



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

[REDACTED]
Rigoberto A.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(Defense Security Service),
Agency.

Appeal No. 2023004763

Hearing No. 570-2023-00117X

Agency No. DCSA-012-22

DECISION

On August 23, 2023, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Administrative Judge's July 26, 2023, Decision Without a Hearing 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 AFFIRMS the Agency's final order.

ISSUES PRESENTED

Whether the Administrative Judge properly determined by summary judgment that Complainant did not meet his burden in proving he was subjected to a medical evaluation in violation of the Rehabilitation Act.

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.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Distribution Process Worker at the Agency's Naval Supply systems Command (NAVSUP) Fleet Logistics Center (FLC) Norfolk facility in Williamsburg, Virginia.

On June 24, 2022, Complainant filed an EEO complaint alleging that the Agency discriminated against him on the basis of disability (mental) when on May 16, 2022, the Agency requested Complainant to submit to a second medical evaluation; though Complainant previously submitted a medical evaluation on February 25, 2022.

The evidence developed during the investigation reveals that Complainant was diagnosed with Post Traumatic Stress Disorder (PTSD) and Alcohol Abuse. Complainant was employed with the Agency since June 2017 as a civilian employee. In June 2017, Complainant accepted a promotion within the Agency which required him to obtain a security clearance. On June 23, 2017, Complainant completed the Electronic Questionnaire for Investigation Processing ("e-QIP") (also known as SF-86), which is required by the Agency in order to determine applicant's eligibility for a national security clearance. The Agency's Consolidated Adjudication Services (CAS) determines security clearance eligibility for the Agency's civilian employees. In his June 23, 2017, SF-86, Complainant stated he was advised by a mental health professional to cut down on alcohol consumption as treatment for his stress disorder.

On April 4, 2019, CAS issued Complainant a memorandum notifying Complainant of the security concerns raised by his answers on his SF-86 related to the Alcohol Consumption and Psychological Conditions National Security Adjudicative Guidelines and offered to allow Complainant to participate in a medical evaluation by an Agency-affiliated clinical psychologist or Board-certified psychiatrist. This was done in order to obtain a professional medical opinion regarding whether a condition existed that could have affected Complainant's judgement or reliability and, therefore, to make a more informed adjudicative decision concerning the Complainant's eligibility for a national security clearance.

On May 3, 2019, Complainant consented to a medical evaluation requested by CAS, which was then conducted by an approved physician. On December 18, 2019, Complainant underwent another psychiatric evaluation to obtain a second opinion related to a denied Department of Veterans Affairs claim.

On or around April 22, 2020, and prior to a final determination by CAS, the Agency was tentatively told that Complainant's clearance would not be approved; however, the Agency cancelled Complainant's security clearance adjudication on the basis that the Agency was no longer considering reassigning Complainant to a sensitive position. CAS therefore closed the action and made no final determination regarding Complainant's security clearance eligibility.

In September 2020, Complainant was transferred to NAVSUP and subsequently acquired a position that required a security clearance. NAVSUP requested CAS determine Complainant's eligibility for a "Secret" security clearance. On September 30, 2021, Complainant submitted a second SF-86. Based on its review of Complainant's September 30, 2021, SF-86, CAS requested the Complainant to provide medical records from his physicians and other mental health professionals that Complainant saw after July 2019.

On May 16, 2022, CAS, through NAVSUP, issued Complainant a memorandum that notified Complainant of security concerns related to the personnel security adjudicative guidelines pertaining to Alcohol Consumption. CAS subsequently offered Complainant an opportunity to participate in a medical evaluation by an Agency-affiliated or Board-certified psychiatrist to obtain a professional medical opinion that it would use to make an informed adjudicative decision for his eligibility for a national security clearance. Complainant agreed to participate in the medical evaluation on May 23, 2022. Subsequently, on August 17, 2022, CAS made a favorable determination regarding Complainant's eligibility to obtain a Secret security clearance.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation (ROI) and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. On July 5, 2023, the Agency filed a Motion for Summary Judgment and a Motion to Dismiss. When Complainant did not object to either filing, the AJ assigned to the case granted the Agency's July 5, 2023, Motion for Summary Judgment and issued a decision without a hearing on July 26, 2023. When the Agency failed to issue a final order within forty days of receipt of the AJ's decision, the AJ's decision finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged became the Agency's final action pursuant to 29 C.F.R. § 1614.109(i). The instant appeal followed.

CONTENTIONS ON APPEAL

On appeal, Complainant contends that the request to undergo a new medical evaluation was not necessary for an issue related to Alcohol Consumption. Complainant argues that the evaluation was a very intrusive medical exam and brings up very painful memories. Complainant stated that he felt like he was threatened to do an unnecessary medical exam or lose his job.

On appeal, the Agency contends that Complainant's voluntary acceptance to participate in the Agency's medical evaluation fell within the Agency's guidelines for assessing eligibility for a national security clearance.

STANDARD OF REVIEW

As this is an appeal from a decision issued without a hearing, 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").

The Commission's regulations allow an AJ to grant summary judgment when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). An issue of fact is "genuine" if the evidence is such that a reasonable fact finder could find in favor of the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A fact is "material" if it has the potential to affect the outcome of the case. In rendering this appellate decision, we must scrutinize the AJ's legal and factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a)(stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review..."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo).

ANALYSIS

Summary Judgment

In order to successfully oppose a decision by summary judgment, a complainant must identify, with specificity, facts in dispute either within the record or by producing further supporting evidence and must further establish that such facts are material under applicable law. Such a dispute would indicate that a hearing is necessary to produce evidence to support a finding that the Agency was motivated by discriminatory animus.

