

The issue is whether appellant established a basis for modifying the April 8, 2003 wage-earning capacity determination.

FACTUAL HISTORY

This case was previously before the Board.¹ Appellant, a 48-year-old mail processing equipment mechanic, injured his back in the performance of duty on December 8, 2001.² The injury occurred when he reached under a flat sorter machine to retrieve mail. Appellant reportedly felt a twinge in his back and afterwards his muscles began tightening. The Office accepted appellant's claim for lumbosacral radiculitis.

On March 26, 2002 appellant accepted a limited-duty assignment as a modified mail processing equipment mechanic. The position required him to rebuild mechanical units working from a bench or table. The work was performed in a sitting position while using small hand tools. The position description also indicated that the parts appellant utilized were not to exceed 20 pounds total weight. His physical restrictions at the time included no lifting or carrying over 20 pounds, limited pushing and pulling (intermittently), limited standing and walking (intermittently), no stooping or bending and intermittent reaching above shoulder height.

In a decision dated April 8, 2003, the Office determined that appellant's actual earnings as a modified mail processing equipment mechanic fairly and reasonably represented his wage-earning capacity. Because there was no loss in earnings, appellant was not entitled to wage-loss compensation following his March 2002 return to limited-duty work.³

On April 24, 2003 appellant filed a claim for recurrence of disability (Form CA-2a) beginning April 5, 2003. He returned to work in a part-time limited-duty capacity on June 14, 2003.⁴ Appellant continued to perform limited-duty work four hours per day until November 10, 2003, when he stopped work entirely. He resumed his full-time regular duties on December 20, 2003.

The relevant medical evidence included treatment records from Dr. Nicholas S. Checkles, a Board-certified physiatrist, and Dr. Richard R.M. Francis, an orthopedic surgeon. Dr. Checkles examined appellant on three occasions between April and May 2003. When he first saw appellant on April 2, 2003 he diagnosed probable lumbar facet syndrome, secondary to arthritic changes. Dr. Checkles also noted possible right L5 or S1 radiculitis. He placed appellant on limited duty, four hours per day with a 10 to 20-pound lifting restriction and no bending, squatting, climbing, kneeling or twisting. Appellant could stand intermittently, sit intermittently up to six hours and walk and lift intermittently up to two hours. Dr. Checkles also precluded appellant from using his feet to operate controls or for repetitive movement. On April 4, 2003 he

¹ Docket No. 05-671 (issued July 12, 2005).

² Appellant first experienced back problems in 1984 while in the U.S. Air Force. He was medically discharged in 1987 and the Department of Veterans Affairs subsequently awarded appellant a 10 percent disability rating for his back.

³ Appellant requested an oral hearing, but later withdrew his request in favor of pursuing reconsideration before the Office. By decision dated October 9, 2003, the Office denied modification of the April 8, 2003 wage-earning capacity determination.

⁴ Appellant was released to perform part-time limited-duty work effective May 28, 2003, however, he did not return to work until June 14, 2003.

indicated that appellant was capable of working limited duty, eight hours per day. Dr. Checkles further noted that appellant was partially disabled from April 5 to 26, 2003.

When Dr. Checkles next examined appellant on April 30, 2003, he noted that appellant reported experiencing a severe episode of back pain two days earlier. Appellant reportedly went to the emergency room where he was seen by a nurse. But he left before being examined by a physician because the emergency room was very busy and appellant could not wait any longer. Appellant had pain medication at home, which he used and his condition gradually improved over the next day or so. Dr. Checkles also reported that appellant had not worked since April 28, 2003. He indicated that he would schedule electrodiagnostic studies and review appellant's imaging studies when they became available. Dr. Checkles advised that appellant was totally disabled from April 28 to 30, 2003 and capable of resuming limited-duty work thereafter.

On May 28, 2003 Dr. Checkles administered electrodiagnostic studies, which revealed normal results. He also reviewed earlier imaging studies that showed mild facet arthrosis at L4-5 and L5-S1 and minimal broad based disc bulging at those same levels, with no significant nerve root compression. Based on the imaging studies and normal electrodiagnostic studies, Dr. Checkles indicated that appellant suffered from acute facet syndrome. He explained that patients with facet syndrome were vulnerable to periodic acute flare-ups of lower back pain, which he believed was probably what appellant experienced on April 28, 2003. Dr. Checkles noted that appellant's condition had improved since that episode and thus, he was able to return to light work with a lifting limitation of 30 pounds. Dr. Checkles released appellant to return to work on a four-hour basis. He explained that if appellant's back could tolerate the part-time schedule, he would then release him to work an eight-hour day. Dr. Checkles retired later that summer and he referred appellant to another physician.

