

debridement, subacromial decompression and distal clavicle excision. The surgery was authorized by the Office. Appellant returned to light-duty work for the employing establishment.

In June 21, 2005 reports, Dr. Newton stated that appellant's surgical wound was well healed. He had full active and passive motion of his arms with a positive left subacromial impingement sign and tenderness to palpation at the left acromioclavicular joint. Dr. Newton could return to work on June 21, 2005 with restrictions from lifting, pushing, pulling or carrying objects weighing more than 20 pounds. In an August 16, 2005 report, he indicated that appellant's left shoulder condition had improved but noted that he still had some pain and limited motion. Appellant's right arm had full range of motion. Dr. Newton restricted appellant from lifting more than 25 pounds with his left arm and from engaging in overhead lifting.¹

Appellant stopped work on October 1, 2005. The Office referred him for vocational rehabilitation services. In July 2006, appellant completed a 16-week residential property management course that was approved by the Office. The Office provided 90 days of placement services but appellant was not able to obtain employment in the property management field.

In December 2006, appellant's vocational rehabilitation counselor determined that, based upon his experience, education, medical restrictions and a labor market survey, appellant was able to work as a building superintendent. The position involved directing workers in the operation and maintenance of facilities and required occasional lifting of up to 20 pounds and frequent handling of objects weighing up to 10 pounds. The job did not require overhead work. A labor market survey revealed that the position was reasonably available in appellant's commuting area.

In a June 1, 2007 report, Dr. Newton indicated that appellant had pain and mildly decreased range of motion in both his right and left shoulders. He recommended restrictions for the right and left shoulders of no lifting, pushing, pulling, or carrying objects weighing more than 25 pounds and no repetitive overhead lifting. In July 2007, appellant's counselor performed another labor market survey which showed that the building superintendent position was reasonably available in his commuting area.

In an August 7, 2007 report, Dr. Newton indicated that appellant reported that his left shoulder pain had improved significantly and his right shoulder pain had also improved but "the right shoulder at this point is the most significant concern." Physical examination of the right shoulder revealed tenderness to palpation to the acromioclavicular joint and over the anterolateral right shoulder. Dr. Newton diagnosed shoulder impingement syndrome and acromioclavicular joint arthritis. He recommended restrictions of no pushing, pulling, carrying or lifting of objects weighing more than 25 pounds. In a March 18, 2008 report, Dr. Newton recommended permanent restrictions for the right shoulder of no pushing, pulling or carrying objects weighing more 25 pounds and no lifting to or above shoulder level. He did not specifically indicate that appellant had left shoulder restrictions.

In early March 2008, appellant's counselor performed another labor market survey which showed that the building superintendent position was reasonably available in appellant's

¹ Appellant performed light-duty work for the employing establishment during this period.

commuting area and that the average week wage was \$627.40 per week. In a May 14, 2008 letter, the Office advised appellant of its proposed reduction of his compensation based on his ability to work as a building superintendent. It provided appellant with 30 days to provide evidence and argument if he disagreed with this proposed action.

In a June 16, 2008 decision, the Office reduced appellant's compensation effective June 16, 2008 based on his capacity to earn wages as a building superintendent.²

Appellant requested a review of the written record before an Office hearing representative. In several statements, he argued that the adjustment of his compensation was improper because he had been unsuccessful in obtaining a job. Appellant asserted that there were no positions available in the declining real estate field.³ In a November 18, 2008 decision, the Office hearing representative affirmed the June 16, 2008 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁴ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.⁶ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁷ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁸

² The Office applied the principles set forth in *Albert C. Shadrick*, 5 ECAB 376 (1953), to determine the percentage of appellant's loss of wage-earning capacity.

³ Appellant did not submit any additional medical evidence.

