

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**D.M., Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
TRANSPORTATION SECURITY  
ADMINISTRATION, Dallas, TX, Employer**

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**Docket No. 08-674  
Issued: August 22, 2008**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 9, 2008 appellant filed a timely appeal from the September 28, 2007 merit decision of the Office of Workers' Compensation Programs, which reduced her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

**ISSUE**

The issue is whether the Office properly reduced appellant's compensation to reflect a capacity to earn wages in the constructed position of property manager.

**FACTUAL HISTORY**

On October 20, 2004 appellant, then a 40-year-old transportation security screener, sustained a left knee injury in the performance of duty: "Heavy bags -- extensive standing -- bending ? knee began to have pain and burning sensation -- swelling at knee cap, burning at back of knee." The Office accepted her claim for left knee strain and paid compensation for

temporary total disability on the periodic rolls. It approved a March 17, 2005 arthroscopy with a chondroplasty of the patella and synovectomy. The Office expanded its acceptance to include internal derangement of the left knee and medial meniscus tear. Appellant received a schedule award for a five percent permanent impairment of her left lower extremity.

On July 15, 2005 appellant underwent a functional capacity evaluation. Three days later her orthopedic surgeon reported that she could return to work with permanent restrictions against lifting more than 20 pounds from floor to knuckle or lifting more than 25 pounds from waist to overhead. He discharged her from regular medical attention.

When the employing establishment declined to offer appellant modified employment, the Office referred her for vocational rehabilitation services. The rehabilitation counselor conducted a labor market survey. Based upon the medically determinable residuals of the injury, and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, the rehabilitation counselor found that appellant was able to perform the job of property manager. The rehabilitation counselor found that appellant met the specific vocational preparation requirement, as this was the same job she had held for 10 years in the private sector. The rehabilitation counselor confirmed that the position was being performed in sufficient numbers so as to make it reasonably available to appellant within her commuting area. On March 30, 2007 the rehabilitation counselor provided the Office with the latest wage and local employment information.

On April 25, 2007 Dr. Richard Colyer, a specialist in emergency medicine and appellant's attending physician, reported that his physical examination of her left knee was within normal limits: healed scars; nontender; no effusion; no swelling; full range of motion; no ligament instability. Lower extremity reflexes were symmetrical; sensation normal; neurovascular intact; full strength 5/5. Although appellant reported continued pain in her left lower extremity and ankle, as well as right hip pain and difficulty sleeping at night secondary to pain, Dr. Colyer concluded that "the effects of the work injury have ceased at this time." Based on the functional capacity evaluation performed on July 15, 2005, he recommended a "light-medium" physical demand level with limited lifting from floor to knuckle at 20 pounds or less and lifting from waist to overhead at 25 pounds. Dr. Colyer recommended that appellant pursue complaints unrelated to her left knee with her primary physician.

On August 22, 2007 the Office notified appellant that it proposed to reduce her compensation for wage loss because the evidence showed she was not totally disabled for all work and had the capacity to earn wages as a property manager. It noted that her capacity to earn wages in the position was greater than the current pay of the job she held when she was injured, so she no longer had a loss of wage-earning capacity. The Office proposed to reduce her compensation for wage loss to zero.

Appellant argued that the constructed position of property manager was not medically suitable because of inclines and grades on the sites, required use of stairways and duties that exceeded her medical restrictions. She explained that her duties would require her to climb stairs and walk through units to inspect the work of contractors and vendors. Appellant stated that she was not physically capable of removing property from a unit during an eviction and could not perform other duties that might be necessary, such as purchasing a 10-ream box of standard

paper, which weighs over 50 pounds, or securing an 80-pound television as a lien against unpaid rent. She stated that she was intellectually and vocationally capable of being hired at a lower level to achieve over time the position of property manager, but that medically she was not suited to either. Appellant stated that her physical limitations would likely result in heavy burdens on staff members beneath her and “will cause termination of my held position by the company.”

