

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of NELLIE KIRK and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Pittsburgh, PA

*Docket No. 99-458; Submitted on the Record;  
Issued June 9, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review of his claim under 20 C.F.R. § 10.138.

On September 12, 1994 appellant, then a 59-year-old nursing assistant, was injured in the performance of duty when a patient physically assaulted her. She ceased working on the date of her injury. Appellant subsequently retired on July 10, 1995. The Office accepted her claim for contusions to the head<sup>1</sup> and left hip as well as left shoulder rotator cuff tear and she was placed on the periodic compensation rolls.

In October 1996, appellant began participating in a vocational rehabilitation program which culminated in an April 16, 1997 offer of reemployment as a nursing assistant. She, however, declined the offer on April 22, 1997. By decision dated July 9, 1997, the Office terminated appellant's compensation effective July 19, 1997 based upon her failure to accept suitable employment.

On June 4, 1998 appellant's counsel filed a request for reconsideration. The request was accompanied by two reports dated May 9, 1995 and April 25, 1997 from appellant's treating physician, Dr. Brent Clark, a Board-certified family practitioner. In his most recent report, Dr. Clark expressed the opinion that appellant was "unable to work in any capacity." In a follow-up letter to the Office dated August 5, 1998, appellant's counsel questioned the propriety of the Office's decision to terminate benefits in the absence of the attending physician's approval of the offered position. The Office denied appellant's request for reconsideration on September 8, 1998 without reaching the merits of her claim. Appellant subsequently filed an appeal with the Board on November 16, 1998.

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<sup>1</sup> While being treated for her employment-related head injury, it was discovered that appellant had an unrelated-brain tumor, which was surgically removed shortly after the September 12, 1994 employment injury.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>2</sup> As appellant filed her appeal with the Board on November 16, 1998, the Board lacks jurisdiction to review the Office's merit decision dated July 9, 1997. Consequently, the only decision properly before the Board is the Office's September 8, 1998 decision denying appellant's request for reconsideration.

The Board finds that the Office properly exercised its discretion in refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.138.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>3</sup> Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim.<sup>4</sup>

Appellant's June 4, 1998 request for reconsideration failed to demonstrate that the Office erroneously applied or interpreted a point of law. Additionally, he did not advance a point of law or a fact not previously considered by the Office. Appellant's counsel is mistaken in his belief that the regulations preclude the Office from rendering a suitability determination regarding an offered position absent the concurrence of the attending physician. In the instant case, while Dr. Clark disagreed that appellant was capable of resuming work, his opinion was found to have been outweighed by the contrary opinion of appellant's treating neurosurgeon, Dr. Frank T. Vertosick Jr., as well as the opinion of Dr. Robert P. Durning, a Board-certified orthopedic surgeon and Office referral physician. Both Drs. Durning and Vertosick reviewed the offered position and expressed their respective opinions that appellant was physically capable of performing the described duties. Although counsel purports to raise a point of law, his argument amounts to no more than a request to reweigh the evidence of record. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.138(b)(1). With respect to the third requirement, submitting relevant and pertinent evidence not previously considered, the Office correctly noted that Dr. Clark's May 9, 1995 and April 25, 1997 reports were repetitious. Both reports were part of the record at the time the Office rendered its decision on July 9, 1997. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value, and does not constitute a basis for reopening the case.<sup>5</sup> Inasmuch as the evidence submitted on reconsideration is

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<sup>2</sup> *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

<sup>3</sup> 20 C.F.R. § 10.138(b)(1).

<sup>4</sup> 20 C.F.R. § 10.138(b)(2).

<sup>5</sup> *Sandra B. Williams*, 46 ECAB 546 (1995); *Sandra F. Powell*, 45 ECAB 877 (1994).

repetitious, appellant is not entitled to a review of the merits of her claim based on the third requirement under section 10.138(b)(1).

As appellant is not entitled to a review of the merits of her claim based on any of the above-noted requirements under section 10.138(b)(1), the Board finds that the Office did not abuse its discretion in denying appellant's June 4, 1998 request for reconsideration.

The September 8, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.  
June 9, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member