



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

[REDACTED]
Arturo B.,¹
Complainant,

v.

Lloyd J. Austin III,
Secretary,
Department of Defense
(National Geospatial-Intelligence Agency),
Agency.

Request No. 2022005150

Appeal No. 2021003276

Agency No. NGA-0014-2020

DECISION ON REQUEST FOR RECONSIDERATION

The Agency requested that the Equal Employment Opportunity Commission (EEOC or Commission) reconsider its decision in Arturo B. v. Dep't of Def., EEOC Appeal No. 2021003276 (August 29, 2022). EEOC Regulations provide that the Commission may, in its discretion, grant a request to reconsider any previous Commission decision issued pursuant to 29 C.F.R. § 1614.405(a), where the requesting party demonstrates 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. See 29 C.F.R. § 1614.405(c).

BACKGROUND

At the time of events giving rise to this complaint, Complainant was an applicant for employment for the position of Police Officer, Pay Band 2, at the Agency's campuses in Arnold, Missouri and St. Louis, Missouri.

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.

On January 23, 2020, Complainant filed an equal employment opportunity complaint alleging that the Agency discriminated against him based on disability (diabetes) when, on October 31, 2019, he received a memorandum from the Agency's Human Development Directorate, stating that he was not medically qualified for and therefore denied a Pay Band 2 Police Officer position with the Agency.

Following an investigation into his complaint, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b), in accordance with Complainant's request. The decision concluded that Complainant failed to prove that the Agency subjected him to discrimination as alleged. Complainant appealed the Agency's final decision.

The Agency had withdrawn Complainant's offer of employment due to the finding of its Medical Board that he was not medically qualified for the position. An Agency Contract Physician conducted Complainant's physical examination after he was conditionally selected for the position. Though Complainant passed his physical examination, the Contract Physician had concerns regarding Complainant's diabetes mellitus, coronary artery disease, history of myocardial infarction, anxiety, and posttraumatic stress disorder (PTSD), so she requested medical records from Complainant's own physicians. Three of Complainant's doctors submitted letters indicating that Complainant's conditions were stable and well-controlled.

Complainant's endocrinologist, who treated Complainant's diabetes, indicated that Complainant had "overall excellent glycemic control" using an insulin pump, that he was "safe to operate machinery," and that Complainant "pose[d] no increased risk of harm to himself or coworkers at this time." The endocrinologist also stated that Complainant had "no complications related to the diabetes." He concluded that Complainant did not require "any special considerations in regard to his diabetes with the exception of the ability to have access to food and to be able to take an appropriate break if blood sugars become either low or high which would allow appropriate intervention." Lastly, the endocrinologist indicated that because insulin is heat sensitive, Complainant "should avoid being in temperatures prolonged above 100 degrees. This can be managed by using a cooling packet on the pump."

Complainant's primary care physician (PCP), who wrote a letter concerning Complainant's mental health, stated that Complainant had "some mild anxiety and a history of insomnia" about 3-4 years prior, for which he prescribed Complainant alprazolam (the generic name for Xanax). He indicated that Complainant mostly used the medication "at bedtime as needed to help him sleep." The PCP indicated that Complainant's "anxiety increased some after his [heart attack,] which is understandable," and that the "issue is now well controlled." The PCP concluded that Complainant did not have "any mental health issues or problems" and did not pose "a threat or risk of harm to himself or any coworker and has never exhibited any tendencies towards this. He is not under any physical or mental restrictions."

Complainant's cardiologist wrote a letter stating Complainant had "been asymptomatic for well over a year" and that, "[f]rom a cardiac standpoint he does not have any activity or lifting restrictions" and "can ful[fil] his job duties with no restrictions."

Despite the opinions of Complainant's private doctors, Contract Physician, who was one of three physicians on the Medical Board, had concerns that: Complainant had end-organ disease due to his cardiovascular disease and prior heart attack; that he would need access to food to control his blood sugar; that he would need to take breaks if his blood sugar became too low or high; that he would need to avoid prolonged temperatures of more than 100 degrees without a cooling packet on his insulin pump; that his diabetes was unstable; and that he had uncontrolled PTSD. Based on the Medical Board's meetings about Complainant's health, it concluded Complainant was not medically qualified for the position. The Agency's final decision concluded that Complainant's various medical conditions disqualified him for the position and that the circumstances did not give rise to an inference of discrimination.

