United States Department of Labor
Employees' Compensation Appeals Board

R.P., Appellant	)	
and	)	**Docket No. 16-0893**
	)	**Issued: November 1, 2016**
DEPARTMENT OF THE NAVY, MARINE CORPS BARRACKS, Barstow, CA, Employer	)	

Appearances:
William H. Brawner, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 25, 2016 appellant, through counsel, filed a timely appeal from a January 27, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision of March 3, 2015 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this claim.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP abused its discretion by denying reconsideration of the merits of appellant's case pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On April 11, 2011 appellant, then a 41-year-old sandblaster, filed an occupational disease claim (Form CA-2) alleging that he developed carpal tunnel syndrome as a result of performing his repetitive work duties. He first became aware of his condition and realized that it resulted from his federal employment on August 15, 2010. OWCP accepted appellant's claim for bilateral carpal tunnel syndrome and bilateral wrist tenosynovitis and paid compensation. On October 13, 2011 appellant underwent authorized right carpal tunnel release surgery and stopped work. He underwent left carpal tunnel release surgery on February 9, 2012. On June 6, 2012 appellant returned to part-time, light-duty work. On September 8, 2012 he returned to full-duty work.

On September 11, 2012 appellant filed a traumatic injury claim (Form CA-1) alleging that on February 23, 2012 he sustained whiplash and neck and back pain as a result of a motor vehicle accident. He indicated that he was leaving an authorized physical therapy appointment to treat his accepted bilateral carpal tunnel syndrome when he was struck from behind by another vehicle.

A September 20, 2012 magnetic resonance imaging (MRI) scan examination report by Dr. Benjamin Eyer, a Board-certified diagnostic radiologist, revealed minimal anterolisthesis and one to two millimeter (mm) disc osteophyte complex, asymmetric to the right foraminal region at C3-4. Dr. Eyer noted moderate foraminal narrowing on the right and minimal foraminal narrowing on the left. He also observed a two mm diffuse disc bulge/osteophyte complex, asymmetric to the left foraminal region, and facet arthropathy and uncovertebral hypertrophy, particularly on the left of C6-7. Dr. Eyer reported no significant central canal or right-sided foraminal narrowing.

Appellant was treated by Dr. Sarah Buenviaje-Smith, a Board-certified anesthesiologist specializing in pain medicine, who related in an October 5, 2012 report that on February 23, 2012 appellant was leaving physical therapy when he was rear-ended by a car. Dr. Buenviaje-Smith noted that he complained of upper and lower back pain since the accident and had filed a workers' compensation claim. She indicated that an MRI scan of the cervical spine revealed three bulging discs. Upon examination of appellant's back, Dr. Buenviaje-Smith observed positive tenderness to deep palpation to bilateral L3-S1 paravertebral muscles and decreased flexion and extension. Examination of appellant's extremities revealed pain on flexion and

[3] Docket No. 14-2043 (issued March 3, 2015).

extension maneuver of the bilateral wrists. Dr. Buenviaje-Smith diagnosed bilateral wrist pain and cervical radiculopathy.

Dr. Rama T. Pathi, a Board-certified orthopedic surgeon, also treated appellant and indicated in a January 2, 2013 note that appellant complained of neck pain and stiffness with radiating numbness and back pain, stiffness, and spasm. He reported increased cervical lordosis and increased cervical kyphosis. Range of motion was painful with flexion in the cervical spine. Dr. Pathi diagnosed back and neck sprain, cervical disc degeneration, lumbosacral spondylolysis, disc degeneration, and lumbago.

In a January 10, 2013 letter, Dr. Pathi related appellant's February 23, 2012 history of injury and concluded that "[appellant] sustained a brand new consequential injury to the neck and back due to the accident."

OWCP referred appellant to Dr. David T. Easley, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether appellant still suffered residuals of bilateral carpal tunnel syndrome and bilateral wrist tenosynovitis and to determine the extent of his disability.

In a January 22, 2013 decision, OWCP denied appellant's consequential injury claim. It accepted that the February 23, 2012 incident occurred as alleged, but found that the medical evidence of record was insufficient to establish that he sustained additional diagnosed conditions as a result of his accepted injury.[4]

On January 28, 2013 OWCP provided additional questions for the second-opinion examiner. It requested that he provide an opinion on whether appellant suffered residuals of the February 23, 2012 cervical and thoracic strains and to describe any nonindustrial or preexisting disability of the neck and back.