In a December 9, 2003 letter to the Office, Dr. Checkles summarized his treatment of appellant. He explained that he first saw appellant for a problem with his lower back on April 2, 2003. Dr. Checkles stated that he diagnosed acute facet syndrome with radiculitis. He also stated that appellant was totally disabled from work at the time of the initial examination. Dr. Checkles indicated that he next saw appellant on April 30, 2003, which was a few days after a reported flare up of his low back symptoms. He noted that he had scheduled appellant for electrodiagnostic testing, which he administered on May 28, 2003. The test results were normal and by that time appellant had improved sufficiently such that he released him to light duty four hours a day. Dr. Checkles also noted that he had not examined appellant since May 28, 2003. He opined that appellant was totally disabled from April 2 to May 28, 2003. Dr. Checkles' final diagnosis was acute facet syndrome with radiculitis during the acute phase.

Dr. Francis first examined appellant on October 24, 2003. He diagnosed symptomatic facet joint arthropathy and possible early degenerative disc disease. Dr. Francis advised that appellant could work four hours a day with a 30-pound lifting restriction. When he saw appellant on November 7, 2003, he diagnosed degenerative disc disease and acute facet syndrome.⁵ Dr. Francis also advised that appellant could work an eight-hour day beginning

⁵ A November 5, 2003 magnetic resonance imaging scan revealed "[n]o specific positive findings ... of the lumbar spine."

November 11, 2003. He recommended that appellant not lift or carry anything in excess of 50 pounds. Appellant was also precluded from bending, stooping or twisting and was limited to four hours sitting, standing, pushing, pulling and reaching above shoulder. Dr. Francis also recommended a 10:00 a.m. to 6:30 p.m. workday. Appellant did not return to full-time work as expected, but instead he stopped working entirely on November 10, 2003.

On December 4, 2003 Dr. Francis advised that appellant was limited to four hours of work per day from 3:00 p.m. to 7:00 p.m. He also noted restrictions with respect to appellant's proximity to conveyor belts and outside doors in an apparent effort to accommodate appellant's sinus problems.

In a December 5, 2003 report, Dr. Francis noted that appellant sustained a twisting injury to his lower back on December 8, 2001 while working on a piece of machinery. Following this incident, appellant developed low back pain. Dr. Francis also noted that "[p]rior to this [appellant] had no history of back or low back pain." A recent x-ray obtained by him showed facet joint enlargement over the lower lumbar spine. Dr. Francis diagnosed chronic low back pain, symptomatic facet joint arthropathy and early lumbar degenerative disc changes at L4-5. He explained that appellant's low back pain was chiefly from the facet joints at L4-5. Dr. Francis recommended eight weeks of physical therapy and some new imaging studies.

On December 10, 2003 Dr. Francis advised that appellant could work limited duty from 3:00 p.m. to 7:00 p.m. and light duty from 10:00 p.m. to 2:00 a.m., as his back condition permitted. On December 17, 2003 he released appellant to full-time regular duty effective immediately.

In a decision dated December 17, 2003, the Office denied appellant's claim for recurrence of disability beginning April 5, 2003. The Office issued a corrected copy of the decision on January 29, 2004 with the added notation that appellant was no longer entitled to medical treatment.

Appellant requested an oral hearing, which was held on July 21, 2004. The Office also received a January 30, 2004 letter from Dr. Francis, who explained that he had referred appellant to another physician for treatment. Dr. Francis stated that he saw appellant on three occasions between October 24 and November 25, 2003. He also indicated that appellant reported chronic low back pain, which Dr. Francis believed was the result of symptomatic facet joint arthropathy and early lumbar degenerative disc disease at the L4-5 level. Dr. Francis noted that he and appellant had a difference of opinion regarding the amount of work he could perform. He was of the opinion that appellant was "a healthy and hearty male" with some low back pain that was "age[-]related and degenerative in nature." Dr. Francis explained that there were various forms of treatment available for appellant's condition ranging from conservative measures up to surgery. He believed that appellant could "go back to work to his occupation." Dr. Francis noted that he was unable to satisfy appellant's requests in a number of ways and therefore he had decided to discontinue treating appellant.