On August 29, 2022, the Commission issued a decision reversing the Agency's final decision finding no discrimination. The Commission found that the Agency conceded Complainant was an individual with a disability, so it therefore dealt only with the question of whether Complainant was qualified for the position. The Commission ultimately determined that the Agency had discriminated against Complainant by rescinding its conditional offer of employment due to the concerns raised by the Contract Physician. Based on its review of the record, the Commission found that "all of Complainant's physicians found Complainant's conditions to be well-controlled" and found "no barriers that would preclude Complainant from working in law enforcement and imposed no restrictions on Complainant's ability to perform the essential functions of the Police Officer position." The Commission found the Agency's reliance on Contract Physician findings was misplaced, and it was "disinclined to defer to the Contract Physician regarding Complainant's own abilities and medical status over Complainant's own treating physicians who, unlike the Contract Physician, were specialists in their respective fields."

The Commission acknowledged that diabetes could render an applicant medically unqualified to perform the essential functions of a desired position, but that in prior cases where the Commission had made such a conclusion, Complainant's own physicians had indicated that Complainant could not perform certain essential functions. The Commission ultimately found that the Contract Physician and the members of the Medical Board "made unwarranted assumptions about what Complainant could do despite ample medical evidence to the contrary" and had therefore violated the Rehabilitation Act. In a footnote, the Commission also indicated that it would not address the issue of whether Complainant posed a "direct threat" to himself or others in the position, as the Agency had not expressly raised that argument as an affirmative defense.

In its request for reconsideration, the Agency argues that the Commission's prior decision is clearly erroneous because it did not analyze the facts in light of the "inherently dangerous" nature of the position in question. The Agency contends that such a position has as an essential element "aggressive law enforcement activities" and that, when viewing Complainant's health conditions in concert, he cannot "safely engage" in such activities.

The Agency argues the Commission also erred by relying on Complainant's doctors' individual assessments instead of the Medical Board's "review of . . . Complainant and his conditions as a whole," and that Complainant's doctors did not "consider . . . Complainant's treatment in conjunction with law enforcement activities." It argues that each of Complainant's physicians only addressed his own area of expertise and "did not look at the overall health of" Complainant by "holistically evaluat[ing]" his diabetes, heart condition, and anxiety and how they would be affected by stressful "policing situations." For example, the Agency contends that Complainant's doctors did not evaluate how diabetes and anxiety could affect his heart condition or how the stress of the police profession could exacerbate his various conditions. The Agency's physicians, on the other hand, were concerned with the "multiple health limiting conditions" of Complainant. The Agency also referred to the fact that the Food and Drug Administration label for Xanax includes warnings about not operating potentially dangerous machinery and argues that Complainant's PCP did not consider how Complainant's use of Xanax would affect his ability to safely handle a weapon.

The Agency ultimately argues that it was not just one medical condition that disqualified Complainant, but all of them, and that one accommodation, such as an insulin pump cooling mechanism, would not be sufficient in this case. The Agency therefore asks us to reverse the prior decision.

In his response to the Agency's request for reconsideration, Complainant argues that his doctors are in fact "linked through a patient portal allowing each one of them to see all" of his test results and doctors' notes from each visit/procedure and that they work together as a team. Complainant also contends that each physician was given a list from the Agency of the functional requirements and environmental factors for the position and to evaluate if Complainant had restrictions that would prevent him from performing any of the listed items. Complainant emphasizes that each physician "found no barriers that would prevent [Complainant] from working in law enforcement." Regarding his insulin pump and cooling mechanisms, Complainant contends that the Agency misunderstands that a pump could be placed on various areas of the body (not just the abdomen) and could accommodate "aggressive law enforcement activities."

Complainant also argues that Police Officers at the Agency are not serving arrest warrants, responding to violent crimes, or encountering suspects who may be armed and dangerous, but instead "provide access control and security to a facility where the majority of the people coming through the gate have a security clearance" and have submitted their name prior to arrival. Complainant also notes that the Agency provided no data to support its claim that the position at issue is inherently dangerous.

ANALYSIS AND FINDINGS

Based on our review of the record, we find that our prior decision was not clearly erroneous. In its prior decision, the Commission noted that the "Agency did not submit any contentions on appeal." In its request for reconsideration, the Agency does not dispute that they failed to submit any arguments during the prior appeal.

