



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

[REDACTED]  
Shon T.,<sup>1</sup>  
Petitioner,

v.

Benjamine Huffman,  
Acting Secretary,  
Department of Homeland Security  
(Customs and Border Protection),  
Agency.

Petition No. 2024004658

MSPB No. SF-0752-23-0530-I-1

DECISION

On August 8, 2024, Petitioner filed a timely petition with the Equal Employment Opportunity Commission (EEOC or Commission) asking for review of a Final Order issued by the Merit Systems Protection Board (MSPB) concerning his claim of discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Petitioner worked as a Supervisory Customs and Border Patrol Officer (CBPO) at the Agency's San Ysidro Port of Entry facility in San Ysidro, California. Petitioner filed an appeal with the MSPB challenging his removal and asserting the affirmative defense of disability discrimination and a failure to provide a reasonable accommodation.

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

In May 2021, while working an overtime shift, Petitioner suffered an ankle injury while pursuing and detaining a vehicle's passengers and was later diagnosed with a right ankle sprain, synovitis, post-traumatic osteoarthritis, and a right ankle bone fracture. See Investigate File, Tab 23, pg. 28. Thereafter, Petitioner submitted a "CA-1" claim for workers' compensation directly to the Agency workers' compensation liaison but not with the Department of Labor. He was placed on Light Duty status effective July 12, 2022 through November 12, 2022, and was informed of his Light Duty status in an email sent to him by the Injury Compensation Coordinator (Compensation Coordinator). See Investigative File, Tab 30, pg. 5. His medical documentation stated that Petitioner could not perform any work requiring excessive standing or walking or use of his right ankle, such as running or detaining people. See Investigative File, Tab 30, pg. 7-9. While on Light Duty, Petitioner continued to work as a Supervisory CBPO in the Admissibility Enforcement Unit (AEU) performing only administrative duties. The AEU does, however, have a detention area in which undocumented persons can be detained if necessary and witnesses testified that any CBPO, including a Supervisory CBPO in the AEU, may be called upon to perform "front line" duties such as transporting detainees and escorting travelers and occasionally intervening in altercations.

Petitioner submitted a Request for Temporary Light Duty (Extension) Form on February 26, 2023, in which he requested an extension of his temporary light duty and submitted medical documentation indicating he continued to have the same physical restrictions while working. On February 27, 2023, the Workplace Resumption Office Branch Chief (Branch Chief) issued Petitioner a letter instructing Petitioner to provide medical documentation as to how his condition affected his performance of the full duties of a Supervisory CBPO. See Investigative File, Tab 23, pg. 26-27. Petitioner submitted a treatment record dated March 2, 2023, which noted that Petitioner had "severe osteoarthritis" and "continued swelling and instability along with easy fatigue to his ankle." See Investigative File, Tab 23, pg. 28-29. The treatment record further stated that Petitioner was "unable to run" or "pivot quickly," and noted that "his current physical findings would put not only himself, but his co-workers and bystanders in potential danger were he needed to physically respond quickly to apprehend, detain, or arrest suspected violators." See id. at 29. On April 4, 2023, the Medical and Fitness Branch reviewed the documentation and recommended that management require Petitioner to undergo a Fitness for Duty Evaluation (FFDE).

On April 26, 2023, the Branch Chief met with Petitioner and instructed him to report for a FFDE, giving Petitioner a "Letter of Intent" that stated the reasons for requiring Petitioner to submit to a FFDE and noting that the FFDE was "required," and warning that a failure to submit to a FFDE "may result in disciplinary action up to and including removal from your position." See Investigative File, Tab 4, pg. 78-79. Petitioner did not sign the letter and testified that he did not believe he was being issued a direct order or that the FFDE was, in fact, required. On May 3, 2023, the Branch Chief again met with Petitioner and presented him with a Direct Order issued by the Assistant Director of Mission Readiness (Assistant Director) which explicitly stated that Petitioner was being issued a direct order to submit to a FFDE and to sign the April 23 Letter and the accompanying notice for Release of his Medical Records and warning that a failure to comply with the direct order "may be cause for disciplinary action, up to and including removal." See Investigative File, Tab 4, pg. 74. Petitioner did not sign either the April 23 Letter of Intent or the May 3 Direct Order.

On May 15, 2023, the Assistant Director of Mission Readiness (Mission Director) issued a letter proposing to remove Petitioner from his position for his failure to submit to a FFDE. See Investigative File, Tab 4, pg. 70-73. Petitioner responded to the proposed removal in writing but on July 10, 2023, the Director of the San Diego Field Office (Director) issued a letter sustaining the charge of failure to submit to a FFDE and affirming Petitioner's removal, which was effective July 21, 2023. See Investigative File, Tab 4, pg. 25-28.

Petitioner appealed his removal to the MSPB. A hearing was held and thereafter an MSPB Administrative Judge (AJ) issued an initial decision finding that the Agency proved that the Petitioner committed the misconduct of failing to follow supervisory orders by failing to submit to a FFDE and that Petitioner did not establish his affirmative defense of a denial of reasonable accommodation. Specifically, the AJ found that Petitioner did not establish that he was a qualified individual with a disability because the evidence in the record indicated that Petitioner's ongoing physical limitations would prevent him from performing the essential functions of his position which included front-line CBPO duties such as inspections, detentions, pat-downs, intervening in physical altercations with detainees, and transportation of individuals. This decision became final on July 11, 2024.

