



of the ankle and foot bilaterally and sustained intermittent periods of total and partial disability.<sup>1</sup> The Office placed appellant on the periodic rolls effective June 17, 2001.

In a progress note dated January 29, 2002, Dr. Jeffrey D. Patterson, a Board-certified orthopedic surgeon, discussed appellant's complaints of "burning pain at her heels" including pain "retro Achilles area of her right heel." He stated:

"On physical exam[ination], there was insertional tenderness just above insertion of the Achilles. There is a Haglund's deformity by x-ray. There is a recurrent equines of the gastrocnemius of both feet."

Dr. Patterson diagnosed retrocalcaneal bursitis and Achilles tendinitis with recurrent scarring of the gastrocnemius lengthening of the Achilles. He requested authorization to perform an excision on the right foot of the Haglund's deformity and a revised Strayer procedure.

On May 22, 2002 the Office referred appellant to Dr. David Bernstein, a podiatrist, for a second opinion evaluation on the issue of whether the requested Haglund's bone deformity excision and revised Strayer procedure of the right foot were causally related either to appellant's accepted employment injury or any of the prior authorized surgical procedures. The Office noted that appellant originally underwent a Strayer procedure on June 2, 2000. The Office further requested that Dr. Bernstein address whether, if he found the proposed surgeries were due to her employment injury or treatment thereof, the proposed surgeries were required to "cure or ameliorate the residuals of [appellant's] injury...."

On June 24, 2002 Dr. Patterson requested authorization for a Strayer procedure of the left foot.

In a report dated June 11, 2002, Dr. Bernstein reviewed the evidence of record and history of medical treatment received. On physical examination, he listed neurological and range of motion findings for the right and left feet. He diagnosed, as due to appellant's employment injury, a history of bilateral ankle fractures, nonunion of the left distal fibula, post-traumatic arthritis of the ankles bilaterally, gastroc soleus/Achilles tendon contractures, sural nerve

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<sup>1</sup> On May 18, 1996 appellant underwent an open reduction of the right distal fibula with internal fixation. Her surgical hardware on the right side was removed on July 2, 1997. On June 9, 1998 appellant had surgery to repair a nonunion of the left distal fibula with a sliding bone graft. She further underwent an ostectomy of the right distal fibula and excision of a post-traumatic talar neck spur. On June 26, 2000 appellant underwent a bilateral Strayer procedure, hardware removal on the left foot, and excision of the left fibula bone chips. Appellant also had nonemployment-related surgery performed on her left foot on that date. On September 27, 2000 appellant had surgery to remove two deep buried screws on the left side. On June 15, 2001 appellant underwent a right calcaneal osteotomy, a modified Brostrom procedure, excision of an impingement spur off the right talar neck, an excision of a small spur off the tip of the left fibula, an excision of exostosis and a hemicondylectomy of the fifth toe proximal phalanx. On October 14, 2001 she had screws removed from her right foot.

entrapment in the posterior leg scar from Achilles tendon lengthening on the right, sural neuritis on the left calcaneus, and saphenous nerve entrapment of the posterior leg scar from Achilles tendon lengthening on the left.<sup>2</sup> Regarding the requested surgeries, Dr. Bernstein stated:

“Both requested surgeries are medically related to the ankle fractures sustained on May 18, 1996. [Appellant’s] decrease in activities and long periods of non-weight bearing as well as cast immobilization on both sides will definitely result in contractures of the gastroc soleus complexes and resulting equinus deformities. This also placed greater traction stresses through the posterior calcaneal tuberosity that often hypertrophy resulting in a Haglund’s deformity.”

Regarding whether the proposed surgeries would benefit appellant, he stated:

“I do not believe that there is not sufficient equinus deformity present at this time [to] require additional lengthening. I do believe that a neurolysis or neurectomy procedure at the level of scar entrapment on both legs may prove beneficial in relieving much of her pain. The Haglund’s bony hypertrophy is only moderately severe and she may benefit to some limited degree by this procedure.”

By letter dated July 18, 2002, the Office informed Dr. Patterson that it had authorized the right Haglund’s deformity excision.<sup>3</sup> The Office requested that Dr. Patterson review Dr. Bernstein’s report and address whether he still believed that bilateral revised Strayer procedures were necessary. The Office noted that it believed that Dr. Bernstein’s conclusion that appellant did not need a revised Strayer procedure applied to both feet but that it would be contacting him for a definite opinion.

