



## **FACTUAL HISTORY**

This is the ninth appeal in this case. In a January 22, 2007 decision,<sup>1</sup> the Board set aside October 24, 2005 and April 14, 2006 Office decisions denying a recurrence of disability commencing October 31, 1998 and denying modification of a loss of wage-earning capacity determination. The Board remanded the case for appointment of an impartial medical examiner. The Board affirmed an October 26, 2005 letter decision denying reimbursement for surgical expenses. The law and the facts of the case as set forth in the Board's prior decisions are incorporated by reference.<sup>2</sup>

On August 16, 2007 the Office referred appellant, the medical record and a statement of accepted facts to Dr. John V. Ioia, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion. In a September 26, 2007 report, Dr. Ioia reviewed the medical record and statement of accepted facts. At the September 13, 2007 examination, he found crepitus in both knees and diminished deep tendon reflexes at both knees and ankles. Dr. Ioia noted that appellant underwent a right hip replacement and placement of a cardiac stent. Appellant also had hypertension, diabetes, mellitus and significant obesity. Dr. Ioia opined that appellant's light-duty work activities were not competent to cause the claimed recurrence of disability on October 31, 1998. He stated that the accepted 1975 and 1984 lumbar injuries remained unchanged and that appellant could perform sedentary work.

In November 15, 2007 reports, Dr. Gary A. Kronick, an attending Board-certified internist, opined that appellant was totally disabled for work due to back pain, obesity, hypertension, diabetes mellitus and degenerative joint disease.

By decision dated February 29, 2008, the Office denied appellant's claim for a recurrence of disability commencing October 31, 1998. It accorded the weight of the medical evidence to Dr. Ioia, who found that appellant did not sustain a spontaneous worsening of the accepted conditions on October 31, 1998. The Office also found no basis for modifying the August 11, 1998 wage-earning capacity determination as appellant had not established the claimed recurrence of disability.

In a letter postmarked March 8, 2008, appellant requested a telephonic hearing, held June 4, 2008. At the hearing, she acknowledged that she was terminated for cause on October 31, 1998 due to falsifying her employment application. Appellant contended, however, that the recurrence of disability was due to repeated bending to remove magazines from a mail hamper.

In a July 31, 2008 decision, the Office hearing representative affirmed the February 29, 2008 decision denying appellant's claim for recurrence of disability. Dr. Ioia's report was found

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<sup>1</sup> Docket No. 06-1142 (issued January 22, 2007). Pursuant to an order issued March, 12, 2008 under Docket No. 08-2260, the Board dismissed an appeal under Docket No. 08-2260 as duplicative of Docket No. 08-2260.

<sup>2</sup> On remand of the case, appellant submitted a June 7, 2006 report from Dr. Matthew G. Zmurko, an attending Board-certified orthopedic surgeon, requesting authorization for lumbar injections. She also submitted a May 24, 2006 lumbar magnetic resonance imaging (MRI) scan showing degenerative disc disease from L2-S1 with a disc herniation at L2-3.

to have special weight as it was comprehensive and based on a complete factual and medical background. The Office hearing representative noted that, as appellant had not established the claimed recurrence of disability, the August 11, 1998 wage-earning capacity did not require modification.

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

The Office's implementing regulations define a recurrence of disability as "an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."<sup>3</sup> 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 the 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>4</sup> A termination for cause, unrelated to a work injury, does not constitute a change in the nature and extent of light work and is not a basis for payment of compensation.<sup>5</sup>

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

The Office accepted that appellant sustained lumbar strains on February 27, 1975 and September 13, 1984. On May 3, 2005 appellant claimed a recurrence of disability commencing October 31, 1998. She initially attributed the claimed recurrence to nonoccupational causes, including frustration over her termination and subsequent job search. The Office therefore denied the claim. At the June 4, 2008 hearing, appellant contended that bending at work caused the claimed recurrence of disability. However, she did not submit evidence substantiating a change in her light-duty job requirements. Dr. Ioia, a Board-certified orthopedic surgeon and impartial medical examiner, opined that appellant's job duties were not competent to cause the claimed recurrence of disability. He explained that the accepted lumbar injuries remained unchanged, with no demonstrated worsening of the condition on October 31, 1998. When a case is referred to an impartial medical specialist to resolve a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight.<sup>6</sup> The Board finds that the Office properly accorded Dr. Ioia's opinion the weight of the medical evidence in this case.

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<sup>3</sup> 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997). *See also Philip L. Barnes*, 55 ECAB 426 (2004).

<sup>4</sup> *Carl C. Graci*, 50 ECAB 557 (1999); *Mary G. Allen*, 50 ECAB 103 (1998); *see also Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>5</sup> *See Richard A. Neidert*, 57 ECAB 474 (2006); *John W. Normand*, 39 ECAB 1378 (1988).

<sup>6</sup> *Gloria J. Godfrey*, 52 ECAB 486 (2001).

Moreover, appellant was terminated for cause on October 31, 1998 as she falsified her employment application. When a claimant stops working at the employing establishment for reasons unrelated to her employment-related physical condition, she has no disability within the meaning of the Federal Employees' Compensation Act.<sup>7</sup> Therefore, the withdrawal of appellant's light-duty position on October 31, 1998 does not constitute a recurrence of disability because she was fired for misconduct. Appellant has not established the claimed recurrence of disability.

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

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, which remains undisturbed until properly modified.<sup>8</sup>

The Office's procedure manual provides that, if 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 claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.<sup>9</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>10</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

Appellant did not allege that she had been vocationally rehabilitated or that the original wage-earning capacity determination was in error. Rather, she asserted that her accepted lumbar conditions worsened on October 31, 1998 such that she could no longer earn the wages set forth in the August 11, 1998 wage-earning capacity determination.

As noted the weight of the medical evidence does not establish that the accepted lumbar conditions changed or worsened on October 31, 1998 such that appellant could no longer perform her light-duty job.<sup>12</sup> Rather, she was terminated for cause on October 31, 1998. The

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<sup>7</sup> See *Richard A. Neidert*, *supra* note 5.

<sup>8</sup> See *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

<sup>10</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>11</sup> *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

<sup>12</sup> *Id.*

withdrawal of a light-duty position for misconduct does not constitute a change in the nature and extent of light work and is not a basis for payment of compensation.<sup>13</sup> Appellant did not meet her burden of proof in establishing that there was a material change in the nature and extent of her injury-related condition, that the original determination was in fact erroneous or that she was vocationally rehabilitated. She failed to establish that the wage-earning capacity determination should be modified.

### **CONCLUSION**

The Board finds that appellant has not established that she sustained a recurrence of disability commencing October 31, 1998 causally related to accepted 1975 and 1984 lumbar injuries. The Board further finds that the Office properly denied modification of the August 11, 1998 wage-earning capacity determination.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated July 31 and February 29, 2008 are affirmed.

Issued: July 23, 2009  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>13</sup> *John W. Normand, supra* note 5.