In a January 29, 2013 report, Dr. Easley described appellant's August 2010 occupational disease injury as a result of his duties as a sandblaster for the employing establishment and the February 23, 2012 employment-related motor vehicle accident. He noted appellant's complaints of constant pain on the tops of both hands and in both wrists and neck pain radiating to the trapezius area bilaterally. Dr. Easley reviewed appellant's history and discussed his medical records. Upon physical examination, he observed decreased sensation of the wrist and full range of motion. Dr. Easley provided range of motion findings for appellant's cervical spine. He diagnosed status post bilateral carpal tunnel release, bilateral carpal tunnel syndrome, and tenosynovitis of the hands, resolved. Dr. Easley reported that appellant continued to suffer residuals of bilateral carpal tunnel syndrome as evidenced by positive Phalen's test and diagnostic studies, but no longer suffered from bilateral wrist tenosynovitis. He indicated that appellant had not reached maximum medical improvement for his bilateral carpal tunnel syndrome. Regarding whether appellant continued to suffer residuals of the February 23, 2012 cervical and thoracic strains, Dr. Easley responded "No."

[4] On January 31, 2013 OWCP received appellant's request, through counsel, for a telephone hearing before an OWCP hearing representative. In a decision dated March 15, 2013, an OWCP hearing representative dismissed appellant's request for a hearing because OWCP had since accepted his consequential injury claim.

By decision dated February 26, 2013, OWCP expanded appellant's claim to include the conditions of cervical and thoracic sprains, resolved as of January 29, 2013. It explained that the decision was based on Dr. Easley's January 29, 2013 second-opinion report.

Appellant disagreed with the February 26, 2013 decision. In letters received by OWCP on January 14, February 18, May 7, and June 6, 2014, he asserted that he sustained more severe injuries, specifically bulging discs in his cervical, thoracic, and lumbar spines, as a result of the February 23, 2012 incident and requested reconsideration.

Appellant continued to seek treatment from Dr. Buenviaje-Smith. In reports dated March 20, 2013 to May 13, 2014, Dr. Buenviaje-Smith noted his complaints of continued left elbow pain, neck pain, and low back pain radiating to his left lower extremity. She provided physical examination findings and diagnosed bilateral carpal tunnel syndrome, cervicalgia, cervical facet joint disease, and lumbar radiculopathy. Dr. Buenviaje-Smith requested authorization for additional medical treatment.

Dr. Pathi also continued to treat appellant. In reports dated March 11, 2013 to March 10, 2014, he related appellant's complaints of pain, numbness, tingling, and swelling of the bilateral wrists. Dr. Pathi reviewed appellant's diagnostic reports and provided physical examination findings. He diagnosed bilateral carpal tunnel syndrome, cervical disc degeneration, cervicalgia, neck sprain, and lumbago. Dr. Pathi reported that appellant's bilateral wrist injury was the direct result of the August 15, 2010 work-related injury.

In narrative reports dated July 2, 2013 to May 20, 2014, Dr. Pathi mentioned the February 23, 2012 motor vehicle accident and related appellant's current complaints of pain to his entire spine radiating to his left lower extremity. He noted that appellant did not have any lumbar spine issues prior to the February 23, 2012 accident. Dr. Pathi discussed that an MRI scan examination of appellant's lumbar spine revealed disc height losses, stenosis, and disc osteophyte complexes on several levels. He also noted that a September 20, 2012 MRI scan examination of appellant's cervical spine demonstrated disc osteophyte complexes, facet arthropathy, stenosis, and foraminal narrowing on various levels. Dr. Pathi disagreed with Dr. Easley's diagnoses of resolved lumbar and cervical sprains and indicated that he would diagnose appellant with multiple lumbar and cervical disc herniations and bulges concurrent with radiculopathy to the upper and lower extremities. He reported that appellant's injuries to his lumbar, thoracic, and cervical spine were the direct result of the February 23, 2012 automobile accident.

