



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

[REDACTED]
Mark D.,¹
Complainant,

v.

Jeff B. Sessions,
Attorney General,
Department of Justice
(Federal Bureau of Investigation),
Agency.

Appeal No. 0120162225

Agency No. FBI201500088

DECISION

On June 22, 2016, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's June 6, 2016, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq. For the following reasons, the Commission REVERSES the Agency's final decision.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Automotive Mechanic (AM) in the St. Louis Division. On April 2, 2015, Complainant filed an EEO complaint alleging that the Agency (FBI) discriminated against him based on disability (ventricular arrhythmia) when, on October 30, 2014, the FBI rescinded its job offer for the Electronics Technician (ET) position (Grade 7/9) in the St. Louis Division, and on December 11, 2014, Complainant's appeal of that rescission was denied.

After the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an EEOC Administrative Judge. In accordance with Complainant's request, the Agency issued a final decision pursuant to 29

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

C.F.R. § 1614.110(b). The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

FACTUAL BACKGROUND

Complainant applied for the job of ET in the St. Louis Field Office in June 2014. He was selected as the primary candidate, and on August 14, 2014, received a Conditional Job Offer starting at the GS-7 grade-level. However, Complainant was subsequently disqualified from the position based on a pre-existing medical condition.

Medical History & Documentation of Medical Fitness

Complainant is a military veteran who was honorably discharged in September 2004 due to heart palpitations and subsequent diagnosis of ventricular arrhythmia.² Complainant was treated at the Veterans' Administration (VA) and received a disability rating of 60%. In 2010, Complainant was prescribed the beta-blocker Metoprolol Tartrate (MT). The record shows that MT had improved Complainant's ventricular function and suppressed his ventricular arrhythmia. Consequently, his disability compensation rating was reduced from 60% to 10%.

On August 28, 2014, Complainant reported to an FBI-contracted physician (FBI-MD) who performed a multitude of tests to determine his physical capabilities, which included requiring him to demonstrate physical movements and positions, such as crouching and bending. FBI-MD also performed an Electrocardiogram (EKG),³ the results of which were normal sinus rhythm. Complainant also submitted information on aspects of his medical history as required. Based on his testing, FBI-MD reported that Complainant was "qualified for strenuous physical exertion." The medical findings from the fitness-for-duty examination (FFDE), as well as the medical history documents, were forwarded to the FBI Headquarters Health Care Programs Unit (HCPU).

On September 16, 2014, Complainant received a letter stating that the HCPU required "more clinical information to make a final determination." The letter also instructed Complainant to submit the complete VA decision which resulted in lowering his disability compensation rating to 10%, and "clinical records of evaluations and treatment for palpitations over the past two (2) years"

² *A ventricular arrhythmia occurs when there is an irregular heart-beat (i.e., sinus rhythm) originating in one of the ventricles of the heart. An arrhythmia can reduce the blood flow to the brain and cause feelings of dizziness. Additional potential consequences of arrhythmias include chest pains, fainting, and headaches.*

³ *An EKG is the process of recording the electrical activity of the heart over a period of time using electrodes placed on the skin and can measure: (1) the underlying rate and rhythm mechanism of the heart; (2) the orientation of the heart (how it is placed) in the chest cavity; (3) any increased thickness (hypertrophy) of the heart muscle; (4) any damage to the various parts of the heart muscle; (5) any impaired blood flow to the heart muscle; and (5) patterns of abnormal electric activity that may predispose the patient to abnormal cardiac rhythm disturbances.*

at Complainant's expense. Complainant provided the requested VA medical data, as well as copies of all his medical records from the past two years. One of the records was a 2012 stress echocardiogram (2012 ECHO Stress-Test) that was performed to assess Complainant's baseline cardiac function. The 2012 ECHO Stress-Test collected data on cardiac function while Complainant was on a treadmill.⁴ The medical report indicated that the test was cut short at 8.6 Peak Mets due to Complainant feeling light-headed. Complainant explained that he did not think the 2012 ECHO Stress-Test results would preclude him from the ET job because the treadmill examination had been conducted under artificial conditions (i.e., without the benefit of food or MT). Complainant stressed that the VA medical tests were not conducted under the "normal" conditions he would be exposed to as an ET.