In this case, Complainant did not file an opposition to the Agency's summary judgment motion. Complainant did not provide any arguments on appeal suggesting any disputes of material facts and a review of the record does not reveal any genuine disputes of material facts. As such, we find that the AJ was not precluded from issuing a summary judgment decision.

Request for Medical Evaluation

The Rehabilitation Act places certain limitations on an employer's ability to make disability-related inquiries or require medical examinations of employees only if it is job related and consistent with business necessity. 29 C.F.R. §§ 1630.13(b),14(c). Generally, a disability related inquiry or medical examination of an employee may be "job related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition." Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) EEOC No. 915.002 (July 27, 2000) at 15-16. Objective evidence is reliable information, either directly observed or provided by a credible third party, that an employee may have or has a medical condition that will interfere with his ability to perform essential job functions or will result in a direct threat. Id. at 7. It is the burden of the employer to show that its disability related inquiries and requests for examination are job related and consistent with business necessity. Id. at 15-23.

In this case, the Agency stated that Complainant's position required him to obtain a security clearance and in order to receive a favorable security clearance adjudication, an additional medical evaluation was necessary.

The Agency's Branch Technical Lead who was in charge of Complainant's security clearance adjudication testified that when Complainant transferred into the position that required a clearance, his file included an evaluation from June 2019 that recommended treatment for alcohol and PTSD, but no proof that he complied. ROI at 460. The Lead stated that in order to determine if Complainant's alcohol and PTSD were still of concern, the Agency required additional information regarding Complainant's treatment records to prove he complied with the doctor's treatment recommendations and was not a risk to national security. Id. The Lead stated that she received treatment records (what Complainant described as the evaluation he obtained personally and submitted on February 25, 2022), but it contained minimal information. ROI at 460; see also ROI at 299-304. The Lead stated that the best course of action at the time was to ask Complainant to undergo a new evaluation to obtain this information as the last evaluation was unfavorable and was several years old. Id. The Lead provided regulations regarding security clearances, including the national security adjudicative guidelines and relevant procedures, which supported her request for an additional medical evaluation. See ROI at 460.

A Supervisory Staff Psychologist testified that he concurred with the Lead's recommendation for a second evaluation as well. See ROI at 333-335. In fact, in support of his concurrence, the Psychologist cited several direct quotes from Complainant's 2019 medical evaluation. For instance, the doctor who evaluated Complainant in 2019 stated "both (alcohol abuse and PTSD) are likely to continue if [Complainant] does not obtain proper clinical care" and "[Complainant] should consider total abstinence from alcohol in light of the potential security concerns expressed by the [Agency]." ROI at 266. The doctor who evaluated Complainant in 2019 also stated that Complainant's diagnoses (PSTD and Alcohol Abuse) "indicate a need for him to be treated with appropriate medication and therapy including, but not limited to, consideration of attending Alcoholics Anonymous (AA) meetings as contingencies for continued involvement in properly safeguarding classified information and performing sensitive duties." Id.

We find that Complainant's 2019 evaluation summary, the two-year gap in between the 2019 evaluation and the Agency's request for an additional medical evaluation, and the lack of updated treatment information from Complainant provide objective evidence that Complainant, because of his medical conditions, might not have been able to perform the essential functions of his position (i.e. obtaining and maintaining a Secret security clearance).

We also note that without the additional information provided by the second evaluation, the Agency intended to deny Complainant a Secret security clearance pursuant to national security adjudicative guidelines regarding alcohol consumption. ROI at 460. ²

In reviewing the record, we find that the Agency met its burden in showing that the request for an additional medical evaluation to assess Complainant's ability to perform his duties were job related and consistent with business necessity. Accordingly, we find no violations of the Rehabilitation Act.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency's Final Order adopting the AJ's summary judgment decision finding no discrimination.

STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0124.1)

The Commission may, in its discretion, reconsider this appellate decision if Complainant or the Agency submits a written request that contains arguments or evidence that 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 for reconsideration must be filed with EEOC's Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. If the party requesting reconsideration elects to file a statement or brief in support of the request, **that statement or brief must be filed together with the request for reconsideration.**

² In so finding, we distinguish the decision to seek the current medical evaluation from the ultimate agency decision regarding the Complainant's security clearance, which is a matter not within the Commission's jurisdiction to address. See Policy Guidance on the Use of the National Security Exception Contained in § 703(g) of Title VII of the Civil Rights Act of 1964, as amended, EEOC Notice No. N-915-041 (May 1, 1989); Dep't of the Navy v. Egan, 484 U.S. 518 (1988).

A party shall have **twenty (20) calendar days** from receipt of another party's request for reconsideration within 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).

Complainant should submit their request for reconsideration, and any statement or brief in support of their request, via the EEOC Public Portal, which can be found at

<https://publicportal.eeoc.gov/Portal/Login.aspx>

Alternatively, Complainant can submit their request and arguments to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, via regular mail addressed to P.O. Box 77960, Washington, DC 20013, or by certified mail addressed to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, a complainant's request to reconsider shall be deemed timely filed if OFO receives it by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604.

An agency's request for reconsideration must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). Either party's request and/or statement or brief in opposition must also include proof of service on the other party, unless Complainant files their request via the EEOC Public Portal, in which case no proof of service is required.

Failure to file within the 30-day time period will result in dismissal of the party's request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. **Any supporting documentation must be submitted together with the 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(f).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0124)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. 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 their 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. If you file a request to reconsider and also file a civil action, **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

December 31, 2024

Date