On April 7, 2014 OWCP received appellant's request for a hearing before an OWCP hearing representative. By decision dated April 23, 2014, an OWCP hearing representative denied appellant's request for hearing as untimely filed.[5]

[5] OWCP informed appellant that he was not entitled to an oral hearing as a matter of right because his request for a hearing was not received within 30 days. The hearing representative exercised his discretion and determined that appellant's claim could equally well be addressed by requesting reconsideration and submitting new medical evidence.

In a letter dated April 30, 2014, appellant alleged that he had submitted four letters from Dr. Pathi where he opined that MRI scan examinations had revealed bulging and herniated discs to appellant's lumbar, thoracic, and cervical spines as a result of the February 23, 2012 motor vehicle accident. He included reports by Dr. Pathi and Dr. Buenviaje-Smith, which were previously submitted.

By decision dated June 17, 2014, OWCP denied modification of its prior decision, finding that the medical evidence of record failed to establish that appellant sustained ongoing cervical and thoracic injuries due to the February 23, 2012 employment incident.

Appellant appealed to the Board on September 25, 2014.

On March 3, 2015 the Board issued a decision which affirmed OWCP's June 17, 2014 denial decision.[6] The Board found that appellant did not meet his burden of proof to establish that he sustained additional conditions, specifically bulging discs in his cervical, thoracic, and lumbar spines, causally related to his February 23, 2012 work-related accident. The Board determined that Dr. Buenviaje-Smith and Dr. Pathi's reports were of limited probative value to establish causal relationship.

On November 10, 2015 OWCP received appellant's November 2, 2015 request, through counsel, for reconsideration. Counsel discussed the history of appellant's claim and asserted that OWCP failed to obtain a referee examination in order to resolve a conflict in medical opinion evidence. He also alleged that Dr. Easley's January 29, 2013 second-opinion report should no longer carry the weight of medical evidence because new medical testing provided a full medical history and listed the new medical reports that Dr. Easley had not reviewed. Counsel further asserted that Dr. Easley's report lacked medical rationale because Dr. Easley provided one-word responses to OWCP's questions without any medical explanation to support his responses. He further objected to OWCP's determination that Dr. Pathi's medical opinion was contradictory and speculative. Counsel reported that because Dr. Pathi did not begin to treat appellant until roughly seven months after the date of the February 23, 2012 automobile accident, he could not lawfully report on those injuries pursuant to state ethics rules. Lastly, he alleged that the new medical reports established that appellant continued to suffer residuals of his February 23, 2012 automobile accident and counsel noted that three Board-certified specialists in orthopedic medicine agreed that appellant continued to suffer residuals of his February 23, 2012 automobile accident.

Appellant was examined on February 18, 2015 by Dr. Vikram Parmar, a Board-certified orthopedic surgeon, for complaints of severe cervical and lumbar axial pain radiating down all four extremities with severe numbness in both hands. Dr. Parmar indicated that appellant's problem began following "no apparent cause." Upon examination, he observed severe pain on palpation of appellant's cervical spine and decreased range of motion with severe pain. Examination of the lumbar spine also revealed decreased range of motion with severe pain and severe palpable trigger points in the muscles of the low back. Dr. Parmar diagnosed cervical stenosis of the spine, lumbar stenosis, and bilateral carpal tunnel syndrome. He explained that he

[6] *Supra* note 3.

needed to get the results of the electromyogram testing in order to determine the severity of appellant's cervical radiculopathy.

Dr. Buenviaje-Smith continued to treat appellant and related in progress reports dated February 26 to December 8, 2015 that he complained of neck pain and tenderness, low back pain with occasional bilateral lower extremity numbness, and bilateral hand pain and weakness. Upon examination, appellant observed moderate tenderness to the paravertebral muscles at C3-7 and pain in the cervical and upper trapezius area. Dr. Buenviaje-Smith diagnosed carpal tunnel syndrome, cervical spondylosis, cervicalgia, and lumbar degenerative disc disease.

In a March 30, 2015 narrative report, Dr. Pathi conducted an examination of appellant's bilateral wrists. He observed tenderness over the radial styloid, scapholunate joint and thenar eminence and tenderness over the median nerve. Dr. Pathi also noted mild tenderness over the volar aspect upon palpation. Sensation was diminished. Upon examination of the left wrist, Dr. Pathi observed tenderness over the triangular fibrocartilage, scapholunate ligament, ulnar styloid, radial styloid, and thenar eminence and numbness and tingling. He provided range of motion examination findings and muscle strength measurements. Dr. Pathi diagnosed bilateral carpal tunnel syndrome and recommended that appellant work light duty. He opined that appellant's injury to his right and left wrists were the direct result of a work-related injury that occurred on August 15, 2010.