On October 3, 2014, Complainant had a Cardiology Diagnostic Study performed which included a 2-D, Doppler and M-Mode Echocardiogram⁵ (Doppler Study) while on his medication. The Doppler Study is a comprehensive procedure that uses Doppler ultrasonography to examine the heart. An echocardiogram (ECHO) uses high frequency sound waves to create an image of the heart while the use of Doppler technology allows determination of the speed and direction of blood flow by utilizing the Doppler effect. The Doppler Study is currently one of the most important non-invasive investigations used in the diagnosis of heart disease⁶ and reported all of Complainant's heart functions to be normal. Such "normal" findings included Complainant's sinus rhythm, ventricular systolic function, diastolic function, right ventricular function, and chamber size. In addition, the study reported no valve disease, including arrhythmia. In other

⁴ Any ECHO stress-test requires "NPO status" which is requiring the patient to refrain from eating or drinking anything but water for 3-4 hours prior to the test. Patients on beta-blockers (such as MT) are required to not take their medication the day of the procedure because Beta-blockers often diminish the heart rate response. A person taking this medication will have a slower at rest heart rate, and may have a hard time reaching ideal heart rate during the treadmill portion of the exam.

⁵ These tests allow a cardiologist to visualize a patient's heart's chambers, muscles and valves. A Doppler Echocardiogram examination is a more detailed examination of how the blood flows through the heart and how the heart's valves are performing. These tests are usually performed together to obtain the most information about a heart's function, including: (1) the pumping function of the heart; (2) the wall motion of the heart muscles in various chambers; (3) the measurement of the dimensions of the heart chambers and the heart muscle thickness; (4) the structure and function of the heart valves; (5) potential congenital abnormalities of the heart (e.g. hole in the heart, abnormal malposition of vessels and chambers of the heart); and (5) potential structural and functional problems (e.g. clots in the heart chambers, fluid collection around the heart, heart tumor, etc).

⁶ Complainant asserts that doppler ECHO is a detailed diagnostic report, recognized by the medical community to be a better instrument for detecting heart abnormalities than a treadmill stress-test. Complainant argues that the doppler ECHO should have been sufficient to overcome any issues raised by the 2012 ECHO Stress-Test.

words, the causes of potential dizziness (that was present during the 2012 ECHO Stress-Tess) or fainting (e.g., arrhythmias) were not present when Complainant was permitted to take his prescribed medication (MT).

Essential Functions & Qualifications

According to the AM PD:

The incumbent frequently makes repairs and may assist other workers in making repairs while vehicles are overhead, and where parts worked on are often in hard-to-reach places. The incumbent is required to stand, stoop, bend, stretch, and work in tiring and uncomfortable positions for extended periods of time. The incumbent frequently lifts parts and equipment that weigh up to 20 pounds and occasionally lifts and carries items that weigh 50 pounds or more.

For the most part, work is performed in an enclosed facility which is usually drafty, noisy, and exposes workers to toxic fumes, dirt, dust, and grease. Ventilation systems may be present to reduce the level of airborne hazards. The incumbent frequently stands on hard surfaces for long periods of time and crawls under vehicles and makes repairs on hard, sometimes damp, surfaces. The incumbent occasionally performs repairs outside in all weather conditions. Vehicle fluids, such as battery acids and hydraulic fluids, may cause burns or irritate the skin, or be otherwise hazardous to health. The incumbent is frequently exposed to the possibility of cuts, bruises, shocks, burns and strains.

The Medical Officer, Health Care Programs Office, Human Resources Division (MDO) testified that the essential physical tasks of the ET position include:

(1) Lift or carry 35 lbs for 50 feet, (2) crouch or stoop for 8 hours, (3) climb 50 feet, (4) jump 4 feet, (5) stand 8 hours, (6) walk 100 yards, (7) push or pull 50 lbs for 50 feet, and (8) run 50 yards. Movement is required on any plane while holding objects in the hands or supported about the body. Climbing requires the use of handholds and footholds to move along any plane or over obstacles without stable or permanent foot support. Work requires using bent knees or bent back and includes maintaining and moving in any kneeling, crawling, crouching, stooping, or other compressed position.

