



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

[REDACTED]
Derrick P.,¹
Complainant,

v.

Megan J. Brennan,
Postmaster General,
United States Postal Service
(Southern Area),
Agency.

Appeal No. 0120180399

Hearing No. 451-2015-00008X

Agency No. 4G-780-0135-11

DECISION

On October 31, 2017, 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 September 27, 2017 final order 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 VACATES the Agency's final order and REMANDS the complaint for an administrative hearing.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a full-time City Carrier at the Brownsville Post Office in Brownsville, Texas (BPO). On April 19, 2011, Complainant filed a formal EEO complaint alleging that the Agency discriminated against him and subjected him to a hostile work environment based on his race/national origin (Hispanic), age (59), and disability (back injury/fibromyalgia) when from February 17, 2011 to March 25, 2011: (1) he was required to work beyond his restrictions; (2) he was required to submit excessive medical

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.

documentation; (3) management mocked and mimicked him; (4) management disclosed Complainant's medical information; and (5) management failed to secure Complainant's medical information.²

On May 2, 2011, the Agency accepted Complainant's race and age-based claims, but informed Complainant that his disability discrimination claim would be held in abeyance because it fell within the purview of a pending class action complaint. At the conclusion of the investigation on the claims of race and age discrimination, 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 (AJ). Complainant requested a hearing but subsequently withdrew his request. Consequently, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b) finding that Complainant had not been subjected to discrimination as alleged.

Complainant appealed arguing that the Agency improperly fragmented his complaint and that his disability discrimination claim fell outside of the scope of the class complaint. In Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120121297 (June 3, 2014), the Commission reversed the Agency's decision to hold the disability portion of the complaint in abeyance and remanded the entire complaint for further processing.

In accordance with the Commission's Order, the Agency conducted a supplemental investigation regarding the same issues, but with the added purview of disability on September 3, 2014. The Agency transmitted the supplemental ROI on December 11, 2014, with the same identifying numbers.³ Complainant requested a hearing before an EEOC AJ. On April 6, 2015, the Agency filed a motion for summary judgment which was opposed by Complainant. On September 19, 2017, the AJ issued a summary judgment decision finding no discrimination. Specifically, the AJ found that the Agency had articulated legitimate, nondiscriminatory reasons for its actions which Complainant had not rebutted as pretextual. In addition, the AJ noted that Complainant filed another EEO complaint (Agency No. 4G-780-0015-12) alleging similar issues as alleged in the instant complaint. To that end, the AJ found that claims 1, 3, and 4 were barred by the doctrine of collateral estoppel.

The Agency subsequently issued a final order fully implementing the AJ's decision. The instant appeal followed.

² Complainant subsequently withdrew race and age as bases of discrimination while the matter was pending before an EEOC Administrative Judge.

³ The EEO investigator also noted in the supplemental ROI that numerous pages of documentary evidence that Complainant had attached to his affidavit were missing, as well as pages 3-4 of the affidavit of Complainant's witness (DG). Upon inspection of the supplemental ROI, we find two pages missing from an affidavit of another witness (RF) who provided favorable testimony for Complainant.

BACKGROUND

In 2003, Complainant suffered a work-related vehicle accident that resulted in a permanent back injury. By 2004, Complainant was diagnosed with cervical degenerative disk disease with spinal canal stenosis, neural compression producing bilateral radiculopathy, and early myelopathy. Complainant also described his medical condition as lower back pain and fibromyalgia. Complainant asserted that his medical condition substantially limited or restricted his ability to perform major life activities such as dressing, grocery shopping, manual tasks, walking, standing, bending, twisting, climbing, lifting, breathing, sleeping, thinking, and concentrating. Complainant indicated that his general activities were constantly, extensively, and severely affected. Complainant also indicated that he is in a continual state of pain that never ceases.

