

on her actual earnings. The record indicated that the employing establishment paid her two hours per day of administrative leave.

Appellant continued to work six hours per day and receive two hours of paid administrative leave. As of September 4, 2004, she no longer received payment for administrative leave.

In a decision dated September 20, 2004, the Office determined that appellant's wage-earning capacity was represented by her actual earnings at six hours per day. The Office found that, pursuant to 5 U.S.C. § 8115 and 8106, she was entitled to compensation as of September 5, 2004 based on a loss of wage-earning capacity of \$181.88 per week.

The Office referred appellant to Dr. John Douthit, an orthopedic surgeon, for a second opinion examination. In a report dated October 20, 2004, Dr. Douthit provided a history and results on examination. He stated that appellant's current complaint was pain in her upper back, which he believed was related to kyphoscoliosis and thoracic spine degenerative disease, rather than the employment injury. Dr. Douthit opined that employment had caused a temporary aggravation of lumbar degenerative disc disease that ceased when she reached maximum medical improvement on February 28, 2001.

By letter dated January 24, 2005, the Office advised appellant that it proposed to terminate her compensation for wage-loss and medical benefits based on the report of Dr. Douthit. In a decision dated March 1, 2005, the Office terminated compensation for wage-loss and medical benefits effective March 2, 2005. The Office did not discuss the wage-earning capacity determinations.

On March 3, 2005 the Office received a February 14, 2005 report from Dr. Yechiel Kleen, a physiatrist, who provided a history and results on examination. Dr. Kleen stated that he agreed with prior treating physicians that appellant sustained a permanent impairment as a result of the work-related injury. He indicated that he did not agree with Dr. Douthit that appellant's condition was related to kyphoscoliosis and degenerative changes. Dr. Kleen also stated that appellant clearly documents that lower back symptoms, not thoracic symptoms, contribute to her limitations at work.

In a decision dated November 14, 2005, the Office denied modification of the March 1, 2005 decision. The Office found that the evidence was not sufficient to create a conflict in the evidence.

Appellant requested reconsideration by letter dated July 7, 2006. Her representative indicated that an additional report from Dr. Kleen was to be submitted, but the record does not contain an additional medical report. By decision dated August 2, 2006, the Office denied the request for reconsideration without merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

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.¹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.²

ANALYSIS -- ISSUE 1

The Office issued a wage-earning capacity decision dated September 20, 2004 based on appellant's actual earnings in a light-duty position. Once a wage-earning capacity decision is made, it remains in effect until it is properly modified.³ In this case, the Office attempted to terminate compensation, without addressing the actual issue presented. The issue is modification of the wage-earning capacity determination, and the Office must meet the requirements for modification as noted above. It is not clear whether, based on the report of Dr. Douthit, 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 March 1 and November 14, 2005 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. In view of the Board's decision, it will not address the reconsideration issue.

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.

¹ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

² *Id.*

³ *See Katherine T. Kreger*, 55 ECAB 633 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 14, 2005 is reversed.

Issued: March 23, 2007
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