The undisputed record shows that in addition to his regular AM duties, Complainant had been performing ET duties (as a collateral assignment) since March 2010 (i.e., approximately 4.5 years). The record also shows that Complainant received a rating of "Excellent" on his most recent Performance Appraisal Report (PAR). It is undisputed that Complainant's ET collateral duties include all ET job functions, except for "tower duty" which involves the task of climbing to heights of 50 feet with heavy equipment and working on communication towers at higher elevations in all types of adverse weather. According to Complainant's undisputed testimony, he could not

demonstrate his ability to carry out this ET function in his collateral role, because St. Louis' tower duty was usually contracted out to a third party. However, Complainant asserts that he has proven that he can perform the essential functions of the AM and ET positions by performing the work which includes having to ascend tall ladders, lift heavy equipment, pull cables and resolve mechanical issues. Complainant also asserts that he never experienced medical problems in the execution of these collateral duties. Complainant notes that he has received awards and accolades for his efforts performing ET work.

The HCPU's Fitness for Duty Determination

On October 30, 2014, Complainant received a letter from the Acting Chief of the FBI Office of Medical Services (MEDCHIEF) stating that his condition of ventricular arrhythmia was not compatible with safe and efficient job performance in the ET position. Complainant called MEDCHIEF and told her his disability had become "static and well stabilized," so that sudden incapacitation was highly unlikely. Complainant also explained to MEDCHIEF that the HCPU was relying on irrelevant data, as the 2012 ECHO Stress-Test had been geared toward obtaining a baseline level of his medical condition without the benefit of medication, rather than his capacity to perform ET functions. MEDCHIEF responded that Complainant could revert the initial finding if he supplied evidence from a cardiologist that his condition had been stabilized for a year. MEDCHIEF did not say he needed to undergo another stress-test, nor did she instruct Complainant to provide an updated EKG or ECHO.

Complainant's Appeal of the HCPU's Medical Fitness Decision

On November 21, 2014, Complainant sent in an appeal package containing several documents. Specifically, Complainant provided the medical records from FBI-MD describing him as "qualified for strenuous physical exertion." Complainant also provided medical progress notes generated by the VA on October 21, 2014, outlining the stabilizing impact of MT on his condition since January 2010. In addition, Complainant enclosed the results of the October 2014 Doppler ECHO confirming that the results were "normal."

Complainant also provided a Memorandum of Understanding from an Administrative Officer in the St. Louis Field Office who confirmed that Complainant had assisted the ETs in St. Louis since March 2010, performing standard ET tasks. The appeal package also included paperwork from one of Complainant's doctors, the Director of the Cardiac Electrophysiology Section, Washington University School of Medicine (MD1). According to MD1, Complainant's heart function had returned to normal with the passage of time and treatment. MD1 also stated: "I do not think that his heart function, which is now normal, or his arrhythmia, which is likely extra beats, compromises his ability to perform his job."

On December 11, 2014, Complainant received a letter from the Human Resources Division Assistant Director (HR) noting the receipt of the additional medical documentation from Complainant. HR, nevertheless, denied Complainant's appeal because the 2012 ECHO Stress-Test left "continuing uncertainties" as to the source of his cardiac rhythm disturbances.

Complainant's Request for a Reasonable Accommodation

Complainant notified MEDCHIEF that he spoke with the Reasonable Accommodation Program Manager (RAPM) and advised him that he was being disqualified from a position based on outdated and irrelevant medical information. Complainant requested, as an accommodation, to take a stress test without being deprived of food or medicine.⁷ Complainant explained that he was seen by three doctors, none of whom would perform or order a cardio stress-test without the appropriate and required medical documentation including the diagnostic and procedure codes, especially given the fact that Complainant's medical condition had stabilized and there was no apparent reason for the test. Accordingly, Complainant was not able to produce the medical documentation that MEDCHIEF was requesting.

COMPLAINANT'S ARGUMENTS

Complainant asserts that if the HCPU needed additional information about his former cardiac issues to resolve "continued uncertainties," it was incumbent upon the FBI to determine whether MD1 or any FBI contract physician could supply such data. Complainant pointed out that MD1's letter narrative invited the recipient to contact him with any questions, yet the HCPU failed to do so. Complainant reasoned that the HCPU's failure to pursue this option was an indication that the Agency was not committed to giving him a fair, complete, or individualized assessment. Complainant notes that HR's letter directed him to wait one year, and submit a new cardio stress-test demonstrating that Complainant could perform at 10 METs without experiencing symptoms. The recommendation to delay the resolution of the "continuing uncertainties" by one year also reflects the Agency's lack of commitment to resolve the issue.