Claim 1 – Work Restrictions Violated

The record shows that the Agency has been accommodating Complainant's medical restrictions since 2006. In addition, Complainant had accepted offers of modified letter carrier positions in 2006, 2007, and 2008.⁴ The modified letter carrier positions that Complainant had accepted between 2006 and 2008 did not involve mail delivery. The modified letter carrier position in 2008 provided Complainant work as a passport agent. While not clear, it appears from the record that sometime after 2008 (most likely in or about January 2011) Complainant returned to his (unmodified) City Carrier position. Complainant asserted that during that transition, a District Reasonable Accommodation Committee (DRAC) "safety" individual (DRAC1) whose name he was not too sure of, came to the BPO and implemented the accommodations noted below which Complainant claimed PM thereafter removed. Complainant alleged that the only way he was able to get the Postmaster (PM) to reinstate some of the accommodations was to threaten to call the DRAC. In addition to the specific accommodations set up by DRAC1, the undisputed record establishes that Complainant was entitled to accommodations necessitated by his medical restrictions as identified by his then current Form CA-17s (Duty Status Reports).

The record shows that Complainant's medical restrictions during the relevant timeframe included being limited to walking 15 minutes per hour; no climbing, kneeling, bending, or stooping; no lifting more than 25 pounds; and standing a maximum of one hour per day. Complainant affirmed that his two supervisors (S1A and S1B)⁵ and PM were aware of his medical restrictions as they were consistently provided with his updated CA-17s.⁶

⁴ The August 2008 Offer of Modified Assignment is the most recent modified job offer in the record prior to February 2011.

⁵ S1A stated that he became Complainant's supervisor in February 2011. S1B stated he became Complainant's supervisor in November 2010.

⁶ The EEO investigative report notes that Complainant attached to his affidavit his CA-17s and that the forms indicate Complainant incurred on-the-job injuries on August 26, 2003 and February 17, 2011 that resulted in herniated discs, back pain, cervical fusion, and neck pain. The EEO

In addition, the documentary record shows that Complainant provided the Agency with the required medical documentation and at all relevant times herein, was deemed eligible for Family Medical Leave Act (FMLA) leave for a serious health condition.

Complainant alleged that in early 2011, the accommodations that were put in place by former management officials were removed without explanation and his supervisors began to harass him regarding his medical restrictions. Specifically, Complainant asserted that beginning in January 2011, S1A began requiring him to work beyond his medical restrictions when he was required to stand for more than one hour while preparing and casing his mail. Management responded by asserting that casing generally should not take more than 45 minutes. Complainant also alleged that in early January 2011, he notified S1A that he could not place flats in the “coffin” due to the bending and stooping involved which was against his medical restrictions and asked for assistance with this task. Complainant claimed that S1A did not respond to his requests until mid-February. S1A affirmed that Complainant never produced any documentation stating he needed an accommodation to provide help placing flats in the coffin, but he never hesitated to assist Complainant when he asked for assistance and Complainant even told him, “I’ll be alright,” on some occasions. Complainant also claimed that he was provided with a lightweight dolly two or three months after his request. S1A responded that packages that weighed more than 25 pounds were given to another carrier in the interim and Complainant was never required to work beyond his medical restrictions.

Complainant further asserted that in or around early February 2011, S1A told him his route was changed to a route which required him to climb stairs. It is unclear from the record when Complainant started the new route. However, Complainant asserted that he told S1A that the new route violated his medical restrictions on several occasions, including on February 11 and 17, 2011.⁷ Complainant also asserted that on February 14, 2011, he had to switch a portion of his route with a co-worker (DC)⁸ to avoid climbing stairs.

investigative report also notes that the forms indicate that Complainant had work restrictions related to driving; walking, standing, and sitting. The EEO investigative report further reports that the forms also indicate that Complainant was to be provided a high back chair, seat cushion, and limited duty work. However, the EEO investigative report notes that these and numerous other documents are missing from the record.

⁷ On February 11, 2011, Complainant filed a Report of Hazard, Unsafe Condition or Practice pertaining to route C-2159, claiming that there was a hazard, unsafe condition or practice due to stairs and bending due to new route adjustments.

⁸ The EEO investigator did not obtain an affidavit from DC.