In a report dated July 29, 2002, Dr. Patterson indicated that he had reviewed Dr. Bernstein’s opinion. He stated:

“I have made the conclusions which I have made and still feel that [appellant] has some recurrent equinus of both Achilles mechanisms. I think that treating the scarred nerves would be of benefit as well to [appellant] and I do not feel that [she] will be completely better [and] the procedures that I have spoken of, including revision of the Strayer repairs, is necessary, as well as the excision of Haglund’s deformity.”

In a report dated July 31, 2002, Dr. Bernstein opined that appellant did not need a distal resection of the gastroc aponeurosis, or Strayer revision, on either the right or the left side because she had “adequate dorsiflexion on both sides at this time....”

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<sup>2</sup> He further found that appellant had an intermetatarsal space neuroma on the left not related to her employment injury and common peroneal neuritis on the right and tarsal tunnel syndrome on the left of unknown origin.

<sup>3</sup> The Office further noted that it had authorized the additional procedures of bilateral neurolysis or neurectomy at the level of scar entrapment of both legs.

By letter dated October 23, 2002, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. David Schenkar, a Board-certified orthopedic surgeon, for an impartial medical examination. The Office noted that Dr. Patterson now requested to perform a revised Strayer procedure of the left and the right foot and that Dr. Bernstein had found that appellant did not require Strayer repairs on either foot. The Office therefore requested that Dr. Schenkar resolve the conflict in medical opinion on the issue of whether appellant “would benefit from bilateral Strayer revision surgery.”<sup>4</sup>

In a report dated September 9, 2002, Dr. Patterson reiterated that he disagreed with Dr. Bernstein’s conclusion that Strayer repairs were not warranted. In an addendum dated September 16, 2002, Dr. Patterson clarified that “while I am performing lysis on the nerves where the nerves were at her prior [S]trayer levels I am already there within the surgery site of repeat revision release of the right Achilles mechanism thus not creating a separate surgical incision site at the skin level.”

In a report dated November 9, 2002, Dr. Schenkar discussed appellant’s complaints and listed findings on physical examination. He listed range of motion measurements for appellant’s right foot and ankle and noted that she was able to “move from stance of push off phase using her available ROM (range of motion).” He indicated that appellant experienced pain on the bottom of her foot “like a spotty peripheral radiculopathy.” On examination of the left foot, Dr. Schenkar listed range of motion findings and noted that the left foot “seems to bother her less.” He recommended against further foot surgery and found that appellant would benefit from more exercise. Dr. Schenkar provided rationale for his opinion by explaining that appellant’s foot strike and strike bearing “are good considering the injury and a compliment [to] the surgeon.”

He stated:

“What I fear [is] that a procedure on the musculotendinous area to attempt improvement with more dorsiflexion will weaken her at least a grade in muscle strength. The net change will be just a little increase in ankle dorsiflexion outweighed by weakness in push off strength. Thus the net will not be helpful.”

By letter dated December 1, 2002, appellant listed factual errors in Dr. Schenkar’s report. She noted that her feet were always painful and she had no preexisting arthritis. Appellant noted that she was not currently employed.

In a progress note dated December 24, 2002, Dr. Patterson stated that instead of physical therapy appellant’s right foot required “excision of the Achilles insertion, the spur and tendon transfer of the flexor hallucis longus into the back of the calcaneus...” He explained that this surgery would prevent rescarring of the Achilles lengthening, get rid of her spur and get the foot “to where it can finally come up adequately after the Achilles has basically been dealt with.” He further indicated that she required similar treatment of the left foot “except for bearing of the

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<sup>4</sup> The Office further requested that Dr. Schenkar resolve a conflict on the issue of whether appellant sustained a low back problem caused or aggravated by her employment injury. The Office has not issued a final decision on this issue and therefore it is not before the Board at this time. See 20 C.F.R. § 501.2(c).

sural nerve in the calf to where it is out of the way and not in a neuroma type of position. Approval is sought for such again otherwise.”

By decision dated February 3, 2003, the Office denied authorization for revised Strayer procedures. The Office found that the opinion of Dr. Schenkar, the impartial medical examiner, constituted the weight of the medical evidence and established that the bilateral revised Strayer procedures would not benefit appellant.<sup>5</sup>

On February 10, 2003 appellant requested a hearing on her claim and indicated that her attorney would be present. A hearing was held on November 19, 2003.<sup>6</sup>

By decision dated January 23, 2004, the hearing representative affirmed the Office’s February 3, 2003 decision.