Complainant asserts that the physical requirements of the AM position are comparable to those of the ET position, as demonstrated by both position descriptions. Complainant notes that MEDCHIEF'S letter of denial referenced the fact that ET duties included climbing to heights of 50 feet and working at higher elevations on communication towers. However, Complainant explained that he could not demonstrate his ability to carry out this function in his collateral ET role, because St. Louis tower duty was usually contracted out to a third party. Complainant emphasized that he had, however, proven he could perform the other work functions both as a part-

⁷ *On March 17, 2015, Complainant submitted an accommodation request (RAR) to the Reasonable Accommodation Committee (RAC) to force the HPCU to issue a medical referral with the appropriate diagnostic coding for the exact stress-test it required so that he could get the VA to conduct the test. RAPM states that Complainant's RAR was an unusual request, as no FBI entity had precluded him from undergoing, or submitting to, the medical exam in question. The RAC for Complainant's case convened on May 5, 2015. RAC reviewed Complainant's submissions and concluded that he is a qualified person with a disability. However, during the RAC deliberations, the committee learned that the ET vacancy was filled. Accordingly, the RAC advised Complainant that since there was no longer a vacancy, the RAR was moot.*

time ET and as an AM. Complainant specified that during his usual work day, he ascends tall ladders, lifts heavy equipment, pulls cables, and resolves mechanical issues. Complainant emphasizes and the record shows that he never experienced medical problems in the execution of these collateral duties. Complainant further adds and the record shows that he has received awards and accolades for his efforts in the collateral ET role.

AGENCY ARGUMENTS

The Agency asserts that Complainant's medical history reveals a longstanding history of heart palpitations and substandard tolerance for exercise. The responsible management officials assert that while MT treatment had improved Complainant's heart condition, it did not completely resolve the issue. MDO and others rely on Complainant's medical records that date back to 2004 and focus on the reports that indicate that Complainant limited his physical activity due to his symptoms, and had lost consciousness on two occasions. MDO and others note that Complainant's 2012 ECHO Stress-Test indicates that he experienced symptoms of lightheadedness and chest discomfort⁸ which led to discontinuation of the test at 8.6 METs which MDO considers inadequate to perform the physically strenuous ET job.

MDO further reports that on October 29, 2014, an FBI contract cardiologist (FBI-CARDIO) reviewed Complainant's medical records and concluded that Complainant had an "elevated risk for safe and efficient" performance in the ET position, based on Complainant's limited tolerance for exercise. MDO states that Complainant's conditional job offer was rescinded based on FBI-CARDIO's medical opinion, pending proof of the cardiovascular functionality necessary to execute ET duties.

The Agency further argues that the supplemental medical documentation provided by Complainant did not address Complainant's aerobic capacity. Accordingly, the decision to rescind his job offer remained in effect. MDO and other responsible management officials all agree that Complainant's current medical file is insufficient to conclude that he can safely perform the ET duties, but could potentially be remedied if Complainant submitted the requested documentation, demonstrating his capacity to tolerate 10 METs of exertion.

The Agency disagrees with Complainant's contention that his fitness level is proven based on the performance of AM duties, explaining that there is no physical entry examination or baseline cardiovascular performance level required for the AM position. In addition, the Agency asserts that Complainant's execution of ET functions in his collateral role does not prove that he is sufficiently fit to conduct all ET duties without increased risk, since he has never performed tower work which includes tasks such as climbing to significant elevations while exposed to the extreme weather. MEDCHIEF notes that elevation has been demonstrated to place demands on cardio-pulmonary function. According to MEDCHIEF and other Agency officials, AMs are not required to endure such conditions in the execution of their duties. MEDCHIEF also asserts that while

⁸ *The medical record shows that "chest discomfort" was noted during the Stress-Test but lightheaded was the only basis noted for discontinuation of the test.*

Complainant's Doppler ECHO and medical reports described his current condition as "normal," such notes and test results are not sufficient to satisfy questions raised by other aspects of Complainant's medical history.

The responsible management officials note that there was no point in contacting MD1 for additional information, because MD1 did not conduct an updated stress-test. MEDCHIEF and others dispute Complainant's contention that the doppler ECHO was superior to a treadmill stress-test, because the doppler test does not measure or gauge a subject's reaction to physical exertion. MEDCHIEF asserts that she expected the VA to accommodate Complainant's request for a new stress-test if he showed the VA the FBI letter outlining his need to demonstrate tolerance for 10 METs of exercise. However, she asserts that it is not the FBI's responsibility to ensure Complainant is able to take the stress-test, noting that the FBI conducts thousands of medical assessments each year, and cannot reasonably be expected to resolve issues between applicants, their insurance companies, and/or providers to guarantee that all potential candidates obtain the necessary medical data. MEDCHIEF concludes that the burden is, therefore placed on the applicant to acquire the necessary tests and documentation.