Complainant stated that he told S1A that he was creating a hostile work environment for him by requiring him to perform work in violation of his medical restrictions.⁹ According to Complainant, S1A told him that PM ordered him to climb the stairs on February 17, 2011, which caused an exacerbation of his injury on that day.¹⁰ S1A responded that he was not aware of any stairs on the new route until after about a week. S1A also stated that as soon as he became aware of the stairs, he traded that territory with another carrier. PM asserted that he did not require Complainant to work beyond his medical restrictions and did not know that he was working beyond his medical restrictions. PM further affirmed that he had no knowledge of Complainant's route including climbing stairs and denied ordering Complainant to deliver mail with stairs due to a route change.

Complainant's contemporaneous notes provide additional details.¹¹ Specifically, at approximately 10:00 a.m., on February 17, 2011, Complainant met with S1A and the local union president (RF) in the union office to discuss the conflict between his new route and his medical restrictions as reflected in his then current CA-17, dated January 4, 2011. Specifically, Complainant needed management to accept the fact that his medical restrictions prohibited him from working the portion of his route that included stairs. The record contains a note signed by "Zone 21 Supervisor." The actual signature above the signature line is illegible, however the record shows that the "Zone 21 Supervisor" was S1A. The note is typed as follows:

TO WHOM IT MAY CONCERN: THIS IS TO INFORM YOU, THAT I HAVE MEDICAL RESTRICTIONS, AND I WAS WORKING FINE ON THIS ROUTE, 2159, UNTIL MANAGEMENT, CHANGED MY ASSIGNMENT. NOW THERE IS CONFLICT BETWEEN MY DOCTOR'S INSTRUCTIONS AND MANAGERMENTS NEW ASSIGNMENT CHANGE. [SIC]

Above the typed letter is the following handwritten: "2-17-11 APPX 10:00 AM." Below the signature is the following handwritten text: "Carrier was instructed to get specific limitations from Doctor."

In Complainant's February 18, 2011 note memorializing the events of the previous day he stated that on the morning of February 17, 2011, he had "again strongly protested to [S1A] that [he]

⁹ When asked if the Complainant ever reported to him or anyone else that he was being subjected to a hostile work environment, PM responded "Yes." However, PM stated that he does not remember the date or to whom it was reported.

¹⁰ Although this claim has been primarily developed as part of Complainant's hostile work environment claim, it should have also been included in Complainant's failure to accommodate claim.

¹¹ The record contains a note written by Complainant on or about February 18, 2011 setting forth the events of February 17, 2011.

should not attempt to deliver [the] route because of excessive stairs climbing, which have just recently been implemented on this route.” Complainant also noted that S1A told him that he must deliver this route per PM. Complainant further noted that RF along with another carrier (DG) had both previously expressed to him that both S1A and PM will be held responsible for their actions in not complying with the medical restrictions as set forth on Complainant’s CA-17.¹² Complainant also noted in his statement that he personally advised S1A on the morning of February 17, 2011, that his new route assignment was detrimental to his health. Complainant started his route at approximately 11:30 a.m. as instructed. Complainant further noted that at approximately 2:00 p.m., he had to return to the post office because he was in unbearable pain. Once he returned to the post office, he could not get out of his postal vehicle due to the extreme pain. Eventually an ambulance was called for him and he was transported to a local hospital.

After a period of recuperation, Complainant obtained a new CA-17 dated March 3, 2011, which stated that Complainant was able to return to work with restrictions including “no stairs (climbing).” On March 4, 2011, S1A offered and Complainant accepted a modified assignment delivering all mail assigned to C59 except deliveries with stairs and delivering equal portions of territory not involving stairs. The record shows that Complainant was back at work on March 7, 2011 under the medical restrictions of the March 3, 2011 CA-17.

Complainant memorialized an incident that occurred on or about March 7, 2011. According to Complainant’s notes, S1A came to his work to advise him that the Health and Resource Management Specialist for the Rio Grande District (HRS) advised him that Complainant can step up to three steps only. Complainant noted that he told S1A “since when was [HRS] my doctor?” and told him to re-read his CA-17. In his note, Complainant lamented about the continual harassment over his medical restrictions. Complainant also noted that on March 4, 2011, he met with the Officer in Charge (TB) of the BPO during PM’s absence, and RF to discuss route assistance before he returned to work. In his note Complainant asserted that TB asked him if he had heard of the National Reassessment Program (NRP) implemented by the Agency, told him that he would try to get him some information on it, and that he should consider retiring.

