

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

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**E.N., Appellant**

**and**

**DEPARTMENT OF THE ARMY,  
Fort Benning, GA, Employer**

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**Docket No. 07-2197  
Issued: September 16, 2008**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On August 29, 2007 appellant filed a timely appeal of a June 20, 2007 decision of the Office of Workers' Compensation Programs denying his request for reconsideration pursuant to 5 U.S.C. § 8128(a). As the most recent merit decision of record, dated September 20, 2005, was issued over one year prior to the filing of this appeal, the Board lacks jurisdiction to review the merits of this claim.<sup>1</sup>

**ISSUE**

The issue is whether the Office properly denied appellant's request for reconsideration pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On September 18, 1984 appellant, then a 31-year-old file clerk, filed an occupational disease claim alleging that he sustained peripheral neuropathy secondary to Isoniazid (INH)

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<sup>1</sup> 20 C.F.R. §§ 501(2)(c) and 501.3(d)(2).

therapy.<sup>2</sup> The Office accepted appellant's claim for peripheral neuropathy secondary to INH therapy. It paid appropriate compensation and medical benefits. Appellant returned to work in a sedentary job effective February 26, 1989. The employing establishment initiated removal action for recurring absences and failure to submit medical documentation, but appellant was allowed to resign effective January 25, 1990.

By decision dated September 23, 1991, the Office found that, as appellant resigned from a suitable job which was available to him, he was not entitled to compensation for loss of wages on or after January 25, 1990. This decision was affirmed by an Office hearing representative on March 19, 1993. As appellant did not provide sufficient reason or justification for refusing suitable work secured for him, he was precluded from receiving compensation effective January 25, 1990 pursuant to 5 U.S.C. § 8106(c)(2) and 20 C.F.R. § 10.124(e). Appellant filed requests for reconsideration but modification was denied in decisions dated August 4, 2004 and September 20, 2005.

After the September 20, 2005 decision, appellant submitted numerous documents, including medical reports dated March 22 through November 30, 2006 by Dr. Ben C. Wouters, a Board-certified neurologist, who diagnosed neuropathy secondary to vasculitis secondary to INH. In a note dated March 22, 2006, Dr. Wouters noted that vasculitic neuropathy is very rare and may have been initially misdiagnosed. He noted that appellant could not work long hours consistently due to pain that he experienced in his feet, but that he could do "[v]ery, very light sedentary work." However, Dr. Wouters noted that appellant would need frequent breaks and would probably miss some days because of pain. He concluded, "Because of this, he is not truly employable as a practical matter, although technically he is."

Appellant also submitted brief progress notes by Dr. Clemmie Palmer, III, a Board-certified psychiatrist. He was treated from August 17, 2005 through April 25, 2007 for chronic anxiety and poor sleep.

The record also contains an undated letter from appellant's former supervisor who had worked with appellant at the time he first developed his occupational disease. She noted that appellant had been transferred to the information desk, where he could sit and work in the hopes that his attendance would improve. However, there was little or no improvement in attendance due to constant pain in his right side. She noted that appellant was eventually fired for unacceptable attendance and failure to provide the required medical excuses for absenteeism. Subsequently, an administrative law judge changed appellant's status from "fired" to "resignation."

In an undated letter to appellant's congressman received by the Office on February 28, 2007 appellant requested reconsideration. He reiterated the history of his case and discussed his return to work.

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<sup>2</sup> Appellant explained that, when he worked for the employing establishment, it was mandatory for all employees to take an annual physical which included a TB Tine test. He noted that he tested positive for tuberculosis and was sent to the Columbus Health Department which prescribed INH therapy. Appellant took the therapy and one night awoke to severe pain, a numb leg and jerking. He noted that he was later diagnosed with peripheral neuropathy.

By decision dated March 9, 2007, the Office denied appellant's request as it was not timely filed and failed to establish clear evidence of error.

By letter to the Office dated April 2, 2007, a constituent services representative from the office of appellant's congressman advised that appellant had contacted their office on August 4, 2006 requesting assistance in obtaining reconsideration. The representative noted that she had mistakenly believed that the information had been sent to the Office on the same date. Appellant proceeded under the belief that his case had been sent to the proper agency and based on the congressman's office's assurance, took no additional action while awaiting the decision. The Congressional office asked for assistance in correcting this error and protecting appellant's due process rights.

In a decision dated June 20, 2007, the Office found that, due to the intervention of appellant's Congressional office, his initial request for reconsideration of the September 20, 2005 decision was timely and the evidence submitted since the last merit decision of September 20, 2005 was reviewed. However, the Office denied reconsideration, finding that the evidence was either previously reviewed, not relevant, or repetitive to the issue upon which his case was denied.

### **LEGAL PRECEDENT**

To require the Office to reopen a case for merit review under 5 U.S.C. § 8128(a), the Office's regulations provide that the application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>3</sup>

A timely request for reconsideration may be granted if the Office determines that the employee has represented evidence and/or argument that meet at least one of these standards. If reconsideration is granted, the case is reopened and is reviewed on the merits.<sup>4</sup>

### **ANALYSIS**

Appellant's claim was accepted for peripheral neuropathy secondary to INH therapy and compensation was paid. However, the Office found that appellant was not entitled to compensation for loss of wages after January 25, 1990 as he resigned from a suitable position. Appellant requested reconsideration and the Office denied appellant's request.

The underlying issue in this case is whether the Office properly determined that appellant was not entitled to compensation for loss of wages on or after January 25, 1990 due to his resignation from a suitable job. In support of his request for reconsideration, appellant submitted

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<sup>3</sup> 20 C.F.R. § 10.606.

<sup>4</sup> 5 U.S.C. §§ 8101-8193, § 8128(a). The Board has found that the imposition of the one-year limitation does not constitute an abuse of discretionary authority granted the Office under section 8128(a) of the Act. *See Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004).

progress notes from his psychiatrist dated from August 17, 2005 through April 25, 2007, notes from his neurologist dated from March 22 through November 30, 2006 and a note from his most recent supervisor detailing the fact that he resigned from his position after initially being fired for absenteeism and failure to submit medical documentation. The Board finds that none of this evidence establishes that, as of January 25, 1990, appellant was disabled from performing the sedentary job found suitable.

Dr. Wouter's reports do not address whether appellant was incapable of performing the duties of the selected position due to the effects of the employment injury. Thus, his notes are irrelevant. The notes from appellant's psychiatrist, Dr. Palmer, simply consist of listing of brief comments from appellant's sessions and are irrelevant to the period in question, when appellant left employment. The supervisor who submitted the statement was not appellant's supervisor at the time he left his employment and it is not relevant to the underlying issue of whether appellant abandoned suitable work after it was secured for him. Accordingly, the Board finds that the new evidence submitted by appellant does not constitute relevant and pertinent new evidence. Furthermore, appellant did not show that the Office erroneously applied or interpreted a specific point of law nor did he advance a legal argument not previously considered by the Office. As he has not met any of the criteria for requiring merit review of his claim, the Office properly denied his request for reconsideration.

#### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 20 and March 9, 2007 are affirmed.

Issued: September 16, 2008  
Washington, DC

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

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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