

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JERRY L. BETRO and DEPARTMENT OF LABOR, OCCUPATIONAL
SAFETY & HEALTH ADMINISTRATION, San Diego, CA

*Docket No. 00-2564; Submitted on the Record;
Issued July 2, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether appellant established that his ear condition is causally related to factors of his federal employment.¹

On October 6, 1992 appellant, then a 47-year-old industrial hygienist, filed an occupational disease claim alleging that his otitis media was caused by factors of his employment.

In a decision dated October 27, 1993, the Office of Workers' Compensation Programs denied appellant's claim on the grounds that the medical evidence of record was insufficient to establish that appellant sustained an injury while in the performance of his duties.

By letter dated October 1, 1994, appellant requested reconsideration. The Office denied appellant's request on January 20, 1995. On August 13, 1996 appellant again requested reconsideration noting that he had not received a reply to his October 1, 1994 request. The Office on November 21, 1996 denied appellant's request and he appealed to the Board, which remanded the case for consideration of appellant's August 13, 1996 request for reconsideration. The Board found that the Office's January 20, 1995 decision was sent to the incorrect address and thus "was never properly issued."²

On remand, the Office requested an opinion from the Office medical adviser on whether appellant's medical records supported a work-related ear condition. In a report dated February 13, 2000, the Office medical adviser stated "that flying aggravated the symptoms but did not cause, aggravate, accelerate or precipitate the underlying otitis media or Eustachian tube dysfunction."

¹ The record contains a memorandum to the Director dated July 12, 1993 with appellant's claim number. That memorandum does not address appellant's claim for otitis media.

² Docket No. 97-2123 (January 5, 2000).

By decision dated May 10, 2000, the Office denied appellant's August 13, 1996 request for reconsideration on the grounds that the medical evidence failed to establish that appellant sustained an ear condition while in the performance of duty. In an attached memorandum, the Office noted that none of the medical reports supported a causal relationship between appellant's otitis media and his employment.

The Board finds that this case is not in posture for decision.

Appellant noted in his personal statement that he had flown from his temporary duty station in San Diego to his home in Sacramento, California on several weekends from July to September 1992. The record reveals that the employing establishment paid for appellant's trip on September 4, 1992. During this time, appellant had the flu, which developed into an ear infection following his flight home on September 4, 1992.

On February 3, 1993 the Office asked appellant to submit a "medical report that provides an opinion on the relationship of your flying during the period of June to September to the condition of otitis media" and a medical opinion on whether his "condition could have progressed to the stage requiring surgery independently" had he not flown.³

In a report dated March 11, 1993, Dr. John Champlin, Board-certified in occupational medicine, stated that appellant's mild and intermittent Eustachian tube dysfunction "only seriously became a problem in the several months preceding September 5, 1992." He added that appellant's "Eustachian tube dysfunction was coincident with his travelling by air on a regular basis pursuant to his job and resulted in my advising him not to seek air transportation on September 5, 1992 for a period of several weeks." Dr. Champlin then noted appellant's "semi-urgent tympanotomy" and opined that appellant "will be likely to have further problems with this if he is required on a regular basis to fly, especially during times when he has an acute upper respiratory tract infection."

On March 25, 1993 the Office asked Dr. Richard D. Fantozzi, a Board-certified otolaryngologist, to address "the relationship of [appellant's] flying during June to September to his condition of otitis media. Could his condition [have] progressed to the stage of requiring surgery independently had he not been flying?"

In response, Dr. Fantozzi submitted a report dated November 5, 1992 and received by the Office on April 12, 1993, in which he stated that he had examined appellant in September 1992 for "significant ear fluid as a result of recent flu and flying" and that he was treated with tympanotomy tube and drainage. Appellant was counseled that he had a significant septal fracture and was advised to have this considered for repair."

In its May 10, 2000 decision, the Office stated that neither Dr. Champlin nor Dr. Fantozzi provided an opinion either on the cause of appellant's ear infection or whether it was caused by his employment.

³ The Board notes that appellant had had tubes placed in his ears on September 18, 1992 in San Diego, three months before the Office asked appellant's doctors their opinions about surgical intervention.

Although Dr. Champlin did not specifically address the Office's question regarding whether appellant's condition could have required surgery without flying, he did state that appellant's ear condition was coincident with his regular, work-related air travel and he also recommended that appellant not travel by air, a constraint which strengthens the causal relationship between appellant's ear condition and the effects of air travel.

Further, although the Office stated that Dr. Fantozzi did not offer an opinion on the cause of appellant's infection, he did address the relationship of appellant's flying during June to September to his ear condition when he stated that he had treated appellant for "significant ear fluid as a result of recent flu and flying." Although his statement regarding the relationship between the medical condition and flying could be clarified, the initial question did not, as the Office implied, request his opinion on the cause of the condition.⁴

While the reports by Drs. Champlin and Fantozzi are not sufficient to carry appellant's burden of proof to establish that his otitis media is causally related to employment, this medical evidence raises an inference of causal relationship between appellant's condition and his employment and is sufficient to require further development of the case record by the Office.⁵ Dr. Champlin was asked an opinion on the relationship of appellant's flying during to the condition of otitis media and he replied that appellant's ear condition was coincident with his regular work pursuant to his job. The Office, however, stated that Dr. Champlin did not offer an opinion that appellant's condition was caused by his employment. Indeed, the Office merely asked what the relationship was between his ear condition and his flying, not the cause of his condition.⁶

Similarly, the Office stated that Dr. Fantozzi "provided no opinion on the cause" of appellant's condition or its relationship to his employment. However, the question that the Office asked was not about the cause of appellant's condition, but the relationship of his condition and his flying. Dr. Fantozzi replied that appellant had a "significant ear fluid as a result of recent flu and flying."

The Board finds that the physicians attempted to respond to the Office's inquiries and that the Office should have developed these responses more fully. Both physicians found a relationship between appellant's condition and his flying which should have prompted the Office to request further explanation or to refer appellant to a second opinion physician. The case will, therefore, be remanded to the Office.

⁴ The Office, in its October 27, 1993 decision, stated that the claims examiner, in his questions to Dr. Fantozzi, was "attempting to determine if the otitis media was bacterial infection, how flying materially aggravated the condition versus increasing symptoms due to pressure change." The record does not reveal any questions designed to elicit responses of this nature from Dr. Fantozzi.

⁵ See *John J. Carlone*, 41 ECAB 354 (1989).

⁶ The record does not include a letter from the Office to Dr. Champlin, rather it includes a letter to appellant, in which the Office requested he submit a report from his doctor, which included an opinion of the relationship of his flying to his ear condition and an opinion as to whether he would have required surgery had he not flown.

On remand, the Office should prepare a statement of accepted facts and refer appellant, the statement of accepted facts and a copy of the medical record to an appropriate specialist for an examination of appellant and a rationalized medical opinion on whether appellant's otitis media was caused or aggravated by factors of his federal employment. After such further development as it may deem necessary, the Office shall issue a *de novo* decision.

The May 10, 2001 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded to the Office for further proceedings.

Dated, Washington, DC
July 2, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member