On March 8, 2011, Complainant’s physician filled out a Texas Workers' Compensation Status Report (DWC Form 73), stating that Complainant was unable to return to work until March 22, 2011. On March 22, 2011, Complainant submitted another DWC Form 73 with new medical restrictions. On March 25, 2011, Complainant was notified that through the National Reassessment Process it had been determined that there was no operationally necessary work available for him within his medical restrictions in the BPO and in the local commuting areas.

Claim 2 – Required to Submit Excessive Medical Documentation

On February 10, 2011, because Complainant did not report for work, S1B asked him for a doctor's note.

¹² The record contains a written statement from RF dated February 17, 2011 at 4:20 p.m. where he corroborates this statement by Complainant.

Complainant did not have a doctor's note because the doctor would not see him without an appointment. Complainant questioned whether he needed a doctor's note. S1B also asked Complainant if he had picked up a CA-17 to give to his doctor to fill out. Complainant again questioned whether he needed to provide one, which prompted S1B to call HRS to clarify whether Complainant needed to submit a doctor's note and whether he needed to provide a CA-17 to his doctor. HRS verified that a CA-17 was not needed when he went to the doctor and Complainant did not need to provide a doctor's excuse when he called in sick.

Complainant also asserted that S1A and S1B required excessive documentation for absences on January 5, 6, 7, 8, 11, 15, 21, and February 16, 2011. Complainant further alleged that DG and RF have witnessed management asking Complainant for excessive documentation for being absent.¹³

S1A denied requiring Complainant to provide medical documentation each time he was absent. PM noted that S1A required Complainant to provide medical updates pursuant to the Employee and Labor Relations Manual, noting that updates are usually provided either every 30 days or as medical conditions change. Further, PM asserted he did not require Complainant to submit medical documentation each time he was absent. S1B also affirmed that Complainant was not required to submit medical documentation each time he was absent.

Complainant also claimed that he was required to submit excessive medical documentation pertaining to his climbing restriction. Specifically, Complainant asserted that he had a "no climbing" restriction for years that had been accommodated by the Agency in the form of job assignments without stairs. However, according to Complainant, once his new route was assigned in February 2011, his supervisors no longer considered his climbing restriction applicable to stairs. Complainant alleged that all three of his supervisors kept pressing him for the meaning of the word "climbing" as noted in his CA-17 and was told "no climbing" referred to trees. Complainant claimed that both PM and S1A told him on February 17, 2011, that the word "climbing" did not refer to stairs since you don't climb stairs, you walk them.

S1A also did not ever recall discussing the definition of "climbing" with Complainant and denied requiring Complainant to provide medical documentation regarding his climbing restriction. PM asserted that he did not have a discussion with Complainant regarding the definition of climbing stairs. However, he did recall a discussion with S1A discussing the difference between climbing a step or two versus climbing a full flight of stairs. PM denied any knowledge of Complainant being required to provide documentation regarding his climbing restriction.

Claim 3 – Mocked and Mimicked by Management

Complainant alleged that he was mocked and mimicked when S1A told him there was nothing wrong with him.

¹³ It is unclear whether DG and RF addressed this assertion in their affidavit given the missing pages in the record.

Complainant also claimed that he was advised by “fellow carriers” that S1A mimicked him by walking with a limp and pretending to be hurt. S1A denied Complainant’s assertions. No other management official had knowledge of Complainant’s assertion. Complainant claimed that he was continually told by S1A and PM to retire.

DG corroborated Complainant’s statement and asserted that he witnessed S1A mock and mimic Complainant and heard S1A say that there was nothing wrong with Complainant. DG also stated that S1A mimicked Complainant by walking with a limp and by pretending to be hurt.

