

emergency room. A chest x-ray and brain computerized tomography (CT) scan were normal. In reports dated January 12 and 24, 2005, Dr. Jose Joselevitz, a Board-certified physiatrist, noted the history of injury and appellant's complaints and diagnosed exposure to N-propyle-bromide at work on December 28, 2004. On April 12, 2005 he noted that appellant had concerns that the chemical exposure caused damage to his left ear and eye.

By letter dated May 11, 2005, the Office accepted that appellant sustained an employment-related toxic effect unspecified gas fume/vapor. On December 14, 2006 appellant submitted a Form CA-2a, claim for recurrence of disability on June 15, 2006. He alleged that since the December 28, 2004 employment injury he had soreness of the left side, face, neck, shoulder, arm, wrist, knee and hip. The employing establishment noted that, after the December 28, 2004 incident, appellant had been moved to a different work location away from fumes and that he had not stopped work. In a letter dated February 1, 2007, the Office informed appellant of the type evidence he needed to submit regarding his recurrence claim. This was to include a detailed description of what happened on June 15, 2006 and a report from his physician that included a firm diagnosis and an opinion supported by medical rationale explaining how his present condition was causally related to the December 28, 2004 chemical exposure incident. Appellant was given 30 days to submit the requested evidence.

By decision dated March 16, 2007, the Office denied the recurrence claim on the grounds that appellant submitted no medical evidence to support the claimed recurrence. On April 2, 2007 appellant requested a hearing. In a letter dated September 7, 2007, the Office informed him that a telephone hearing was scheduled at 4:15 p.m. on October 9, 2007 and provided instructions for placing the telephone call. By decision dated October 25, 2007, the Office found that appellant had abandoned his hearing request.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.¹ A recurrence of medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a "need for further medical treatment after release from treatment," nor is an examination without treatment.²

The employee has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury and should submit a detailed medical report.³ Under the Federal Employees' Compensation Act,⁴ the

¹ 20 C.F.R. § 10.5(x); see *Theresa L. Andrews*, 55 ECAB 719 (2004).

² *Id.* at § 10.5(y); see *Mary A. Ceglia*, 55 ECAB 626 (2004).

³ *Id.* at § 10.404(b).

⁴ 5 U.S.C. §§ 8101-8193.

term “disability” means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an 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.⁵ 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.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability on June 15, 2006 because he did not submit contemporaneous medical evidence showing that he was disabled from his accepted condition or that he had a continuing employment-related condition that required continuing medical treatment.⁷ By letter dated February 1, 2007, the Office informed appellant of the type evidence needed to establish his recurrence claim. Appellant, however, did not submit a response to the request. The most recent medical report of record is Dr. Joselevitz’s April 12, 2005 report. While the physician noted appellant’s concern that the December 28, 2004 chemical exposure caused damage to his left ear and eye and diagnosed a history of exposure to N-propyle bromide, this report is not probative regarding appellant’s medical condition in June 2006. As appellant did not submit medical evidence sufficient to establish his claim, he did not meet his burden of proof to establish that he sustained a recurrence of disability or of a medical condition, and the Office properly denied his claim.⁸

LEGAL PRECEDENT -- ISSUE 2

The Office’s regulations address the requirements for obtaining a hearing and provide that a teleconference may be substituted for the oral hearing at the discretion of the hearing representative.⁹ Scheduling is at the sole discretion of the hearing representative and is not reviewable.¹⁰ The legal authority governing abandonment of hearings rests with the procedure manual of the Office which provides that a hearing can be considered abandoned only under very limited circumstances.¹¹ 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

⁵ See 20 C.F.R. § 10.5(f); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁶ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁷ See *J.F.*, 58 ECAB ____ (Docket No. 06-186, issued October 17, 2006).

⁸ *Supra* note 3.

⁹ 20 C.F.R. §§ 10.615, 10.616.

¹⁰ *Id.* at § 10.622(b).

¹¹ *Claudia J. Whitten*, 52 ECAB 483 (2001).

claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. Under these circumstances, the Office will issue a formal decision finding that the claimant has abandoned his or her request for a hearing.¹²

ANALYSIS -- ISSUE 2

On April 2, 2007 appellant requested a hearing. By letter dated September 7, 2007, the Office mailed him a notice that a telephone hearing was scheduled at 4:15 p.m. on October 9, 2007 and provided instructions for contacting the Office.

The Board finds that the October 9, 2007 Office communication put appellant on notice that a telephone hearing had been scheduled. Appellant did not communicate with the Office either before or within 10 days after the scheduled hearing to request a postponement or explain why he did not telephone the Office for the scheduled hearing. The record thus supports that he did not request a postponement of the October 9, 2007 hearing, that he failed to appear by not participating in the scheduled teleconference and that he failed to provide any notification for such failure within 10 days of the scheduled date of the telephone hearing. As this meets the conditions for abandonment specified in the Office's procedure manual, the Office properly found that appellant abandoned his request for an oral hearing before an Office hearing representative.¹³

CONCLUSION

The Board finds that appellant did not establish that he sustained a recurrence of disability on June 15, 2006 and that he abandoned a telephonic hearing scheduled for October 9, 2007.¹⁴

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(e) (January 1999); *D.F.*, 58 ECAB ____ (Docket No. 06-1815, issued November 27, 2006).

¹³ *Claudia J. Whitten*, *supra* note 11.

¹⁴ It is noted that appellant submitted evidence with his appeal to the Board. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 25 and March 16, 2007 be affirmed.

Issued: August 7, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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