

temporary total disability. By decision dated February 4, 1993, the Office determined that actual earnings as an interviewer of \$250.40 per week represented appellant's wage-earning capacity. The Office stated that pursuant to 5 U.S.C. § 8115 and 5 U.S.C. § 8106 appellant's compensation was being reduced based on his wage-earning capacity.

The record indicated that appellant filed a recurrence of disability claim commencing April 22, 1994. By decision dated December 21, 1994, the Office denied the recurrence of disability claim.

The Office developed the issue of entitlement to a schedule award and appellant was referred to Dr. John Fraser, an orthopedic surgeon. In a report dated October 29, 1996, Dr. Fraser provided a history and results on examination. He stated that wrist x-rays showed no evidence of fracture, dislocation or evidence of previous trauma. Dr. Fraser reported no evidence of any pathology in the soft tissue or bony systems at this time. The second opinion stated, "I have reviewed his records and think he was at MMI [maximum medical improvement] as of now, but he had been placed at MMI in the early 1990's, and I would more likely concur with that finding at that time. In the absence of any documentable pathology, I believe that the loss of motion in the wrist is purely subjective and is not secondary to a pathological process. Hence, I would give him no disability rating for this."

By letter dated January 31, 1997, the Office notified appellant that it proposed to terminate his compensation for wage loss, based on Dr. Fraser's report. By decision dated April 16, 1997, the Office terminated compensation for wage-loss and medical benefits effective April 27, 1997.

The Board noted in its March 2, 2000 decision that appellant had made a timely request for a hearing regarding the April 16, 1997 decision. In an order dated December 30, 2003, the Board again noted that appellant had submitted a timely hearing request and the Office should issue an appropriate decision.²

A hearing before an Office hearing representative was held on October 25, 2005. By decision dated December 30, 2005, the hearing representative affirmed the April 19, 1997 termination decision.

Appellant requested reconsideration and submitted evidence regarding malpractice complaints against Dr. Fraser. By decision dated May 10, 2006, the Office denied modification of the prior decision.

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 Docket No. 03-1580 (issued December 30, 2003).

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

The Office issued a wage-earning capacity decision dated February 4, 1993 based on appellant's actual earnings in an interviewer position. Pursuant to 5 U.S.C. § 8115, the wage-earning capacity of an employee is determined by actual earnings if the actual earnings fairly and reasonably represent wage-earning capacity. Once a wage-earning capacity decision is made, it remains in effect until it is properly modified.⁵ Although appellant had filed a recurrence of disability claim for April 1994, the Office did not modify the wage-earning capacity determination or address the issue of modification at that time.⁶

In this case, the Office attempted to terminate compensation as of April 27, 1997 based on the report of Dr. Fraser. The initial issue, however, that must be addressed is modification of the existing wage-earning capacity determination. The requirements for modification are noted above and the Office must meet the requirements for modification. It is not clear whether, based on the report of Dr. Fraser, the Office was attempting to find that the prior wage-earning capacity was erroneous, or whether it had found a material change in the employment-related condition.

The April 27, 1997, December 30, 2005 and May 10, 2006 decisions do not make adequate findings and address the proper issue of modification of wage-earning capacity. The Office did not acknowledge that a wage-earning capacity determination had been made, identify the modification issue, discuss the evidence and explain how it met the requirements for modification. It is the Office's burden of proof and they did not meet their burden in this case.⁷

CONCLUSION

The issue in the case is whether a modification of the wage-earning capacity determination was appropriate and the Office failed to make proper findings on the issue presented.

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

⁴ *Id.*

⁵ *See Katherine T. Kreger*, 55 ECAB 633 (2004).

⁶ *Id.* (when a claim for recurrence of disability is made after a formal wage-earning capacity determination, the issue is modification of the wage-earning capacity).

⁷ Once the modification issue is properly resolved, the Office may address termination of medical benefits.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 10, 2006 and December 30, 2005 are reversed.

Issued: April 18, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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