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

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| **GARY F. BEAMAN, Appellant** | ) | |
| **and** | ) | **Docket No. 04-352** |
| | ) | **Issued: July 1, 2004** |
| **U.S. POSTAL SERVICE, POST OFFICE, Des Moines, IA, Employer** | ) | |

*Appearances:*
*Martin Ozga, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

### ***JURISDICTION***

On November 24, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated October 16, 2003, denying his recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

### ***ISSUE***

The issue is whether appellant sustained a recurrence of disability on August 29, 2001 causally related to his November 6, 1986 employment injury.

### ***FACTUAL HISTORY***

On November 6, 1986 appellant, then a 39-year-old acting maintenance supervisor, filed a traumatic injury claim alleging that on that date his ears were injured when a coworker cupped

his hands over appellant's ears and slapped them several times.[1] The Office accepted his claim for a left tympanic membrane perforation with conductive hearing loss and subsequent otitis media of the left ear.[2] On December 19, 1991 the Office granted a schedule award for a 34 percent hearing loss in the left ear. Effective February 2, 1993, appellant was granted disability retirement.

In a July 22, 1987 report, Dr. Robert G. Smits, a Board-certified otolaryngologist, stated that appellant's ears were free of infection, but he continued to have a large perforation of the left tympanic membrane. He recommended surgical repair of the eardrum. In a December 1, 1988 report, Dr. Smits noted a large central perforation of the left ear and recommended tympanoplasty to repair the hole in the eardrum along with reconstruction of the ossicular chain to improve appellant's hearing.

In a narrative report dated May 22, 1989, Dr. Daniel J. Blum, a Board-certified otolaryngologist and an Office second opinion physician, indicated that appellant had a history of otitis media treated in the right ear by myringotomy and insertion of a ventilation tube in the left ear by a mastoidectomy with reconstructive surgery in 1969. He stated that appellant's preexisting otitis media was essentially cured by the 1969 surgery as evidenced by multiple hearing tests and physical examinations which also documented a marginal perforation in the right tympanic membrane that had persisted. Dr. Blum indicated that appellant likely developed barotrauma to the left ear on November 6, 1986 as evidenced by injection and erythema and subsequently developed middle ear swelling that became infected and ruptured the tympanic membrane. Dr. Blum stated:

> "I believe the diagnosis should be: (1) large left tympanic membrane perforation with conductive hearing loss due to barotrauma of the left ear with subsequent otitis media as a result of the [November 6, 1986] incident; (2) preexisting [right ear] posterior superior quadrant marginal tympanic membrane perforation that is unrelated to the [November 6, 1986] incident.
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> "Based upon the information available, appropriate definitive therapy would consist of a left tympanoplasty with ossicular chain reconstruction. Appropriate treatment of the right ear would consist of simple tympanoplasty with closure of the marginal tympanic membrane perforation if normal eustachian tube dysfunction can be documented. As stated earlier, I do not believe the right tympanic membrane perforation is the result of the [November 6, 1986] incident."

[1] A November 6, 1986 emergency room report noted that a coworker approached appellant from behind and cupped his hands over appellant's ears causing pain in the left ear. The diagnosis was a possible ruptured tympanic membrane. In notes dated November 14, 1986, a Dr. Tvedte indicated that on November 6, 1986 an individual struck his cupped hands over appellant's ears and caused a possible tear in the left tympanic membrane.

[2] The Federal Employees' Compensation Act nonfatal summary in this case indicates that the Office accepted the conditions of bilateral tympanic membrane perforation (with the right ear perforation healed as of September 25, 1990), chronic mastoiditis and otitis media.

On March 9, 1990 the Office authorized a left tympanoplasty with ossicular chain reconstruction, but advised that appellant's right ear condition was found to be unrelated to the November 6, 1986 employment injury and, therefore, treatment of the right ear was not authorized. Appellant underwent left tympanoplasty on September 25, 1990.

