

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RICHARD W. RUSK and GENERAL SERVICES ADMINISTRATION,  
ANACOSTIA FIELD OFFICE, Washington, DC

*Docket No. 98-2171; Submitted on the Record;  
Issued May 15, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had a 21 percent loss of wage-earning capacity.

On April 14, 1986 appellant, then a 47-year-old pipefitter, was attempting to unscrew a steam pipe with a pipe wrench while standing on a ladder when the ladder buckled. Appellant developed pain in his left shoulder and neck. He stopped working on April 15, 1986 and received continuation of pay from that date until May 29, 1986. The Office accepted appellant's claim for an acute left trapezius muscle strain, herniated and impingement of the left shoulder. A June 24, 1986 magnetic resonance imaging scan showed a herniated C6-7 disc as well as degenerative disc disease. The Office accepted appellant's claim for the herniated cervical disc. The Office paid temporary total disability compensation from May 30 through September 14, 1986. Appellant returned to work on September 16, 1986. He stopped work again in December 1986. The Office resumed payment of temporary total disability compensation retroactive to December 17, 1986. On April 2, 1987 appellant underwent a C6-7 discectomy and fusion. On March 25, 1988 appellant underwent arthroscopic surgery of his left shoulder which included a partial synovectomy of the shoulder, a partial acromionectomy and division of the coracoacromial ligament. On December 18, 1990 appellant began work as a bridge inspector for a private company. He was fired from the job effective August 22, 1991 for repeated failures to cover inspections. He received compensation for a loss of wage-earning capacity based on actual earnings for the period of his employment and resumed receipt of temporary total disability compensation thereafter. In a December 12, 1991 decision, the Office issued a schedule award for a six percent permanent impairment of the left arm.

In an April 3, 1998 decision, the Office found appellant could perform the duties of a construction inspector<sup>1</sup> and therefore had a 21 percent loss of wage-earning capacity.

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<sup>1</sup> Department of Labor's *Dictionary of Occupational Titles*, DOT No. 182.267-010.

Appellant's compensation was reduced in accordance with the loss of wage-earning capacity determination as of March 28, 1998.

The Board finds the Office properly determined appellant's loss of wage-earning capacity.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications, and the availability of suitable employment.<sup>2</sup> Accordingly, the evidence must establish 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. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.<sup>3</sup>

An official from the state employment service indicated that the job was performed in sufficient numbers so as to be reasonably available within appellant's commuting area. The Office noted that, in addition to his work as an inspector, appellant had been self-employed as a sub-contractor from January 1978 to April 1980 and as a mechanical contractor in March 1983 and September 1985. This job experience showed appellant had the one to two years of vocational background to perform the duties of the job.

The position of construction inspector is a light-duty position, requiring the ability to lift up to 20 pounds, climb, balance, stoop, kneel, crouch, reach, handle, finger, feel, talk, hear and see. In a December 6, 1996 report, Dr. Ramesh G. Chandra, a Board-certified orthopedic surgeon, indicated that appellant had full mobility of the cervical spine with no evidence of paraspinal or muscle spasm and good strength in the left shoulder with a full range of motion. He commented that appellant could not return to work as a pipefitter but should be able to perform other occupational duties. He stated appellant had no limitations except for repetitive, overuse functions of the left arm. Appellant therefore has the physical capacity to perform the duties of a construction inspector.

Appellant's attorney contended that appellant had interviewed for jobs as a construction inspector but had not been hired because of his current age of 59 and his history of receiving compensation. The attorney stated that appellant could document his attempts to seek employment. No such documentation was submitted, however. While age is one factor to be taken into account in determining wage-earning capacity, appellant has not submitted any evidence, such as statements from those conducting interviews, that his age prevented him from being hired as a construction inspector.<sup>4</sup> There is no evidence of record to contradict the

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<sup>2</sup> See generally, 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989).

<sup>3</sup> *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

<sup>4</sup> Moreover, the fact that a claimant is unsuccessful in obtaining a job in the selected position does not establish that the work is not reasonably available in the area; see *Dennis D. Owen*, 44 ECAB 475 (1993).

findings that appellant could perform the duties of a construction inspector, physically and vocationally, and that the job was reasonably available within his commuting area.

The decision of the Office of Workers' Compensation Programs, dated April 3, 1998, is hereby affirmed.

Dated, Washington, D.C.  
May 15, 2000

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Michael E. Groom  
Alternate Member