

In a work restriction evaluation dated December 23, 1991, Dr. R. Richard Maxwell, an attending Board-certified orthopedic surgeon, opined that appellant could work three to four hours per day with restrictions. He determined that he could intermittently sit for one to two hours per day and walk and stand for one hour per day. Dr. Maxwell found that appellant could not bend, squat, climb, kneel, twist or lift over 10 pounds.

In an investigative memorandum dated September 9, 1993, a special agent asserted that appellant had concealed his employment as the owner and manager of a beauty store. On October 25, 1993 a rehabilitation counselor provided labor market information for the positions of beauty supply store manager and sales manager. She determined that the position of beauty store manager was reasonably available within the area and provided wage information. An Office rehabilitation specialist noted that appellant had several years of experience working as the manager of a beauty supply company.

By decision dated December 10, 1993, the Office reduced his compensation effective December 12, 1993 based on its finding that he had the capacity to work as a sales manager. By decision dated December 17, 1993, the Office found that appellant forfeited compensation for periods from 1986 to 1993 in the amount of \$118,513.21 because he knowingly failed to reveal earnings from employment.

At a hearing, held on May 12, 1995, appellant and witnesses asserted that he did not participate in the beauty supply business. His sister owned the beauty supply store. Appellant and his sister jointly owned the building in which the business was located. He collected the rent, contracted for repairs and went to the building to collect rent if problems arose. Appellant also collected rent on other personal property and another small building. He maintained that he had a passive role as a landlord collecting rents.

By decision dated July 20, 1995, the hearing representative reversed the forfeiture decision, finding that the evidence did not show that appellant knowingly failed to disclose earnings. She further determined that the evidence did not establish that he ran the beauty supply store but noted that his testimony showed that he worked as a building manager or superintendent. The hearing representative instructed the Office upon return of the case record to “develop the claim as necessary for a proper determination of wage-earning capacity based on the position of building manager/superintendent.”

In a report dated June 17, 1996, Dr. Maxwell found that appellant could work six to eight hours per day with restrictions. He indicated that appellant could lift 10 to 20 pounds and “occasionally probably 20 to 50 pounds.” Dr. Maxwell asserted, “[Appellant] can probably sit for 15 to 20 minutes at a time, walk for 20 minutes at a time, stand for 15 minutes at one time, bending only rarely, twisting rarely [and] kneeling rarely.” He noted that whether appellant returned to work might depend on his psychological condition.¹

A second hearing was held on June 18, 2002. Appellant asserted that he was an owner, or landlord, and did not collect rents. He did not physically perform the duties of a property

¹ In progress reports dated March 2000 to February 2002, Dr. Maxwell listed findings on physical examination and provided recommendations for treatment.

manager and did not direct staffing. In a decision dated August 28, 2002, a hearing representative reversed the December 10, 1993 wage-earning capacity determination. She found that the evidence did not establish that the position of sales manager was either medically or vocationally suitable. The hearing representative recommended that the Office comply with the findings of the prior hearing representative and “develop a proper retroactive wage-earning capacity determination based on the position of building manager/superintendent.”

A rehabilitation counselor, in a report dated December 31, 2002, noted that as appellant did not have a real estate license he would only be able to manage one property. She stated, “An on site property manager is not required to have a real estate license. Those with the real estate license make more money. They also have more responsibilities. The position is considered light work.” The rehabilitation counselor indicated that wages were \$376.00 per week or \$9.40 per hour.

By decision dated February 24, 2003, the Office modified its prior wage-earning capacity determination to reflect that appellant had the ability to earn wages as a building manager. The Office paid him compensation for the difference between what it had previously paid under its determination that he had the wage-earning capacity of a sales manager and what it owed based on its finding that he could earn wages as a building manager for four hours per day beginning December 12, 1993 and eight hours per day beginning June 18, 1996. The Office noted that appellant resumed work with the employing establishment on September 21, 2002. In a decision dated June 12, 2003, the Office denied modification of its February 24, 2003 decision.

Appellant appealed to the Board. On February 15, 2005 the Director filed a motion requesting that the Board remand the case as the Office had not complied with the hearing representative’s instructions to issue a full loss of wage-earning capacity decision with full appeal rights. In an order dated March 4, 2005, the Board granted the Director’s motion to remand and cancelled oral argument. The Board instructed the Office to allow appellant to submit evidence regarding his ability to work as a building manager.