ANALYSIS AND FINDINGS

As this is an appeal from a decision issued without a hearing, pursuant to 29 C.F.R. § 1614.110(b), the Agency's decision is subject to de novo review by the Commission. 29 C.F.R. § 1614.405(a). See Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614, at Chapter 9, § VI.A. (Aug. 5, 2015) (explaining that the de novo standard of review "requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker," and that EEOC "review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission's own assessment of the record and its interpretation of the law").

Initially, we note that the events in this case arose after January 1, 2009, the effective date of the American with Disability Act (ADA) Amendment Act of 2008, which made significant changes to the definition of disability under the ADA and the Rehabilitation Act. Pursuant to the ADA Amendments Act, "disability" under the ADA is defined as: (1) a physical or mental impairment that substantially limits one or more of the major life activity of such individual; or (2) a record of such an impairment; or (3) being regarded as having such an impairment as described in paragraph (1) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor." See 29 C.F.R. § 1630.2(g).

The Agency does not dispute that Complainant is an individual with a disability. Therefore, this issue is not before the Commission on appeal, and need not be explored further. The next inquiry is whether Complainant is a "qualified individual with a disability." 29 C.F.R. § 1630.2(m). A "qualified individual with a disability" is one who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position and who, with or without

reasonable accommodation, can perform the essential functions of such position. *Id.*; Complainant v. Dep't of Treasury, EEOC Appeal No. 0120110248 (Feb. 20, 2015).

A review of the record reveals that Complainant received a conditional offer and was deemed by the Agency as qualified for every facet of the ET position except with respect to passing the physical fitness requirement of the position. The key question then is whether the physical fitness standard that Complainant failed to satisfy, or the Agency's application of such standard, is consistent with the requirements of the Rehabilitation Act. Nathan v. Dep't of Justice, EEOC Appeal No. 0720070014 (July 19, 2013). If the standard itself fails to meet the "job-related and consistent with business necessity" requirement, or if the Agency failed to apply the standard in an appropriate way (for example, by failing to determine whether performance could be achieved through reasonable accommodation) the Complainant has a valid claim. 29 C.F.R. § 1630.2(m); Complainant v. Tenn. Valley Auth., EEOC Appeal No. 0120093256 (Feb. 20, 2015).

The Rehabilitation Act prohibits a covered entity from engaging in discrimination against a qualified individual based on disability in, among other things, hiring. Such discrimination includes "using qualification standards,⁹ employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability ... unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity. *Id.* § 12112(b)(6); *see also* 29 C.F.R. § 130.10. The regulations provide that an agency can meet this standard by showing that the requirement, as applied to the individual, satisfies the "direct threat" analysis set forth in the Commission's regulations. *See* 29 C.F.R. § 1630.2(r); 29 C.F.R. 1630 App. 1630.15(b) and (c); Nathan v. Dep't of Justice, EEOC Appeal No. 0720070014 (July 19, 2013); Complainant v. Dep't of the Treasury, EEOC Appeal No. 0120110248 (Feb. 20, 2015). A person is a "direct threat" if he or she poses a significant risk of substantial harm to the health or safety of himself or herself or others which cannot be eliminated or reduced to an acceptable level by reasonable accommodation. 29 C.F.R. § 1630.2(r). The "direct threat" evaluation must be based on an individualized assessment of the individual's present ability to perform the essential functions of the job. *Id.*

The Agency concludes that Complainant cannot safely perform the essential functions of the ET position mainly because his 2012 ECHO Stress-Test shows an inability to perform the necessary strenuous physical tasks. To exclude an individual based on future possible injury, the Agency must show there is a significant risk (i.e., a high probability of substantial harm); a speculative or remote risk is insufficient. An agency must show more than an individual with a disability seeking employment stands some slightly increased risk of harm. The burden of showing a significant risk is on the agency. Selix v. U.S. Postal Serv., EEOC Appeal No. 01970153 (Mar. 16, 2000).

⁹ *The regulations define "qualification standard" as "the personal and professional attributes, including the skill, experience, education, physical, medical, safety, and other requirements established by a covered entity as requirements which an individual must meet to be eligible for the position held or desired."* 29 C.F.R. § 1630.2(q).