Petitioner then filed the instant petition.

### CONTENTIONS ON PETITION

Petitioner contends that the Agency's requiring Petitioner to submit to a FFDE was a prohibited disability-related inquiry in violation of the Rehabilitation Act and further that the MSPB AJ erred in finding that the Agency did not violate the Rehabilitation Act by denying Petitioner a reasonable accommodation and removing him on the basis of his disability because Petitioner had been performing the essential administrative functions of his position while on Light Duty and there was no showing of undue hardship.

In response, the Agency argues that the MSPB correctly found that Petitioner was not a qualified individual with a disability because a majority of the witnesses testified that the duties of a Supervisory CBPO included being able to respond to "front-line" situations and that the position included physical and mental requirements.

### STANDARD OF REVIEW

EEOC Regulations provide that the Commission has jurisdiction over mixed case appeals on which the MSPB has issued a decision that makes determinations on allegations of discrimination. 29 C.F.R. § 1614.303 et seq. The Commission must determine whether the decision of the MSPB with respect to the allegation of discrimination constitutes a correct interpretation of any applicable law, rule, regulation or policy directive, and is supported by the evidence in the record as a whole. 29 C.F.R. § 1614.305(c).

### ANALYSIS

Petitioner first contends that the order to submit to a FFDE was unlawful as a prohibited disability-related inquiry. Employers may require a medical examination such as the FFDE at issue here only if the examination is job-related and consistent with business necessity. See Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (July 27, 2000) (web version) (Guidance), at 5. This requirement is met when the employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform the essential job functions is impaired by a medical condition; or (2) that an employee poses a direct threat due to a medical condition. See Guidance at 14.

This means that the employer must have a reasonable belief based on objective evidence that an employee will be unable to perform the essential functions of his/her job because of a medical condition. 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. Where the employer forms such a belief, its disability-related inquiries and medical examinations are job-related and consistent with business necessity, if they seek only the information necessary to determine whether the employee can perform the essential functions or work without posing a direct threat to self or others. Id. It is the burden of the employer to show that its disability-related inquiries and requests for medical examination are job-related and consistent with business necessity. See Cerge v. U.S. Dep't of Homeland Sec., EEOC Appeal No. 0120060363 (Oct. 9, 2007).

We reject Petitioner's argument that the Agency violated the Rehabilitation Act by asking Petitioner to submit to a FFDE. The Agency first required Petitioner to submit to an FFDE after he submitted a request to extend his Light Duty assignment and submitted medical documentation that stated that Petitioner continued to suffer from swelling and instability and continuous pain in his ankle and that he could not run or pivot and further that his physical restrictions would "put not only himself, but his co-workers and bystanders in potential danger were he needed to physically respond quickly to apprehend, detain or arrest suspected violators." See Investigative File, Tab 23, pg. 28-29. Due to the medical documentation submitted by Petitioner, we find that the AJ correctly found that the Agency's request that Petitioner submit to an FFDE was lawful as the Agency had a reasonable belief that Petitioner could no longer perform the essential functions of his position. See Rico M. v. Dep't of Justice, EEOC Appeal No. 0120160238 (Feb. 6, 2018).

An agency is required to make reasonable accommodation to the known physical and mental limitations of an individual with a disability unless the agency can show that accommodation would cause an undue hardship. 29 C.F.R. §§ 1630.2(o), (p). In order to establish that he was denied a reasonable accommodation, Petitioner must show that: (1) he is an individual with a disability as defined by 29 C.F.R. § 1630.2(g); (2) he is a "qualified" as defined by 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide a reasonable accommodation. See EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct. 17, 2002) (Enforcement Guidance).

After showing that Petitioner is an individual with a disability, he must then establish that he is a qualified individual who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the individual holds or desires and who, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m).

The AJ found that Petitioner did not establish that he was a qualified individual with a disability because the evidence indicated that his physical restrictions prohibited him from performing the essential functions of his position. The AJ noted the testimony of the majority of the witnesses, including other Supervisory CBPOs, who stated that Supervisory CBPOs were required to be able to perform the duties required of CBPOs, such as responding to incidents regarding arrests and subduing subjects or intervening in altercations and other potential use of force situations. The AJ also emphasized that Petitioner sustained his ankle injury while serving as a Supervisory CBPO in the AEU in pursuing and detaining some individuals. We find that the AJ's conclusion that Petitioner is not a qualified individual is supported by the evidence in the record. See Adena J. v. Nat'l Credit Union Admin., EEOC Appeal No. 2024003388 (July 31, 2024).

Accordingly, we find that the MSPB properly determined that Petitioner did not establish her affirmative defense of disability discrimination of a failure to accommodate when the Agency removed him from federal service.

### CONCLUSION

Based upon a thorough review of the record, it is the decision of the Commission to CONCUR with the final decision of the MSPB finding no discrimination. The Commission finds that the MSPB's decision constitutes a correct interpretation of the laws, rules, regulations, and policies governing this matter and is supported by the evidence in the record as a whole.

### PETITIONER'S RIGHT TO FILE A CIVIL ACTION (W0124)

This decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. You have the right to file a civil action in an appropriate United States District Court, based on the decision of the Merit Systems Protection Board, **within thirty (30) calendar days** of 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.

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:



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Carlton M. Hadden, Director  
Office of Federal Operations

February 26, 2025  
Date