

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

J.W., Appellant	)	
	)	
and	)	
	)	<b>Docket No. 06-1506</b>
	)	<b>Issued: November 8, 2006</b>
<b>DEPARTMENT OF AGRICULTURE, CORPUS</b>	)	
<b>CHRISTI CLASSING OFFICE,</b>	)	
<b>Corpus Christi, TX, Employer</b>	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

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

**JURISDICTION**

On May 22, 2006 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated May 8, 2006 which denied modification of his 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 appellant's April 11, 2005 wage-earning capacity determination.

**FACTUAL HISTORY**

This case has previously been before the Board. In an April 19, 2006 decision, the Board found that the Office met its burden of proof in reducing appellant's compensation effective April 17, 2005 based on his capacity to earn wages in the constructed position of administrative clerk. The Board also found that the Office properly denied his August 10, 2005 request for

reconsideration. The Board further noted that the Office improperly adjudicated appellant's October 12, 2005 letter as a request for a merit review pursuant to section 8128(a) of the Federal Employees' Compensation Act<sup>1</sup> rather than as a request for modification of the April 2005 wage-earning capacity determination. The Board vacated the October 27, 2005 Office decision and remanded the case for further development.<sup>2</sup> The law and the facts of the previous Board decision are incorporated herein by reference.

In an October 12, 2005 report, Dr. Scott J. Lamb, a Board-certified physiatrist, noted appellant's complaints and findings on examination. He advised that appellant could work light duty for four hours a day. Dr. Lamb listed that appellant could work light duty a maximum of 4 hours per day with a 15-minute break per hour, no driving heavy equipment and lifting restricted to 20 pounds.

Evidence submitted subsequent to the Office's October 27, 2005 decision consisted of an October 19, 2005 treatment note in which Dr. Thomas W. Edwards, an attending Board-certified anesthesiologist, noted appellant's medical history, made findings on examination and diagnosed lumbar facet arthropathy on the right at L4-5 and L5-S1, lumbar intervertebral disc disease and lumbosacral radiculitis. He recommended lumbar facet injections.

On October 12, 2005 the Office had referred appellant, together with the medical record, a set of questions and a statement of accepted facts, to Dr. Charles W. Kennedy, a Board-certified orthopedic surgeon, for a second opinion evaluation.<sup>3</sup> In a report dated November 1, 2005, Dr. Kennedy noted his review of the record, magnetic resonance imaging scan findings of mild degenerative disc disease and physical findings. He advised that functional capacity evaluation demonstrated that appellant was able to do occasional lifting of up to 40 or 50 pounds, frequent lifting of about 10 pounds and negligible constant lifting. Dr. Kennedy released appellant to work a four-hour day, advising that he not do any type of work where there was repetitive lifting, even of 10 to 15 pounds. In an attached work capacity evaluation, he advised that appellant was not able to perform his usual job but could work four hours a day with permanent restrictions to his physical activity.

Dr. Edwards performed facet injections on November 15, 2005. In a February 9, 2006 report, Dr. Lamb diagnosed low back pain/strain with a chronic discogenic component. He opined that little change was likely and recommended that appellant maintain his activity.

By decision dated May 8, 2006, the Office reviewed Dr. Lamb's October 12, 2005 report and denied modification of the April 11, 2005 wage-earning capacity decision.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> Docket No. 06-262 (issued October 27, 2005).

<sup>3</sup> The purpose of the examination was to determine if surgery was appropriate. Dr. Kennedy advised that it was not. By decision dated November 22, 2005, the Office denied authorization for the requested surgery. Appellant did not appeal this decision with the Board.

## LEGAL PRECEDENT

Once the Office has made a determination of an employee's wage-earning capacity, 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. The burden of proof is on the party attempting to show a modification of the wage-earning capacity award.<sup>4</sup> It is, however, well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination and such a request is not a request for review under 5 U.S.C. § 8128. It is a request for additional compensation.<sup>5</sup>

## ANALYSIS

The medical evidence relevant to appellant's capacity to earn wages as a modified administrative clerk consists of Dr. Lamb's October 12, 2005 report and the report of Dr. Kennedy who performed a second opinion evaluation for the Office on November 1, 2005. It does not appear that the latter report was reviewed by the Office in its October 28, 2005 decision. Dr. Kennedy was in agreement that appellant could only work four hours a day. These reports are therefore supportive of appellant's contention that his employment-related condition has worsened and he cannot work eight hours a day as an administrative clerk, as found by the Office in its April 11, 2005 loss of wage-earning capacity decision.

Proceedings under the Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.<sup>6</sup> In this case, although the reports of Dr. Lamb and Dr. Kennedy do not contain rationale sufficient to discharge appellant's burden of proof to establish that his employment-related condition has worsened or changed such that the April 11, 2005 wage-earning capacity decision should be modified, the reports constitute substantial, unrefuted evidence in support of his modification claim such that further development of the case by the Office is warranted.<sup>7</sup>

On remand, the Office should further develop the medical evidence as appropriate to obtain a rationalized opinion regarding whether appellant has established that the April 11, 2005 loss of wage-earning capacity decision should be modified. Following such further development of the case record as it deems necessary, the Office should issue an appropriate *de novo* decision.

## CONCLUSION

The Board finds that this case is not in posture for a decision as to whether modification of appellant's wage-earning capacity determination is warranted.

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<sup>4</sup> *Thaddeus J. Spevack*, 53 ECAB 474 (2002).

<sup>5</sup> *Gary L. Moreland*, 54 ECAB 638 (2003).

<sup>6</sup> *Betty J. Smith*, 54 ECAB 174 (2002).

<sup>7</sup> *Thaddeus J. Spevack*, *supra* note 4; *see John J. Carlone*, 41 ECAB 354 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 8, 2006 be vacated and the case is remanded to the Office for proceedings consistent with this opinion of the Board.

Issued: November 8, 2006  
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