Moreover, such a finding must be based on an individualized assessment of the individual that considers: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and 4) the imminence of the potential harm. 29 C.F.R. § 1630.2(r); Chevron U.S.A. v. Echazabal, 536 U.S. 73 (2002); Cook v. State of Rhode Is., Dep't of Mental Health Retardation and Hospitals, 10 F.3d 17 (1st Cir. 1993). A determination of significant risk cannot be based merely on an employer's subjective evaluation, or, except in cases of a most apparent nature, merely on medical reports. Rather, the agency must gather information and base its decision on substantial information regarding the individual's work and medical history. Chevron U.S.A. v. Echazabal, *supra*; Harrison v. Dep't of Justice, EEOC Appeal No. 01A03948 (July 30, 2003); Nathan v. Dep't of Justice, EEOC Appeal No. 0720070014 (July 19, 2013) (finding that as part of its individualized assessment, the agency should examine adaptive behaviors and prior work experience).

We find that the Agency failed to conduct such an individualized assessment. The record shows that the responsible management officials all rely on the fact that, at some unspecified point over Complainant's 10-year medical history, he had limited his physical activity due to his symptoms, and had lost consciousness on two occasions. The record does not indicate when such issues took place and nothing in the record suggests that they occurred *after* Complainant started taking MT, which the record shows dramatically improved and stabilized his medical condition. The responsible management officials also substantially rely on the 2012 ECHO Stress-Test indicating that Complainant experienced symptoms of lightheadedness and chest discomfort which led to discontinuation of the test at 8.6. Peak METs. The responsible management officials conclude that Complainant's medical history prior to his treatment with MT and the 2012 ECHO Stress-Test (without the benefit of MT) were more reliable indicators of future safety risk than FBI-MD and MD1's opinions that were each based on the results of comprehensive examinations performed during the relevant time-frame.

The undisputed record shows that Complainant's heart condition is stabilized with proper medication. The Agency's own physician who performed the FFDE (which included an EKG), conducted a comprehensive physical examination focused on assessing Complainant's physical fitness in relation to the ET position and reported to the HCPU that Complainant was "qualified for strenuous physical exertion." In addition, the October 3, 2014 Doppler Study examined every possible heart function, sinus rhythm, chamber size and found all functions "normal" with no evidence of arrhythmias or other disorders. Complainant's doctors concluded that his condition has stabilized. Moreover, the undisputed record shows that Complainant has been performing ET functions which included climbing tall ladders and carrying heavy equipment for several years without incident.

We find that the Agency relied upon medical records that do not present an accurate reflection of Complainant's current state of health. The undisputed record establishes that the 2012 ECHO Stress-Test was performed without food or medication to establish a base-line for Complainant's condition. Given the circumstances regarding how the test is administered, we do not find it to be particularly relevant to the Agency's process of evaluating Complainant's ability to safely perform the essential functions of the ET position, since Complainant performs all work tasks with the benefit of medication. In addition, given the fact that the 2012 ECHO Stress-Test was conducted

2.5 years before the Agency's evaluation of Complainant's physical fitness, we find it even less helpful to the Agency's evaluation process, especially considering that a more current comprehensive diagnostic study was conducted in October 2014. Despite such weaknesses, the HCPU continued to rely on the inferior and outdated medical history and stress-test.

Not only do the responsible management officials fail to rely upon the most current and comprehensive medical information at hand, they do not explain any assessment as to the duration of any risk, nature and severity of potential harm, or likelihood and imminence of potential harm. In fact, the responsible management officials fail to even characterize the future safety risk as "significant" or the harm as "substantial." Rather, the testimony shows that management officials describe the risk of harm by using phases such; (1) "uncertain;" (2) "elevated;" and (3) "increased."

The burden is on the Agency to gather sufficient evidence to establish direct threat.¹⁰ The medical records that were considered by the Agency are sufficient to conclude that Complainant does not pose such threat and is qualified for the ET position. There is nothing in the record to suggest that Complainant, in his normal medicated state, is unable to perform the physical requirements of the ET position. Rather, the undisputed record shows that Complainant has, in fact, been performing most of the St. Louis ET duties for years without incident. With respect to the one aspect of the ET job that Complainant has not actually performed (i.e., tower work), we find that the Agency has not shown that Complainant's future performance of such work poses a significant risk of substantial harm to the health or safety of himself or others.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we REVERSE the Agency's decision and REMAND this matter to the Agency for further processing in accordance with our ORDER below.