By decision dated February 1, 1993, the Office denied appellant's claim for a right ear injury on the grounds that the evidence of record did not establish that this condition was causally related to his November 6, 1986 employment injury.

In a September 29, 2001 narrative report, Dr. Blum noted that appellant had an extensive history of prior ear disease and post-traumatic injury of the ears with chronic tympanic membrane perforation on the right recently complicated by chronic drainage and decreased hearing bilaterally. He noted that appellant had undergone two surgical procedures on his left ear, an atticotomy and a tympanoplasty for removal of an attic cholesteatoma and repair of the eardrum. Dr. Blum provided findings on examination and diagnosed chronic otorrhea on the right, chronic marginal right posterior tympanic membrane perforation, bilateral hearing loss, left middle ear atelectasis on the left, status post left tympanoplasty with a history of atticotomy or mastoid surgery on two previous occasions and localized focus of apparent cholesteatoma[3] that appeared to involve the tympanic membrane, but underlying attic or mastoid disease could not be ruled out. He opined that appellant should have computerized tomography scanning of the temporal bones with subsequent removal of the cholesteatoma on the left.

By letter dated June 2, 2002, appellant requested reconsideration of the Office's decision denying his claim for a right ear injury and he requested authorization for surgery on his left ear to remove the cholesteatoma. He provided additional medical evidence.

In a progress note dated March 7, 2002, Dr. Blum provided findings on examination and diagnosed tympanic membrane perforation on the right, postoperative changes of the left middle ear, mastoid and ear canal with an intact tympanic membrane and marked retraction, middle ear fluid and a small pearl of cholesteatoma. He indicated that he had observed the cholesteatoma the previous year and it had increased in size since then. Dr. Blum recommended surgical removal of the cholesteatoma and tympanoplasty.

On May 16, 2003 appellant claimed a recurrence of disability on August 29, 2001 for chronic otitis media, bilateral tympanic perforations and hearing loss causally related to his November 6, 1986 employment injury. He did not stop work.

By decision dated July 8, 2003, the Office denied appellant's recurrence of disability on the grounds that the evidence did not establish that his recurrence of disability was causally related to his November 6, 1986 employment injury. The Office indicated that the medical evidence failed to explain how appellant's left ear conditions were causally related to his November 6, 1986 employment injury rather than his preexisting ear conditions.

[3] A tympanic cholesteatoma is a cystlike mass filled with desquamating (shedding) debris (usually skin) associated with chronic infection of the middle ear. *See* DORLAND'S *Illustrated Medical Dictionary*, 323-24, 456 (27th ed. 1988).

Appellant requested reconsideration and submitted additional evidence.

In a July 14, 2003 narrative report, Dr. Blum stated that he had treated appellant for chronic otorrhea of the right ear with perforation, mixed hearing loss bilaterally, eustachian tube dysfunction on the left and localized cholesteatoma of the left tympanic membrane. He noted that as of March 7, 2002 the left ear cholesteatoma had become enlarged and surgical excision was recommended. Dr. Blum stated:

> "Regarding an opinion of the relationship between [appellant's] current left ear condition and the work-related injury of [November 6, 1986], it is my opinion that his current slowly progressive cholesteatoma is a consequence of his injury of [November 6, 1986] or the surgical repair that was necessitated by the injury.

On September 30, 2003 an Office claims examiner asked Dr. Daniel D. Zimmerman, an internist and an Office medical adviser, to review the case file and provide an opinion as to whether Dr. Blum's July 14, 2003 report provided sufficient medical rationale to establish any additional left ear condition as causally related to the November 6, 1986 employment injury.