Claims 4 & 5 – Disclosure of Medical Information and Medical Information Not Secure

Complainant asserted that his medical information was not properly secure and was disclosed by management when “for years” he has seen both his CA-17 and other employees’ CA-17s laying out on the supervisors’ desk which he asserted was located on the workroom floor. Although Complainant could not provide specific dates, he did say that it usually occurred after he returned from a doctor’s visit or submitted his medical paperwork. Further, Complainant attested that S1A, S1B and PM have approached him on the workroom floor and discussed his medical information such that other people could hear.

DG stated that PM discussed Complainant's medical information with him, and specified incidents that occurred between October and December 2011, including discussions about Complainant’s medical restrictions. RF also affirmed that PM discussed Complainant's medical information with him. Specifically, RF stated that in February and November 2011, PM openly discussed with him matters pertaining to Complainant’s Form CA-17, Complainant’s stool usage, and management’s inability to find work for Complainant. RF also confirmed that on another occasion S1A stated that he did not care about Complainant's medical restrictions.

In addition, Complainant alleged that a coworker (JM) has seen his CA-17s left on the supervisors' desks.¹⁴ The record also contains the following typed statement signed by Complainant and 11 other employees.¹⁵

All medical and accidental reports are left on the Supervisor desk for any one to view, this is an ongoing practice including all personal information of the employees such as, CA-1, CA-2, CA17, Doctors Excuse, Police Reports and Dog bites and also, the file cabinets are unsecured and any one can easy open those file cabinets [*sic*].

S1A stated that the Agency has a CA-17 on file for Complainant which is currently in the “safety file” which is housed in filing cabinets.

¹⁴ The EEO investigator did not obtain an affidavit from JM.

¹⁵ Many of the signatures are not legible, but they include DG and RF. The EEO investigator did not obtain an affidavit from any of these employees.

S1A also affirmed that it is unlikely that any medical files have been left lying around. PM stated he was not aware that Complainant's medical information was disclosed and has not seen any medical information on supervisors' desks. PM also has no recollection of approaching Complainant on the workroom floor and discussing his medical information.

S1B stated that all medical information was kept in a filing cabinet and was not displayed to or shared with any employees. S1B also asserted that no incidents of disclosure of Complainant's medical information have been reported to him or any other management official. S1B affirmed that the supervisors' office was off-limits to employees unless employees are summoned there. S1B also denied discussing Complainant's medical information when other employees were present.

Claim 6 – Harassment

Complainant alleged that the incidents identified in Claims 1-5 created a hostile work environment. Complainant also stated that he complained to his union representative when he felt he was being harassed and he was not defended so he gave up. Complainant claimed that he advised management he felt he was being subjected to a hostile work environment and to his knowledge no action was taken which is why he filed this EEO complaint.

Complainant stated that the alleged harassment caused him delays at work, mental lapses, and a lack of effectiveness to serve the public. Complainant also claimed that since the February 17, 2011 incident, he has been angry, cries, loses emotional control, suffered physically, and became incontinent. Complainant stated he does not want to talk to anybody and has even considered suicide, but then remembers the injury was not his fault. Complainant identified four employees (DL, DG, RF and JM) as witnesses to incidents of the alleged harassment but the EEO investigator noted that he chose not to question DL and JM because Complainant did not provide any information as to what the witnesses would testify about.

S1A stated neither Complainant nor anyone acting on his behalf ever told him that his or anyone else's acts constituted harassment or caused a hostile work environment. S1A noted that since no complaint of harassment or hostile work environment was ever made, no investigation was conducted. S1A added that he did not believe Complainant was harassed or his actions toward Complainant constituted harassment nor did he notice any changes in Complainant's work habits. When asked if Complainant ever reported to him or anyone else that he was being subjected to a hostile work environment, PM responded "Yes." However, PM stated that he did not remember the date or to whom it was reported.

STANDARD OF REVIEW

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*). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's and Agency's factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination statute was violated. See *id.* at Chapter 9, § VI.A. (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”).