ORDER (D0610)

The Agency is ordered to take the following remedial action:

1. Within sixty (60) days of receipt of this Order, the Agency shall offer Complainant reinstatement into the position of Electronics Technician in the St. Louis Field Office of the FBI located in St. Louis, Missouri.¹¹ The Agency shall afford Complainant fifteen (15) days to determine whether to accept reinstatement. Should Complainant reject the offer of

¹⁰ *Selix v. U.S. Postal Serv., EEOC Appeal No. 01970153 (Mar. 16, 2000).*

¹¹ *Complainant's grade-level should reflect the grade-level he likely would have risen to by now assuming he started his position on December 11, 2014 (i.e., the date the Agency denied Complainant's appeal after receiving sufficient medical information) at the GS-7 grade-level.*

reinstatement, Complainant's entitlement to back pay shall terminate as of the date of his rejection.

2. Within sixty (60) days of receipt of this Order, the Agency shall determine the appropriate amount of back pay, with interest, and other benefits due to Complainant, pursuant to 29 C.F.R. § 114.501. The back pay-period shall start on December 11, 2014 through the date of acceptance or rejection of the Agency's offer of reinstatement set forth in paragraph 1 above. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the Agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the Agency shall issue a check to Complainant for the undisputed amount within ninety (90) calendar days of the date the Agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled, "Implementation of the Commission's Decision."
3. The Agency shall also pay compensation for the adverse tax consequences of receiving back pay as a lump sum. Complainant has the burden of establishing the amount of increased tax liability, if any. Once the Agency has calculated the proper amount of back pay, Complainant shall be given the opportunity to present the Agency with evidence regarding the adverse tax consequences, if any, for which Complainant shall then be compensated.
4. Within ninety (90) days of receipt of this Order, the Agency shall conduct a supplemental investigation with respect to Complainant's claim of compensatory damages. The Agency shall allow Complainant to present evidence in support of his compensatory damages claim. See Carle v. Dep't of the Navy, EEOC No. 01922369 (Jan. 5, 1993). Complainant shall cooperate with the Agency in this regard. The Agency shall issue a final decision addressing the issues of compensatory damages no later than thirty (30) days after the completion of the investigation.
5. Within ninety (90) days of receipt of this Order, the Agency shall provide eight (8) hours of in-person or interactive EEO training for MDO, MEDCHIEF and HR on the Rehabilitation Act. The training shall emphasize the Rehabilitation's Act's requirements with respect to the use of fitness-for-duty examinations and other selection criteria to ensure that similar violations do not occur.
6. Within sixty (60) days of receipt of this Order, the Agency shall consider taking appropriate disciplinary action against MDO, MEDCHIEF and HR. If the Agency decides to take disciplinary action, it shall identify the action taken. If the Agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline. If any of the responsible management officials or employees have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).

7. The Agency shall immediately post a notice in accordance with the paragraph below.
8. The Agency is further directed to submit a report of compliance in digital format as provided in the statement entitled "Implementation of the Commission's Decision." The report shall be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Further, the report must include evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its St. Louis Field Office facility copies of the attached notice. Copies of the notice, after being signed by the Agency's duly authorized representative, shall be posted **both in hard copy and electronic format** by the Agency within 30 calendar days of the date this decision was issued, and shall remain posted for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The Agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer as directed in the paragraph entitled "Implementation of the Commission's Decision," within 10 calendar days of the expiration of the posting period. The report must be in digital format, and must be submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g).

ATTORNEY'S FEES (H1016)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), he is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the Agency. The attorney shall submit a verified statement of fees to the Agency -- **not** to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of the date this decision was issued. The Agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0617)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be in the digital format required by the Commission, and submitted via the Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on

the underlying complaint in accordance with the paragraph below entitled “Right to File a Civil Action.” 29 C.F.R. §§ 1614.407 and 1614.408.

A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). **If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated.** See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party’s timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant’s request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency’s request must be submitted in digital format via the EEOC’s Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this

decision. In the alternative, you may file a civil action **after one hundred and eighty (180) calendar days** of the date you filed your complaint with the Agency, or filed your appeal with the Commission.

If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. “Agency” or “department” means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant’s Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

July 27, 2018

Date