

reports and diagnostic test results dated April 29, 1997 through April 6, 2007 which addressed his lumbar conditions and total disability for work.

In a March 4, 2009 decision, OWCP denied appellant's request for modification of its July 28, 1998 decision. It found that the evidence submitted failed to establish a material worsening of his accepted conditions or provide a rationalized medical opinion explaining why he could not perform the duties of the constructed electronics technician position.

On June 28, 2010 OWCP referred appellant, together with a statement of accepted facts and the case record to, Dr. James F. Bethea, a Board-certified orthopedic surgeon, for a second opinion. In a July 21, 2010 report, Dr. Bethea reviewed a history of the accepted August 26, 1986 employment injuries and appellant's medical treatment. Appellant rated his pain which radiated to both feet equally as 10 out of 10. He complained about numbness in his toes on both feet. Appellant had difficulty with walking, sitting, standing, bending, lying down and sleeping. Dr. Bethea listed his findings on physical examination and reviewed diagnostic test results related to the back. He diagnosed chronic lumbar syndrome status post lumbar spine surgery. Dr. Bethea advised that the accepted aggravation of preexisting spondylolisthesis had not resolved. He stated that the authorized surgery had not stopped his symptoms. Dr. Bethea concluded that appellant could not return to his regular job as an engineering technician.

On October 1, 2010 appellant requested reconsideration of his claim based on Dr. Bethea's July 21, 2010 report.

In an October 21, 2010 decision, OWCP denied appellant's October 1, 2010 request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error in the last merit decision dated March 4, 2009.

As noted above, OWCP issued a formal decision on appellant's wage-earning capacity on July 28, 1998, prior to the time he requested reconsideration on October 1, 2010. Board precedent and OWCP's procedures direct the claims examiner to consider the criteria for modification when a claimant requests resumption of compensation for total wage loss.³ While appellant used the term reconsideration in his October 1, 2010 request, he implicitly asserted that the medical evidence obtained by OWCP established that his employment-related condition had worsened.⁴ The Board finds that OWCP should have adjudicated the issue of modification of the wage-earning capacity determination.⁵ The Board will therefore remand the case to OWCP for

³ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995) (if a formal decision on loss of wage-earning capacity is issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss, in which instance OWCP will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity determination).

⁴ 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. *Stanley B. Plotkin*, 51 ECAB 700 (2000); see Federal (FECA) Procedure Manual, *id.* at Chapter 2.814.11 (June 1996).

⁵ *F.B.*, Docket No. 09-99 (issued July 21, 2010).

proper adjudication, to be followed by an appropriate merit decision to preserve appellant's appeal rights.

ORDER

IT IS HEREBY ORDERED THAT the October 21, 2010 decision of the Office of Workers' Compensation Programs be set aside and the case remanded for further proceedings consistent with this order of the Board.

Issued: January 12, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board