ANALYSIS AND FINDINGS

We must determine whether it was appropriate for the AJ to have issued a decision without a hearing on this record. The Commission's regulations allow an AJ to issue a decision without a hearing when he or she finds that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). This regulation is patterned after the summary judgment procedure set forth in Rule 56 of the Federal Rules of Civil Procedure. The U.S. Supreme Court has held that summary judgment is appropriate where a court determines that, given the substantive legal and evidentiary standards that apply to the case, there exists no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a motion for summary judgment, a court's function is not to weigh the evidence but rather to determine whether there are genuine issues for trial. *Id.* at 249. The evidence of the non-moving party must be believed at the summary judgment stage and all justifiable inferences must be drawn in the non-moving party's favor. *Id.* at 255. 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.

If a case can only be resolved by weighing conflicting evidence, issuing a decision without holding a hearing is not appropriate. In the context of an administrative proceeding, an AJ may properly consider issuing a decision without holding a hearing only upon a determination that the record has been adequately developed for summary disposition. See Petty v. Dep't of Def., EEOC Appeal No. 01A24206 (July 11, 2003).¹⁶ Finally, an AJ should not rule in favor of one party without holding a hearing unless he or she ensures that the party opposing the ruling is given (1) ample notice of the proposal to issue a decision without a hearing, (2) a comprehensive statement of the allegedly undisputed material facts, (3) the opportunity to respond to such a statement, and (4) the chance to engage in discovery before responding, if necessary.

¹⁶ The Commission recognizes that the hearing is an adjudicatory proceeding that completes the process of developing a full and appropriate record. Where the record is incomplete or inadequate, the record must be developed under the supervision of the AJ. See EEO MD-110, Chap. 7, § III.B. (Aug. 5, 2015).

According to the Supreme Court, Rule 56 itself precludes summary judgment “where the [party opposing summary judgment] has not had the opportunity to discover information that is essential to his opposition.” Anderson, 477 U.S. at 250. In the hearing context, this means that the administrative judge must enable the parties to engage in the amount of discovery necessary to properly respond to any motion for a decision without a hearing. Cf. 29 C.F.R. § 1614.109(g)(2) (suggesting that an AJ could order discovery, if necessary, after receiving an opposition to a motion for a decision without a hearing).

The courts have been clear that summary judgment is not to be used as a “trial by affidavit.” Redmand v. Warrenner, 516 F.2d 766, 768 (1st Cir. 1975). The Commission has noted that when a party submits an affidavit and credibility is at issue, “there is a need for strident cross-examination and summary judgment on such evidence is improper.” Pedersen v. Dep’t of Justice, EEOC Request No. 05940339 (Feb. 24, 1995).

After a careful review of the record, as set forth below, we find that the AJ erred when she concluded that there was no genuine issue of material fact in this case.

Claim 1 – Failure to Accommodate

Under the Commission's regulations, a federal agency may not discriminate against a qualified individual based on disability and is required to provide reasonable accommodations to the known physical and mental limitations of an otherwise qualified individual with a disability unless the Agency can show that reasonable accommodation would cause an undue hardship. See 29 C.F.R. § 1630.2 (o), (p). To establish that he was denied a reasonable accommodation, Complainant 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” individual with a disability pursuant to 29 C.F.R. § 1630.2(m); and (3) the Agency failed to provide him with 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 on Reasonable Accommodation). An individual with a disability is “qualified” if he or she satisfies the requisite skill, experience, education, and other job-related requirements of the employment position that the individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m). “Essential functions” are the fundamental job duties of the employment position that the individual holds or desires. Id. § 1630.2(n).

Claim 1 reflects a denial of reasonable accommodation claim with respect to the following four accommodations: (1) the use of a stool/chair on the workroom floor; (2) assistance placing flats in the “coffin;” (3) a light weight dolly; and (4) the elimination of stairs on his route.

With respect to the first three accommodations, the AJ concluded that the undisputed record established that Complainant was accommodated within a reasonable time. Specifically, the AJ concluded that Complainant’s one-hour standing restriction “should not have been violated since casing mail should only take about 45 minutes.” In addition, the AJ noted that Complainant admitted that he obtained a chair on his own.