In order to exclude an individual because of possible future injury, the Agency bears the burden of showing there is a significant risk, for example, of a high probability of substantial harm. A speculative or remote risk is insufficient. The Agency must show more than an individual with a disability seeking employment stands some slightly increased risk of harm. Complainant v. U.S. Postal Service, EEOC Appeal No. 01970153 (Mar. 16, 2000). Such a finding must be based on an individualized assessment of the individual that takes into account: (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). See Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002); Cook v. State of Rhode Island, Dep't of Mental Health Retardation and Hosps., 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. Inc. v. Echazabal, *supra*; Harrison v. Dep't of Justice, EEOC Appeal No. 01A03948 (Jul. 30, 2003). Relevant evidence may include input from the individual with a disability, his work history or experiences in previous positions, and opinions of medical doctors who have expertise in the particular disability or direct knowledge of the individual with the disability. Complainant v. Dep't of the Treasury, EEOC Appeal No. 0120110248 (Feb. 20, 2015).

Here, the medical information from Complainant's treating physicians indicated that there were no contraindications for his work in law enforcement. All three doctors stated that his conditions were stable and that he posed no risk to himself or others based on their assessment of Complainant. As the Commission noted in its prior decision, the Rehabilitation Act prohibits the Agency from making unwarranted assumptions about Complainant's abilities to perform the essential functions of the position. The Agency's speculation about Complainant's conditions, given that it contradicted the assessment of Complainant's own physicians, was not found to be justified by the record.

The Agency's arguments for reconsideration are unavailing. Its concerns about Complainant's use of Xanax, for example, do not address the fact that Complainant was prescribed the drug "as needed" for use at night for insomnia, and that his treating physician did not indicate Complainant suffered from PTSD or other "mental health issues or problems."² The Agency provides no evidence that Complainant's physicians were unaware of his other conditions or were improperly siloed.

² The Agency relies on Complainant's self-reporting on a medical form that he suffered from PTSD after his heart attack, but Complainant's treating physician indicated only that Complainant had increased anxiety after his heart attack, which the doctor indicated was a normal reaction and that the anxiety was now well-controlled. The record therefore does not indicate that the Commission's prior decision was clearly erroneous in its assessment of Complainant's medical history.

The Commission's prior decision was not clearly erroneous for relying on the assessment of Complainant's physicians, as our cases have stressed the importance of the opinions of a complainant's own doctors. See, e.g., Complainant v. Dep't of Def., EEOC Appeal No. 01A24984 (Aug. 10, 2004) (rejecting the agency's argument "that severe harm could result from complainant's allegedly 'uncontrolled' diabetes," and finding "that complainant's physician had been monitoring complainant's condition for several months and was best-suited to opine about the level of control complainant had over his diabetes"), req. for recon. den'd, EEOC Request No. 05A50076 (February 9, 2005). Additionally, the Agency did not explicitly raise the affirmative defense that Complainant posed a "direct threat" to himself or others in its final decision or while the matter was on appeal (as we stated in the prior decision), and it is too late to raise such an argument for the first time in this request.³

We note that the Agency failed to submit a brief when the matter was originally on appeal, and the Agency provides no explanation in the request for reconsideration why its current arguments could not have been raised on appeal. We emphasize that a request for reconsideration is not a second appeal to the Commission. Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (Aug. 5, 2015), at 9-18; see, e.g., Lopez v. Dep't of Agric., EEOC Request No. 0520070736 (Aug. 20, 2007). Rather, a reconsideration request is an opportunity to demonstrate that the appellate decision involved a clearly erroneous interpretation of material fact or law, or will have a substantial impact on the policies, practices, or operations of the Agency. The Agency has not done so here.

After reviewing the previous decision and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(c), and it is the decision of the Commission to deny the request. The decision in EEOC Appeal No. 2021003276 remains the Commission's decision. There is no further right of administrative appeal on the decision of the Commission on this request. The Agency shall comply with the Order as set forth herein.

ORDER

1. The Agency shall within 30 days of the date this decision is issued, appoint Complainant to the position of, Police Officer, Pay Band 2, or a substantially equivalent position at the Agency's campuses in Arnold, Missouri and St. Louis, Missouri, retroactive to May 22, 2019 (date of conditional offer). The Agency shall retroactively promote Complainant to the next appropriate step and/or grade, respectively, if appropriate, on the one-year anniversary of his appointment and then on an annual basis or according to Agency policy.