In an October 6, 2003 report, Dr. Zimmerman indicated that, when appellant underwent a left tympanoplasty in September 1990, there was no mention of a cholesteatoma. He noted Dr. Blum's May 22, 1989 diagnosis of a large left tympanic membrane perforation due to barotrauma with subsequent otitis media, but opined that there was insufficient explanation as to how the left ear cholesteatoma was caused by the 1986 trauma to the ears or the 1990 surgery, "particularly, when it is clear that the cholesteatoma was not present in 1986, 1989 or 1990 and may have been at least in part, the reason for the [left] mastoidectomy years before the incident of 1986." Dr. Zimmerman stated:

> "On October 21, 1991 [appellant] reported a 'history of long-standing bilateral chronic otitis media since childhood, currently in inactive status' as reported by [Dr.] Smith. A long history of otitis media since childhood is the cause of [appellant's] current (as of March 7, 2002) increase in the size of the cholesteatoma as reported by [Dr.] Blum.
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> "[The Office] cannot authorize any operative procedure on the [left] ear.
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> "A cholesteatoma develops as a consequence of long-standing ear infections, not the trivial trauma of [November 6, 1986]."

By decision dated October 16, 2003, the Office denied modification of its July 8, 2003 decision. The Office indicated that the evidence of record did not establish that appellant's November 6, 1986 employment injury caused his left ear cholesteatoma.

## ***LEGAL PRECEDENT***

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and

probative evidence, that the disability for which compensation is claimed is causally related to the accepted injury.[4] This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.[5]

## ***ANALYSIS***

The Board finds that this case is not in posture for a decision due to a conflict in medical opinion, necessitating referral to an impartial medical specialist pursuant to section 8123(a) of the Act.[6]

Section 8123(a) of the Act provides, in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[7]

Dr. Blum was a second opinion physician for the Office in this case initially, regarding the issue of whether appellant had a work-related right ear condition and whether surgery on the left ear was appropriate. However, he later became a treating physician for appellant regarding his left ear cholesteatoma condition and other left ear conditions. Therefore, the Board finds that Dr. Blum is a treating physician for appellant regarding the issue of causal relationship between the left ear cholesteatoma condition and the November 6, 1986 employment injury.

Dr. Blum indicated in his July 13, 2003 report that appellant's left ear cholesteatoma was causally related to his November 6, 1986 employment injury or to subsequent left ear surgery. In reports dated September 29, 2001 and March 7, 2002, he related that the left ear cholesteatoma was related to appellant's accepted left tympanic membrane perforation and otitis media and postoperative changes of the left middle ear and noted that the cholesteatoma had increased in size. Dr. Zimmerman, the Office district medical adviser, opined that appellant's left ear cholesteatoma was not related to the November 6, 1986 employment injury and was due to long-standing ear infections rather than the ear slapping incident on November 6, 1986.

The reports of Drs. Blum and Zimmerman[8] constitute a medical conflict on the issue of whether appellant's left ear cholesteatoma was work related and whether he sustained a

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[4] *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

[5] *Lourdes Davila*, 45 ECAB 139 (1993); *Mary S. Brock*, 40 ECAB 461 (1989).

[6] 5 U.S.C. § 8123(a).

[7] *Id.*; *see also Raymond A. Fondots*, 53 ECAB ___ (Docket No. 01-1599, issued June 26, 2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

[8] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.7(e) (April 1993), (stating that an Office medical adviser may create a conflict in medical opinion necessitating referral to an impartial medical specialist); *see also Debra S. Judkins*, 41 ECAB 616 (1990).

recurrence of disability on August 29, 2001 causally related to his November 6, 1986 employment injury requiring referral to an impartial medical specialist to resolve the conflict.

## ***CONCLUSION***

This case will be remanded for the Office to refer appellant, the case record and a statement of accepted facts to an appropriate impartial medical specialist for the purpose of resolving the conflict as to whether his left ear cholesteatoma was causally related to his November 6, 1986 employment injury. After this and such further development as it deems necessary, the Office shall issue a *de novo* decision.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 16 and July 8, 2003 are set aside and the case is remanded for further action consistent with this decision.

Issued: July 1, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member