Dr. Pathi provided a letter dated April 9, 2015. He verified that he had treated appellant for his August 15, 2010 bilateral wrist injury and for diagnoses of back sprain, degenerative disc disease, loose body forearm, cervical lumbago, cervicalgia, neck sprain, lumbosacral spondylolysis, trauma arthropath forearm, carpal tunnel syndrome, cervical disc degeneration, and joint contracture forearm. Dr. Pathi reported that appellant's accepted bilateral wrist injury remained medically present and had not resolved. He noted that appellant was currently working light duty.

In an April 21, 2015 MRI scan examination report, Dr. Eyer reported degenerative disc disease within the lumbar spine, a two mm disc bulge with a small annular fissure at L2-3, diffuse disc bulge and mild facet arthropathy at L4-5, and diffuse disc bulge measuring up to five to six mm and moderate-to-severe foraminal narrowing on the right and moderate foraminal narrowing on the left.

Appellant was examined by Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon, who described appellant's occupational disease injury to his wrists and hands in reports dated May 26 and August 30, 2015. Dr. Ha'Eri related that on February 23, 2012 appellant was involved in a motor vehicle accident and subsequently experienced severe neck and back pain, which required pain management treatment. Upon examination of appellant's cervical spine, he observed tenderness upon palpation of appellant's neck and normal cervical lordosis. Examination of appellant's lumbar spine revealed decreased normal lordosis and tenderness upon palpation along the paravertebral muscle spasm. Dr. Ha'Eri diagnosed bilateral carpal tunnel syndrome, cervical strain and aggravation of a preexisting cervical degenerative disc disease, lumbosacral strain and aggravation of a preexisting two-level lumbar disc displacement. He reported that "the treating physicians considered the injury to appellant's neck and lower back to be consequential to the original injury of the bilateral carpal tunnel syndrome (he was involved in

accident when still was under care for carpal tunnel syndrome)." Dr. Ha'Eri disagreed with Dr. Easley's opinion that appellant's neck and back condition had resolved and pointed out that appellant was seeing a pain management specialist. He opined that appellant would "require provisions for future medical care for residuals of his bilateral carpal tunnel syndrome and if accepted for the conditions of his neck and particularly lower back."

Dr. Pathi continued to treat appellant. In a July 9, 2015 narrative report, he noted that appellant was involved in a motor vehicle accident on February 23, 2012 after attending a physician's appointment. Dr. Pathi explained that he was unable to address the injuries to appellant's cervical spine, lumbar spine, and thoracic spine due to the fact that he was not authorized to treat the injuries that occurred on February 23, 2012. He reported that appellant's injuries were cervical, lumbar, and thoracic disc bulges, not sprains. In office notes dated May 20 to November 23, 2015, Dr. Pathi related appellant's symptoms of decreased joint range of motion and weakness and pain to the low back, buttocks, and hamstring. He noted that appellant injured his back on April 16, 2015 when he lifted a crate of files at work. Dr. Pathi reported objective findings on examination and reviewed appellant's records. He diagnosed degenerative disc disease, back sprain, lumbago, and lumbosacral spondylosis. Dr. Pathi opined that appellant's back injury was a direct result of a work-related injury that occurred on April 16, 2015.

Appellant provided a September 15, 2015 statement, wherein he explained that the emergency room physician initially diagnosed his injuries as sprains, but warned him that his conclusions were based on limited medical evidence and could be incomplete. He was advised to see a chiropractor for the pain, but when the treatment was unsuccessful he sought treatment from Dr. Pathi. Appellant reported that he also had just attended a union steward class and realized that he could file a workers' compensation claim. He noted that OWCP strongly resisted his efforts change his treating physician to Dr. Pathi and that the delay caused considerable disruption in his medical care.

