

superimposed on preexisting degenerative disc disease while in the performance of duty. By decision dated July 2, 1999, the Office adjusted appellant's compensation to reflect her wage-earning capacity as a customer service representative. In an October 20, 2000 decision, an Office hearing representative affirmed the July 2, 1999 decision but modified the decision to reflect appellant's entitlement to compensation at the augmented three-fourths rate. Appellant then appealed to the Board. In a March 19, 2002 decision, the Board affirmed the October 20, 2000 decision, finding that the constructed position of customer service representative represented her wage-earning capacity.² The law and the facts of the Board's March 19, 2002 decision are incorporated herein by reference.

Following the Board's March 19, 2002 decision, by letter dated November 8, 2002, appellant requested reconsideration and submitted additional evidence. In a decision dated March 19, 2003, the Office denied appellant's reconsideration request. On May 19, 2003 she filed an appeal with the Board and requested oral argument. Appellant also submitted a June 24, 2003 medical report from Dr. Hampton J. Jackson, a Board-certified orthopedic surgeon. By order dated February 27, 2004, the Board dismissed the appeal at appellant's request and cancelled the oral argument.³ On July 9, 2004 appellant again requested reconsideration, stating that she was questioning the "suitability of employment in the job." She also submitted a June 18, 2004 medical report from Dr. Nicole A. Collins, a Board-certified internist. In a decision dated July 29, 2005, the Office denied appellant's reconsideration request, finding that it had no jurisdiction to consider her application for review as the subject matter was *res judicata*, based on the Board's March 19, 2002 decision, the last merit decision in this case.

LEGAL PRECEDENT

It is well established that 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.⁴ The burden of proof is on the party attempting to show a modification.⁵ There is no time limit for a claimant to submit a request for modification of a wage-earning capacity determination.⁶

ANALYSIS

In the case at hand, the Office considered appellant's July 9, 2004 correspondence to be a request for reconsideration pursuant to section 8128(a) of the Federal Employees' Compensation Act⁷ and denied her request. The Board, however, finds that appellant's contention concerned

² Docket No. 01-533 (issued March 19, 2002).

³ Docket No. 03-1484 (issued February 27, 2004).

⁴ *Gary L. Moreland*, 54 ECAB 638 (2004); *Tamra McCauley*, 51 ECAB 375 (2000).

⁵ *Id.*

⁶ *Gary L. Moreland*, *supra* note 4.

⁷ 5 U.S.C. §§ 8101-8193.

the suitability of the constructed position. She is requesting modification of the Office's June 2, 1999 wage-earning capacity determination and submitted medical evidence in support thereof. She was not requesting reconsideration of the Office's decision. The Board finds that the Office improperly characterized appellant's July 9, 2004 letter as a request for reconsideration subject to the limited review set for in section 10.606 of the Office's regulations.⁸ Appellant is entitled to a merit decision on whether she met her burden of proof to modify the June 2, 1999 wage-earning capacity decision. The case will be remanded to the Office for further development of this issue. Upon remand, the Office should develop the record as necessary and issue an appropriate decision with regard to appellant's wage-earning capacity.

CONCLUSION

The Board finds that on September 13, 2005 appellant requested modification of the June 2, 1999 loss of wage-earning capacity determination and is entitled to a merit decision on that issue.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 9, 2004 be vacated and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: March 7, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

⁸ 20 C.F.R. § 10.606.