United States Department of Labor
Employees' Compensation Appeals Board

S.C., Appellant	)	
and	)	**Docket No. 07-822**
	)	**Issued: July 10, 2007**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS BORDER PROTECTION, Miami, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 7, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated April 25, 2006 denying his claim for compensation. He also timely appealed a decision of the Branch of Hearings and Review dated November 22, 2006 finding that he had abandoned his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has met his burden of proof in establishing that he was totally disabled from May 1 to July 7, 2005; and (2) whether the Office properly determined that appellant had abandoned his request for a hearing.

FACTUAL HISTORY

On May 22, 2004 appellant, then a 47-year-old immigration inspector, filed a traumatic injury claim alleging that on May 21, 2004 he slipped and fell in the employing establishment

parking lot while in the performance of duty. He returned to light-duty work on July 8, 2004. The Office accepted appellant's claim for contusion of the right hand, contusion wrist, contusion right hip and contusion to right chest on August 4, 2004.

In a letter dated May 1, 2005, appellant requested one year of leave without pay from the employing establishment to recover from his injuries. He filed a claim for compensation requesting compensation for leave without pay from May 1 to July 7, 2005. In support of his claim, appellant submitted a note dated May 5, 2005 from Dr. Mark A. Vacker, a Board-certified family practitioner, describing neck pain and right iliac bone discomfort. The employing establishment denied appellant's request for leave without pay and he resigned from the employing establishment effective July 14, 2005. The Office accepted the additional conditions of cervical and lumbar strains as due to appellant's May 21, 2004 employment injury on February 13, 2006.

On March 22, 2006 the Office requested additional information in support of appellant's claimed period of disability. In a report dated March 20, 2006, Dr. J. Michael Hemphill, a Board-certified neurologist, noted appellant's history of injury and performed a physical examination. Dr. Hempill found that appellant's neurological examination and electromyelogram was normal. He recommended physical therapy and a magnetic resonance imaging scan.

Dr. Vacker completed a note on April 21, 2005 and described appellant's symptoms of chronic back and neck pain following his employment injury. He found tenderness in the cervical and thoracic spines. Dr. Vacker examined appellant on May 5, 2005 and noted that appellant was scheduled for a series of injections. He stated: "[P]ain is chronic debilitation, patient was considering leaving work, he had instead decided to apply on FMLA [Family Medical Leave Act] to see if he improves with the new Tx [treatment] options."

By decision dated May 25, 2006, the Office denied appellant's claim for compensation due to total disability from May 1 to July 7, 2005. Appellant requested an oral hearing on May 10, 2006. In a letter dated October 10, 2006, mailed to his address of record, 805A Ketch Court, Hinesville, Georgia 31313, the Branch of Hearings and Review informed appellant that his hearing was scheduled for November 7, 2006 at 1:15 p.m. at the Federal Building, 400 West Bay Street, Room 826, Jacksonville, Florida 32203. By decision dated November 22, 2006, the Office informed appellant that as he failed to appear for his oral hearing and failed to contact the Office either before or after the date of the oral hearing to explain his failure to appear. The Office found that appellant had abandoned his request for an oral hearing.[1]

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act,[2] the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving

[1] The Board notes that the Office improperly associated the case record for *C.F.*, Docket No. 07-812 with that of this case.

[2] 5 U.S.C. §§ 8101-8193.

at the time of injury.[3] Disability is thus not synonymous with physical impairment, which may or may not result in incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act.[4] Furthermore, whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[5] The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[6]

ANALYSIS -- ISSUE 1

Appellant filed a claim for compensation requesting wage-loss compensation from May 1 through July 7, 2005. In support of his claim for total disability for this period, appellant submitted notes from Dr. Vacker, a Board-certified family practitioner, addressing his chronic neck and back pain. On May 5, 2005 Dr. Vacker stated that appellant was considering leaving work but had instead decided to apply for leave to see if he improved with new treatments. He did not offer his own opinion that appellant was totally disabled for work due to the accepted employment injury. Dr. Vacker merely restated appellant's feeling regarding his condition. When a physician's statements regarding an employee's ability for work consist only of a repetition of the employee's complaints that he or she hurts too much to work without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[7] As there is no medical evidence directly addressing the specific dates of disability for which compensation is claimed, therefore, appellant has not met his burden of proof in establish that he was totally disabled from May 1 through July 7, 2005.

LEGAL PRECEDENT -- ISSUE 2

A claimant who has received a final adverse decision by the Office may obtain a hearing by writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.[8] Unless otherwise directed in writing by the claimant, the Office hearing representative will mail a notice of the time and place of the hearing to the claimant and

[3] 20 C.F.R. § 10.5(f).

[4] *Cheryl L. Decavitch*, 50 ECAB 397, 401 (1999).

[5] *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

[6] *William A. Archer* 55 ECAB 674, 679 (2004).

[7] *Id.*

[8] 20 C.F.R. § 10.616(a).

any representative at least 30 days before the scheduled date.[9] The Office has the burden of proving that it mailed to appellant and his representative a notice of a scheduled hearing.[10]

The authority governing abandonment of hearings rests with the Office's procedure manual. Chapter 2.1601.6(e) of the procedure manual, dated January 1999, provides as follows:

"e. Abandonment of Hearing Requests.

> (1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.
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> Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [district office]. In cases involving prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.
>
> (2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should adviser the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.
>
> This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend."[11]

ANALYSIS -- ISSUE 2

The Office issued a decision on April 25, 2006 denying appellant's claim for compensation due to total disability from May 1 through July 7, 2005. Appellant requested a hearing with an Office hearing representative regarding this matter on May 10, 2006 and such a hearing was scheduled for November 7, 2006.

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[9] 20 C.F.R. § 10.617(b). Office procedure also provides that notice of a hearing should be mailed to the claimant and the claimant's authorized representative at least 30 days prior to the scheduled hearing. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(a) (January 1999).

[10] *See Michelle R. Littlejohn*, 42 ECAB 463, 465 (1991).

[11] Federal (FECA) Procedure Manual , Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(a) (January 1999).

The Office scheduled an oral hearing before an Office hearing representative at a specific time and place on November 7, 2006. The record shows that the Office mailed appropriate notice to the claimant at his last known address. The record also supports that appellant did not request postponement, that he failed to appear at the scheduled hearing and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in Office procedure manual, the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.

CONCLUSION

The Board finds that appellant failed to establish that he was totally disabled from May 1 to July 7, 2005 and that the Office properly denied his claim for compensation for this period. The Board further finds that appellant abandoned his request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the November 22 and April 25, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 10, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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