In an October 14, 2015 narrative report, Dr. Buenviaje-Smith related that she had treated appellant since May 31, 2012 for pain in his bilateral hands and wrist due to a work-related injury. She reported that he discussed his neck and low back complaints on October 5, 2012 and related that he was involved in a motor vehicle accident on February 23, 2012 when he was leaving a physical therapy session for his carpal tunnel syndrome. Dr. Buenviaje-Smith indicated that appellant's cervical and bilateral carpal tunnel syndromes were accepted by OWCP, but it was still under dispute whether his lumbar condition was work related. She explained that she had treated both his neck and bilateral hand pain since they were both included in his workers' compensation claim.

Appellant resubmitted Dr. Easley's January 29, 2013 second-opinion report, Dr. Simon Robert's June 24, 2013 diagnostic examination report, Dr. Pathi's July 2 and August 12, 2013 reports, Dr. Thakran's January 14, 2014 neurophysiological report, Dr. Tauber's August 10, 2014 report, Dr. Pathi's January 29, 2015 progress report, and an August 13, 2014 diagnostic examination report. He also submitted OWCP's January 22, 2013 and November 10, 2015 decisions, which denied appellant's consequential injury claim.

In a decision dated January 27, 2016, OWCP denied appellant's reconsideration request case. It determined that the medical reports from Dr. Pathi and Dr. Buenviaje-Smith were of limited probative value and did not warrant merit review of the prior decision.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application.[7]

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[8]

A request for reconsideration must also be received by OWCP within one year of the date of OWCP's decision for which review is sought.[9] If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[10]

ANALYSIS

By decision dated January 27, 2016, OWCP denied appellant's reconsideration request finding that the evidence submitted was insufficient to warrant merit review.

In his reconsideration request received on November 10, 2015, counsel alleged that Dr. Easley's January 29, 2013 second-opinion report lacked medical rationale to demonstrate that appellant suffered any ongoing residuals of his February 23, 2012 employment injury and that new medical reports supported his claim of a consequential injury. OWCP determined in its January 27, 2016 decision that medical reports by Dr. Pathi and Dr. Buenviaje-Smith did not warrant further merit review of its March 3, 2015 denial decision. It explained that the medical reports were of limited probative value because they lacked medical rationale to establish a causal relationship between the February 23, 2012 automobile accident and any ongoing cervical and lumbar conditions. On current appeal before the Board, counsel alleges that OWCP improperly refused to reopen the case for reconsideration based on the probative value of the new medical reports and not on whether appellant submitted relevant and pertinent new evidence. He also asserts that the reconsideration request contained three new legal arguments that OWCP failed to address.

[7] 5 U.S.C. § 8128(a).

[8] 20 C.F.R. § 10.606(b)(3); *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

[9] *Id*. at § 10.607(a).

[10] *Id.* at § 10.608(b)(3); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

The Board has reviewed the case record and finds that appellant submitted relevant and pertinent new evidence not previously considered by OWCP sufficient to warrant further merit review. Along with his reconsideration request, appellant submitted a February 18, 2015 report by Dr. Parmar, an April 21, 2015 diagnostic report by Dr. Eyer, and May 26 and August 30, 2015 reports by Dr. Ha'Eri, not previously reviewed by OWCP. Although these reports were received by OWCP on November 10, 2015, OWCP makes no mention of them in its January 27, 2016 decision.[11] The Board has found that because its jurisdiction of a case is limited to reviewing the evidence that was before OWCP at the time of its final decision, it is critical that OWCP review all evidence relevant to that subject matter and received by OWCP prior to the issuance of its final decision.[12] In its January 27, 2016 reconsideration decision, OWCP merely noted that the reports by Drs. Pathi and Buenviaje-Smith were insufficient to warrant merit review. It failed to address the new medical reports by Drs. Parmar, Eyer, and Ha'Eri. In light of OWCP's failure to address all relevant evidence before it at the time, the case shall be remanded for a proper review of the evidence and issuance of an appropriate final decision.[13]

CONCLUSION

The Board finds that the case is not in posture for decision.

[11] *See R.M.*, Docket No. 14-1083 (issued July 2, 2015).

[12] *See William A. Couch*, 41 ECAB 548 (1990); *E.Z.*, Docket No. 14-274 (issued March 16, 2015).

[13] *T.N.*, Docket No. 15-0440 (issued April 14, 2015).

ORDER

IT IS HEREBY ORDERED THAT the January 27, 2016 decision of the Office of Workers' Compensation Programs is set aside and remanded for further proceedings consistent with this opinion.

Issued: November 1, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board