³ We also note that the Agency does not explain how the possible accommodations identified by Complainant's endocrinologist—such as access to food, a break if his blood sugar becomes low or high, or a cooling packet for his insulin pump—would prevent him from effectively performing duties of the position. It instead simply argues that he would need more than a cooling packet as an accommodation. This is insufficient to show that the prior decision was clearly erroneous.

2. Within 60 days of the date this decision is issued, the Agency shall determine the appropriate amount of back pay (if any) with interest, and other benefits due to Complainant, pursuant to 29 C.F.R. § 1614.501. Complainant shall cooperate in the Agency's efforts to compute the amount of back pay and benefits due, and 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 60 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. Within 30 days from the date the backpay amount is paid to Complainant, the Agency shall request that Complainant submit his claim for compensation for all additional income-tax liability associated with lump sum payments. The Agency shall afford Complainant 60 days to submit his claim and supporting documents. The burden of proof to establish the amount of additional tax liability, if any, is on Complainant. The calculation of additional tax liability must be based on the taxes Complainant would have paid had he received the backpay in the form of regular salary during the backpay period, versus the additional taxes he paid due to receiving the back-pay in a lump-sum award. Thereafter, the Agency shall issue a decision regarding claimed additional tax liability within 60 days after the time period expires for Complainant to submit his claim for additional tax liability.
4. Within 60 days of the date this decision is issued, the Agency shall conduct a supplemental investigation to determine whether Complainant is entitled to compensatory damages as a result of the Agency's discriminatory actions. During the course of the investigation, the Agency shall afford Complainant the opportunity to present evidence in support of his compensatory damages claim. See Carle v. Dep't of the Navy, EEOC Appeal No. 01922369 (Jan. 5, 1993). Complainant, in turn, shall cooperate with the Agency's investigation, to include responding to the Agency's requests for documentation and completing Agency forms within 30 days of the Agency's request.
5. After completing the investigation into Complainant's entitlement to compensatory damages, the Agency shall have 60 days to issue a final decision as to whether Complainant is entitled to such damages. The Agency shall expeditiously pay Complainant the compensatory damages as determined by the Agency and submit a copy of the final decision on compensatory damages to the Compliance Officer at the address set forth herein.
6. Within 90 days of the date this decision is issued, the Agency shall provide eight hours of training to the responsible management officials, namely the Contract Physician and the members of the Medical Board. The training shall address the Agency's obligations under the Rehabilitation Act. The Agency may, if it so chooses, contact the EEOC Office of

Federal Operation's Training and Outreach Division for assistance in obtaining the necessary training.

7. Within 120 calendar days from the date this decision is issued, the Agency shall consider disciplining the Contract Physician and the members of the Medical Board. The Commission does not consider training to be disciplinary action. The Agency shall report its decision to the Compliance Officer. 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 these individuals have left the Agency's employ, the Agency shall furnish documentation of their departure date(s).

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 supporting documentation of the Agency's calculation of back pay and other benefits due Complainant, including evidence that the corrective action has been implemented.

POSTING ORDER (G0617)

The Agency is ordered to post at its Agency campuses in Arnold, Missouri and St. Louis, Missouri 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 (H1019)

If Complainant has been represented by an attorney (as defined by 29 C.F.R. § 1614.501(e)(1)(iii)), she/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 receipt of this decision. 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 (K0719)

Under 29 C.F.R. § 1614.405(c) and § 1614.502, compliance with the Commission's corrective action is mandatory. Within seven (7) calendar days of the completion of each ordered corrective action, the Agency shall submit via the Federal Sector EEO Portal (FedSEP) supporting documents in the digital format required by the Commission, referencing the compliance docket number under which compliance was being monitored. Once all compliance is complete, the Agency shall submit via FedSEP a final compliance report in the digital format required by the Commission. See 29 C.F.R. § 1614.403(g). The Agency's final report must contain supporting documentation when previously not uploaded, and the Agency must send a copy of all submissions to the Complainant and his/her representative.

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.

Failure by an agency to either file a compliance report or implement any of the orders set forth in this decision, without good cause shown, may result in the referral of this matter to the Office of Special Counsel pursuant to 29 C.F.R. § 1614.503(f) for enforcement by that agency.


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

February 16, 2023
Date