On June 24, 2005 the Office requested that appellant submit information regarding his ability to work as a building manager. Appellant requested a hearing. In a decision dated September 26, 2005, the Office reduced his compensation from December 12, 1993 through June 17, 1996 based on its finding that he could work as a building manager for four hours per day and reduced his compensation from June 18, 1996 through September 20, 2002 based on its finding that he could work full time as a building manager.

Appellant requested an oral hearing, which was held on July 25, 2006. He maintained that he did not work as a building manager. Appellant’s sister indicated that she performed the duties of a building manager at the building they owned jointly. She also stated that her 1995 testimony was accurate. At the hearing, Thomas Mitchell, a vocational consultant, testified that appellant did not have the work experience or physical ability to perform the duties of building manager.

In a decision dated October 24, 2006, the hearing representative affirmed the September 26, 2005 decision.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent termination or modification of compensation benefits.² An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages but who is not totally disabled for all gainful employment is entitled to compensation computed on loss of wage-earning capacity.³

Under section 8115(a) of the Federal Employees' Compensation Act⁴ the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent his wage-earning capacity. If actual earnings do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his disabled condition.⁵

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fit the employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*⁶ and codified by regulation at 20 C.F.R. § 10.403⁷ should be applied.

ANALYSIS

The Office accepted that appellant sustained back strain and a herniated disc at L5-S1 due to a December 8, 1980 employment injury and paid him compensation for disability beginning January 26, 1981. The Office reduced his compensation based on its finding that he had the capacity to earn wages as a building manager for four hours per day from December 12, 1993 through June 17, 1996 and eight hours per day from June 18, 1996 through September 20, 2002.

² *John D. Jackson*, 55 ECAB 465 (2004).

³ 20 C.F.R. §§ 10.402, 10.403; see *Alfred R. Hafer*, 46 ECAB 553 (1995).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *John E. Cannon*, 55 ECAB 585 (2004).

⁶ 5 ECAB 376 (1953).

⁷ 20 C.F.R. § 10.403.

The Board finds that the Office improperly reduced appellant's compensation based on its finding that he could work as a building manager. In determining the availability of suitable employment, the evidence must demonstrate that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives.⁸ There is no evidence of record addressing whether the position of building manager was reasonably available within appellant's geographical location. In a December 31, 2002 report, a rehabilitation counselor noted that as appellant did not have a real estate license he would only be able to manage one property. She related, "An on site property manager is not required to have a real estate license. Those with the real estate license make more money. They also have more responsibilities. The position is considered light work." The rehabilitation counselor specified that wages were \$376.00 per week or \$9.40 per hour. She did not, however, provide an opinion on whether the position was reasonably available within appellant's commuting area. Further, it is unclear from the rehabilitation counselor's report whether the wages reported for the position referred to property managers with or without real estate licenses. The rehabilitation counselor also did not address the issue of whether the position of building manager was available on a part-time basis from December 12, 1993 through June 17, 1996. Additionally, she did not comment on whether the position was within appellant's vocational capability. Accordingly, as the Office failed to properly consider the factors enumerated in section 8115(a), it has not established that he had the capacity to perform the position of building manager.

The Board further finds that the Office failed to establish that the selection position was medically suitable from December 12, 1993 through June 17, 1996. In a work restriction evaluation dated December 23, 1991, Dr. Maxwell found that appellant could work three to four hours per day with no bending, squatting, climbing, kneeling, twisting or lifting over 10 pounds. He opined that appellant could intermittently sit for one to two hours per day and walk and stand for one hour per day. The Office found that, based on Dr. Maxwell's December 23, 1991 evaluation, appellant could perform the duties of the selected position of building manager for four hours per day from December 12, 1993 through June 17, 1996. The Department of Labor's *Dictionary of Occupational Titles*, however, identifies the position of building manager/superintendent as light work, which requires lifting up to 20 pounds occasionally and 10 pounds frequently.⁹ As this exceeds appellant's work restrictions of no lifting over 10 pounds, the position of part-time building manager from December 12, 1993 through June 17, 1996 was not medically suitable.

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation based on its finding that he had the capacity to earn wages as a building manager for four hours per day from December 12, 1993 through June 17, 1996 and eight hours per day from June 18, 1996 through September 20, 2002.

⁸ See *Lawrence D. Price*, 54 ECAB 590 (2003).

⁹ Department of Labor, *Dictionary of Occupational Titles* (4th ed. rev. 1991).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 24, 2006 is reversed.

Issued: March 13, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board