St. Petersburg, FL, Employer**

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**Docket No. 07-1156
Issued: April 1, 2008**

Appearances:
Ronald S. Webster, Esq., for the appellant
No appearance, for the Director

Oral Argument October 17, 2007

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 26, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 15, 2007 regarding modification of a wage-earning capacity determination. 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 denied modification of an October 19, 2005 wage-earning capacity determination.

FACTUAL HISTORY

The case was before the Board on a prior appeal.¹ With respect to a June 6, 2003 wage-earning capacity determination based on actual earnings, the Board set aside the decision as

¹ Docket No. 04-1579 (issued August 4, 2005).

improper based on a finding that appellant was no longer working due to her employment injury. The history of the case as noted by the Board is incorporated herein by reference.

By decision dated October 19, 2005, the Office reduced appellant's compensation effective October 30, 1998. The Office found that appellant had been employed as a sales associate with Burlington Coat Factory commencing October 30, 1998 with wages of \$292.60 per week. According to the Office, appellant worked full time until November 1, 2001.²

In a decision dated December 9, 2005, the Office denied modification of the October 19, 2005 decision. The Office found that appellant had not shown an employment-related worsening of her condition as of November 2, 2001. Appellant requested a hearing, which was held on October 18, 2006. She submitted an April 26, 2006 report from an attending physician, Dr. Kazi Hassan, who noted that appellant had a history of low back pain with L4-5 disc herniation. Dr. Hassan stated that, as appellant was getting older, "her back pain is progressively getting worse because of an existing problem and also worsening due to the nature of the injury and she has also degenerative disc disease." He noted that appellant had worked at Burlington Coat Factory for several years and, "based on my request, she had stopped because it was causing her relentless pain."

By decision dated January 11, 2007, an Office hearing representative found that further development was required on the issue of whether the wage-earning capacity determination should be modified as of November 2, 2001, noting Dr. Hassan's April 26, 2006 report. The case was remanded for further development on the issue.

By decision dated February 15, 2007, another Office hearing representative set aside the January 11, 2007 decision. The hearing representative found that the January 11, 2007 decision was incorrect because it did not address the December 9, 2005 decision, which had decided the issue of whether appellant's condition had materially worsened after November 2, 2001. According to the hearing representative, "None of the medical reports prior to [the] December 9, 2005 decision contained medical rationale to explain whether the worsening in the claimant's condition was medically connected to her original work injury. Instead, the contemporaneous medical evidence specified that the claimant's back pain was aggravated by her work activities at Burlington Coat Factory."

LEGAL PRECEDENT

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

² The record indicates that appellant reduced her hours in private employment to approximately 20 hours per week as of November 2, 2001. She stopped working on March 10, 2003.

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

ANALYSIS

As noted, a modification of a wage-earning capacity is warranted where the original determination was erroneous. The October 19, 2005 decision is a retroactive wage-earning capacity determination, finding that appellant's wage-earning capacity was properly based on actual earnings commencing October 30, 1998 as a full-time sales associate in private employment. Appellant had reduced her hours to part time in November 2001 and stopped working in private employment as of March 10, 2003. However, the Office's procedure manual provides that a retroactive determination may be made where the claimant has worked in the position for at least 60 days, the employment fairly and reasonably represents wage-earning capacity, and "the work stoppage did not occur because of any change in the claimant's injury-related condition affecting [her] ability to work."⁵

Appellant did work in the position for more than 60 days. The critical issue, however, is whether the work stoppage occurred because of a change in the injury-related condition. In its August 4, 2005 decision, the Board found that appellant was no longer working due to her claimed injury. If the Office is making a contrary finding, it must clearly explain its finding and the supporting evidence. The October 19, 2005 decision did not explain its finding that the work stoppage was not employment related. The February 15, 2007 decision refers to a "work stoppage" on November 2, 2001, although this was a reduction in hours, not a work stoppage. Appellant did not stop working until March 10, 2003. To properly issue a retroactive wage-earning capacity determination based on actual earnings, when the claimant has stopped working, the evidence must show the work stoppage did not occur because of a change in the injury-related condition.

With respect to March 10, 2003, the hearing representative noted a report of that date from Dr. Hassan, who indicated that appellant had severe back pain, to the point that she could not walk. Dr. Hassan noted that bending, stooping and lifting caused her pain and he asked her employer if they could allow her to sit every 15 to 30 minutes. He indicated that appellant was advised not to work until she received further treatment. Dr. Hassan continued to submit reports, such as on April 10, May 9 and June 6, 2003 reporting that appellant remained disabled. He did not provide an opinion as to causal relationship between the back pain and the employment injury.

Therefore the contemporaneous evidence did not provide any probative evidence on the issue of the relationship between the work stoppage and the employment injury. Furthermore, there is the April 26, 2006 report from Dr. Hassan. While the February 15, 2007 Office decision

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

⁴ *Id.*

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

acknowledges the report was submitted, it appears to find that it was of limited value because it was submitted after the December 9, 2005 Office decision denying modification. A claimant may submit new evidence relevant to the issue of modification of a wage-earning capacity determination. The April 26, 2006 report is relevant to the issue of whether the work stoppage on March 10, 2003 was employment related, as it refers to the progressive worsening of the existing injury. Dr. Hassan noted that appellant had stopped work because of back pain and he referred to a “worsening due to the nature of the injury.”⁶

The Board finds that based on the evidence of record the October 19, 2005 retroactive wage-earning capacity determination was erroneous. Appellant was no longer working in the Burlington Coat Factory position, and the Office failed to establish that “the work stoppage did not occur because of any change in the claimant’s injury-related condition affecting her ability to work.” Since one of the standards for modifying a wage-earning capacity determination is that the original determination was erroneous, the Board finds a modification to be warranted.

CONCLUSION

The October 19, 2005 retroactive wage-earning capacity determination was erroneous and therefore appellant has established that modification of the determination is warranted.

⁶ The hearing representative indicated in her January 11, 2007 decision that the report raised an unresolved issue as to whether there was a worsening of the employment-related condition.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 15, 2007 is reversed.

Issued: April 1, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board