In a decision dated September 28, 2007, the Office reduced appellant’s compensation for wage loss to reflect a capacity to earn wages in the constructed position of property manager.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>1</sup>

The Federal Employees’ Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>2</sup> “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.<sup>3</sup>

In determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings, if actual earnings fairly and reasonably represent a wage-earning capacity. If the actual earnings do not fairly and reasonably represent a wage-earning capacity or if the employee has no actual earnings, the employee’s wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of the injury, the degree of physical impairment, the employee’s usual employment, age and qualifications for other employment, the availability of suitable employment and other factors or circumstances that may affect wage-earning capacity in the employee’s disabled condition.<sup>4</sup>

When the Office makes a medical determination of partial disability and of the 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 labor market, that fits the employee’s capabilities in light of his or her 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 *Albert C. Shadrick* will result in the percentage of the employee’s loss of wage-earning capacity.<sup>5</sup>

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<sup>1</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> 20 C.F.R. § 10.5(f) (1999).

<sup>4</sup> 5 U.S.C. § 8115(a).

<sup>5</sup> *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

## ANALYSIS

Following her employment injury on October 20, 2004, appellant received compensation for temporary total disability. At the time of her July 15, 2005 functional capacity evaluation, her disability had become only partial. Appellant's orthopedic surgeon released her to return to work with permanent lifting restrictions. On April 25, 2007 Dr. Colyer, the attending physician, confirmed that appellant remained partially disabled for work. He repeated the lifting restrictions and recommended a position with a light-to-medium physical demand level.

Given this information, and the fact that appellant had no actual earnings from modified employment at the employing establishment or from a successful placement with a private employer, the Office appropriately referred her to an Office rehabilitation specialist for the selection of a position that fit her capabilities in light of her physical limitations, education, age and prior experience. As the rehabilitation specialist is an expert in the field of vocational rehabilitation, the Office may rely on his or her opinion as to whether a job is vocationally suitable and reasonably available.<sup>6</sup>

The rehabilitation counselor selected the job of property manager from the *Dictionary of Occupational Titles*. The job's physical demand level fit Dr. Colyer's recommendation. It was sedentary to light and required only occasional lifting up to 20 pounds. Appellant also met the job's specific vocational preparation requirement. She had previously worked as a property manager in the private sector. In addition to endorsing the vocational suitability of the job, the rehabilitation counselor confirmed that the job was being performed in sufficient numbers so as to make it reasonably available to appellant within her commuting area.

Appellant objected to the constructed position contending that, it is not medically suitable. But she based her objections on physical demands that do not appear in the *Dictionary of Occupational Titles*, such as lifting 80-pound televisions or 50-pound boxes of office paper. The job of property manager is classified as sedentary or light, and the position description makes clear that the property manager arranges for management services and employs or contracts for services, including on-site management personnel if required. There is nothing in the description that implies the manager must assist contractors or vendors or staff members with any heavy lifting that might be required. Appellant's argument that she would be fired for placing a heavy burden on staff members is speculative and without basis in the record.

The Board finds that the Office met its burden to justify a reduction of appellant's compensation for temporary total disability. The Office gave due regard to appropriate factors and properly determined appellant's wage-earning capacity as appeared reasonable under the circumstances. Because the latest wage information showed that the average weekly wage for a property manager exceeded the current pay for appellant's date-of-injury position, the Office properly reduced appellant's compensation for wage loss to zero. Appellant no longer had an incapacity, because of the employment injury, to earn the wages she was receiving at the time of injury. The Board will affirm the Office's September 28, 2007 decision.

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<sup>6</sup> *Wilson Clow, Jr.*, 44 ECAB 157 (1992).

**CONCLUSION**

The Board finds that the Office properly reduced appellant's compensation to reflect her capacity to earn wages in the constructed position of property manager.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 28, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 22, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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