⁴ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁵ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁷ *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

⁸ *Id.*

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or 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 labor market, that fits that 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 open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁹

In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury.¹⁰ In determining wage-earning capacity based on a constructed position, consideration is not given to conditions which arise subsequent to the employment injury.¹¹ The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area.¹²

ANALYSIS

The Office accepted that appellant sustained a thoracic strain, left shoulder strain and left rotator cuff strain while lifting a bag onto a table at work. Dr. Newton, an attending Board-certified orthopedic surgeon, performed left shoulder surgery including intra-articular debridement, subacromial decompression and distal clavicle excision. The Office reduced appellant's compensation effective June 16, 2008 based on his capacity to earn wages as a building superintendent.

After appellant stopped work in October 2005, the Office received information from Dr. Newton advising that he could work within specified restrictions. In a June 1, 2007 report, Dr. Newton found that appellant had pain and mildly decreased range of motion in both his right and left shoulders. He recommended restrictions for the right and left shoulders of no lifting, pushing, pulling, or carrying objects weighing more than 25 pounds and no repetitive overhead lifting. In an August 7, 2007 report, Dr. Newton noted that appellant reported that his right shoulder was his most significant concern and recommended restrictions of no pushing, pulling, carrying, lifting of objects weighing more than 25 pounds. In a March 18, 2008 report, he recommended permanent restrictions for the right shoulder of no pushing, pulling, or carrying objects weighing more than 25 pounds and no lifting to or above shoulder level. The Board notes that appellant's claim was not accepted for a right shoulder condition. The Board notes

⁹ See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

¹⁰ See *Jess D. Todd*, 34 ECAB 798, 804 (1983).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

¹² See *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

that the medical evidence reveals that appellant did not develop right shoulder problems until after his May 24, 2004 work injury. Therefore, consideration would not be given to his right shoulder condition in determining wage-earning capacity based on a constructed position.¹³

Appellant's vocational rehabilitation counselor determined that, based upon his experience, education, medical restrictions, and a labor market survey, appellant was able to work as a building superintendent. The position involved directing workers in the operation and maintenance of facilities and required occasional lifting of up to 20 pounds and frequent handling of objects weighing up to 10 pounds. The job did not require overhead work. Labor market surveys revealed that the position was reasonably available in appellant's commuting area and that the average salary was \$627.40 per week.¹⁴

The Board finds that Dr. Newton's work restrictions establish that appellant is able to perform the building superintendent position. The job duties and physical requirements of the position are well within the work restrictions outlined by Dr. Newton.¹⁵ There is no medical evidence establishing that appellant is not physically capable from performing the building superintendent position. Appellant's vocational rehabilitation counselor properly determined that appellant was able to perform the position of building superintendent. The state employment services contact showed the position was available in sufficient numbers so as to make it reasonably available within his commuting area. The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the building superintendent position.¹⁶ Appellant did not submit any evidence or argument to establish that he could not vocationally or physically perform the building superintendent position. The fact that he did not obtain employment does not show that the building superintendent position was not reasonably available. The Board has held that the fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area.¹⁷

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of building superintendent represented appellant's wage-earning capacity.¹⁸ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of building superintendent and that such a position was reasonably available within the general labor market of his commuting

¹³ See *supra* note 11.

¹⁴ Appellant's vocational rehabilitation counselor undertook several labor market surveys, the last being performed in March 2008.

¹⁵ The job only required lifting up to 20 pounds and did not require overhead work.

¹⁶ Moreover, appellant completed an Office-approved course which trained him for the job.

¹⁷ See *supra* note 12.

¹⁸ See *Clayton Varner*, 37 ECAB 248, 256 (1985).

area.¹⁹ Therefore, the Office properly reduced appellant's compensation effective June 16, 2008 based on his capacity to earn wages as an building superintendent.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective June 16, 2008 based on his capacity to earn wages as a building superintendent.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' November 18 and June 16, 2008 decisions are affirmed.

Issued: September 28, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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

¹⁹ Moreover, the Office applied the principles set forth in *Shadrick* to determine the percentage of appellant's loss of wage-earning capacity. *See supra* note 9.