### **LEGAL PRECEDENT**

Section 8103 of the Federal Employees’ Compensation Act<sup>7</sup> provides that the United States shall furnish to an employee who is injured while in the performance of duty the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.<sup>8</sup> In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under the Act.<sup>9</sup> The only limitation on the Office’s authority is that of reasonableness.<sup>10</sup> Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.<sup>11</sup> It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.<sup>12</sup>

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<sup>5</sup> The Board notes that the Office inappropriately phrased the issue as to whether it should authorize the excision of the Haglund’s deformity and revised Strayer procedure. The Office previously authorized the Haglund’s deformity excision based on the opinions of appellant’s attending physician and the Office referral physician. The Office properly reached a determination in its decision regarding only the revised Strayer procedures.

<sup>6</sup> At the hearing, appellant requested that the hearing representative instruct the Office to issue a decision on her claim for back problems due to her employment injury.

<sup>7</sup> 5 U.S.C. §§ 8101-8193.

<sup>8</sup> 5 U.S.C. § 8103; *see also Thomas W. Stevens*, 50 ECAB 288 (1999).

<sup>9</sup> *See David Spearman*, 49 ECAB 445 (1998).

<sup>10</sup> *Id.*

<sup>11</sup> *Gregorio E. Conde*, 52 ECAB 410 (2001).

<sup>12</sup> *James R. Bell*, 49 ECAB 647 (1998).

In order for surgery to be authorized, appellant must submit evidence to show that such surgery is for a condition causally related to the employment injury and that the surgery is medically warranted. Both of these criteria must be met in order for the Office to authorize payment.<sup>13</sup>

Section 8123 of the Act provides that where there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.<sup>14</sup> In situations where there exists a conflict in medical opinion and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.<sup>15</sup>

### ANALYSIS

In order for surgery to be authorized, appellant must establish that the surgery is for a condition due to her employment injury and that the surgery is medically warranted.<sup>16</sup> In this case, both appellant's physician, Dr. Patterson, and Dr. Bernstein, the Office referral physician, found that the proposed Strayer revisions were causally related to her accepted employment injury. However, the Office properly found a conflict in medical opinion between Dr. Patterson and Dr. Bernstein on the issue of whether the bilateral revised Strayer procedures were likely to benefit appellant. The Office referred appellant to Dr. Schenkar, a Board-certified orthopedic surgeon, for resolution of the conflict.

Where the case is referred to an impartial medical specialist to resolve a conflict in medical opinion, such opinion must be given special weight if it is sufficiently well rationalized and based on a proper factual background.<sup>17</sup> The Board finds that the opinion of Dr. Schenkar is based on a proper factual and medical history, is well rationalized and supports that revised Strayer procedures were not warranted for appellant's condition. Prior to reaching his conclusions, Dr. Schenkar described appellant's complaints and provided detailed findings on examination. Moreover, Dr. Schenkar provided a proper analysis of the findings on physical examination and reached conclusions regarding appellant's opinion which comported with this analysis.<sup>18</sup> On examination, Dr. Schenkar listed range of motion findings for the feet and ankles. He found that appellant did not require further surgery due to her good foot strike and strike bearing. Dr. Schenkar explained that improving appellant's dorsiflexion with surgery would "weaken her at least a grade in muscle strength." He therefore found that the overall effect of the surgery "will not be helpful." As Dr. Schenkar provided a detailed and well-rationalized report

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<sup>13</sup> *Cathy B. Millin*, 51 ECAB 331 (2000).

<sup>14</sup> 5 U.S.C. § 8123; *see also Charles S. Hamilton*, 52 ECAB 110 (2000).

<sup>15</sup> *Manual Gill*, 52 ECAB 282 (2001); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>16</sup> *See Cathy B. Millin*, *supra* note 13.

<sup>17</sup> *Sherry A. Hunt*, 49 ECAB 467 (1998).

<sup>18</sup> *See John T. Russell, II*, 46 ECAB 536 (1995).

based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner.

Appellant submitted a report dated December 24, 2002 from Dr. Patterson, who reiterated that appellant required an excision of the Achilles insertion surgical procedure on the right and left foot. However, as Dr. Patterson was on one side of the medical conflict resolved by the impartial medical specialist, his report is insufficient to overcome the special weight accorded the impartial specialist or create a new conflict.<sup>19</sup>

Dr. Schenkar's opinion that the proposed bilateral revised Strayer procedures were not medically warranted constitutes the weight of the medical evidence. The Office, therefore, did not abuse its discretion in denying appellant's request for bilateral revised Strayer procedures on her feet as the weight of the medical evidence did not establish that such surgeries were "likely to cure or give relief" to her accepted condition.

### **CONCLUSION**

The Board finds that the Office properly denied authorization for revised Strayer procedures of both feet.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated January 23, 2004 is hereby affirmed.

Issued: September 28, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>19</sup> *Barbara J. Warren*, 51 ECAB 413 (2000).