By decision dated November 22, 2004, the hearing representative affirmed the December 17, 2003 decision denying appellant's claimed recurrence of disability. However, the

hearing representative reversed the January 29, 2004 decision terminating appellant's medical benefits.

On appeal, the Board found that, instead of addressing whether a recurrence of disability had been established, the Office should have determined whether appellant established a basis for modifying the April 8, 2003 wage-earning capacity determination. Accordingly, the Board remanded the case to the Office to address this particular issue. The Board also instructed the Office that a brief period of disability could be accepted without formally modifying the wage-earning capacity determination.⁶

In a decision dated September 27, 2005, the Office denied modification of the April 8, 2003 wage-earning capacity determination.

Appellant again requested an oral hearing, which was conducted on March 27, 2007. In his post-hearing brief, appellant's counsel argued that based on the reports of Dr. Checkles and Dr. Francis, the Office should accept a limited period of total disability from April 5 to May 28, 2003 and partial disability from May 29 to December 19, 2003. The Office's hearing representative issued a May 2, 2007 decision denying modification.

LEGAL PRECEDENT

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.⁷ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁸ 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 erroneous.⁹ The burden of proof is on the party seeking modification of the wage-earning capacity determination.¹⁰

ANALYSIS

Appellant's counsel previously argued that his client should be compensated for temporary total disability from April 5 to May 28, 2003. Counsel also claimed that appellant was entitled to receive four hours of wage-loss compensation per day for the period May 29 to December 19, 2003. With respect to the first period, Dr. Checkles indicated in his December 9, 2003 letter that appellant was totally disabled from April 2 to May 28, 2003. However, this

⁶ The Board's July 12, 2005 decision is incorporated herein by reference.

⁷ 5 U.S.C. § 8115(a) (2000); *see Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁸ *See Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

⁹ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

¹⁰ *Id.*

statement contradicted his prior reports wherein Dr. Checkles indicated that appellant was only partially disabled. Additionally, the Office has not accepted acute facet syndrome as employment related.¹¹ Thus, even if one accepts Dr. Checkles' latest opinion regarding the disabling effects of appellant's back condition, the evidence nonetheless is insufficient to establish an employment-related disability. None of his reports included an opinion on causal relationship.

Five months elapsed between Dr. Checkles' May 28, 2003 examination and when appellant first saw Dr. Francis on October 24, 2003. In the interim, appellant worked part-time, limited duty beginning June 14, 2003. Dr. Checkles anticipated increasing appellant's workday from four to eight hours as tolerated, however, he did not examine appellant after May 28, 2003. When appellant saw Dr. Francis on October 24, 2003, he found him capable of performing part-time limited-duty work. A few weeks later he released appellant to perform eight-hours of limited-duty work. However, over the next five weeks Dr. Francis vacillated between full-time limited duty, part-time limited duty and ultimately full-time regular duty effective December 17, 2003. All of this transpired with little or no explanation provided by Dr. Francis.

Neither Dr. Checkles nor Dr. Francis exhibited any particular knowledge of the type of limited-duty work appellant performed over the two-year period preceding his claimed recurrence of disability. As such, their respective reports do not explain why appellant was no longer capable of performing those duties beginning April 5, 2003. Another deficiency with Dr. Francis' opinion is that he was apparently unaware that appellant's lumbar condition dated back to 1984 when he was in the Air Force. In his December 5, 2003 report, Dr. Francis incorrectly noted that prior to the December 8, 2001 employment injury appellant "had no history of back or low back pain." Dr. Francis did not specifically attribute appellant's back condition to his December 8, 2001 employment injury. In his final report dated January 30, 2004, Dr. Francis indicated that appellant's low back pain was "age[-]related and degenerative in nature." Accordingly, Dr. Francis' various reports do not establish that appellant's facet joint arthropathy and lumbar degenerative disc disease are employment related.

The Board finds that appellant has not met any of the requirements for modification of the Office's April 8, 2003 wage-earning capacity determination. Appellant did not allege that he was retrained or otherwise vocationally rehabilitated or that the original April 8, 2003 wage-earning capacity determination was erroneous. Furthermore, the medical evidence does not establish a material change in appellant's employment-related condition. As such, the Office properly denied modification.

¹¹ Where appellant claims that a condition not accepted or approved by the Office was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury. *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

CONCLUSION

Appellant has not established a basis for modifying the Office's April 8, 2003 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT that the May 2, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 2008
Washington, DC.

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board