Furthermore, the AJ noted that Complainant admitted that in mid-February of 2011, the flats were placed in the coffin for Complainant, so he did not have to bend and stoop. The AJ added that although Complainant claimed that he was provided with a lightweight dolly two or three months after his request, he did not dispute that packages that weighed more than 25 pounds were given to another carrier in the interim.

We find that the record was not adequately developed with respect to the first three accommodations. Specifically, Complainant asserted that he had all three accommodations provided to him without incident under different supervision and upon S1A's arrival, his accommodations were removed without explanation. The EEO investigator failed to obtain documentary and testimonial evidence from the Agency to support or refute Complainant's assertion. The record also does not contain information from previous supervisors to corroborate or refute the assertion that Complainant does not need a chair on the workroom floor. It is also not clear whether, providing Complainant packages under 25 pounds resolved the need for lightweight dollies. The EEO investigator did not question any of Complainant's co-workers who have direct knowledge of whether or not Complainant's accommodations were removed and for what duration.¹⁷

We further find the evidence in the record raises a genuine dispute of material fact on the question of whether the Agency denied Complainant a reasonable accommodation in violation of the Rehabilitation Act. The AJ did not address the Agency's failure to accommodate Complainant's "no climbing" restriction. Yet, without explanation she notes in her decision that Complainant was required to work beyond his restrictions

We further find that the record shows a material dispute regarding whether Complainant's supervisors knowingly denied Complainant the reasonable accommodation of a route assignment without stairs in violation of the Rehabilitation Act.¹⁸ The undisputed record establishes that Complainant was performing his City Carrier position in a satisfactory manner and is a qualified individual with a disability.¹⁹

¹⁷As set forth below, the record contains evidence which calls into question the motives and credibility of certain supervisors. Accordingly, it was incumbent upon the EEO investigator to obtain additional sources of information for the record.

¹⁸ As noted above, the record establishes that Complainant's City Carrier position encompassed the medical restrictions noted in his CA-17, which included "no climbing" and all of his medical restrictions. Whether or not a DRAC issued a decision on each of Complainant's medical restrictions individually, the agreement to comply with his CA-17 restrictions could properly be characterized as a reasonable accommodation. See Velva B., Class Agent v. U.S. Postal Ser'v., EEOC Appeal No. 0720160006 (Sept. 25, 2017) (Class Agent's modified assignment could properly be characterized as a reasonable accommodation).

¹⁹ The Agency does not dispute that Complainant is a qualified individual with a disability.

The undisputed record also shows that for years the Agency has been accommodating Complainant's disability by following his medical restrictions as reflected in his CA-17s.²⁰ The record shows that during the relevant time-frame, Complainant's CA-17 reflected a "no climbing" restriction. Complainant asserted that prior to the new route assignment, he was accommodated with a route without stairs. Complainant also stated that his former and current supervisors all understood that his "no climbing" restriction meant no stairs. Contrary to the AJ's description of the record, the evidence establishes a genuine issue of material fact with respect to this issue. Specifically, the AJ indicated that it was reasonable based on the facts for management to request clarifying medical documentation from Complainant on February 17, 2011 based on management's stated confusion as to whether Complainant could walk up a step or two, a flight of stairs or no stairs at all.

When viewing the record evidence in the light most favorable to Complainant, the record shows that Complainant had been accommodated with routes without stairs for some time and that prior supervisors and current supervisors knew that his "no climbing" restriction meant "no stairs." S1A stated that as soon as he became aware of the existence of stairs on Complainant's route, he traded that territory with another carrier. Evidence in the record contradicts S1A's statement. Documentary and testimonial evidence in the record show that despite at least two written complaints to management and a meeting with S1A and the union president, the repeated complaints about management's violation of Complainant's climbing restrictions were not resolved.

S1A also did not ever recall discussing the definition of "climbing" with Complainant and denied requiring Complainant to provide medical documentation regarding his climbing restriction. Yet, the evidence contains documentary evidence to the contrary. PM also stated he recalled a discussion with S1A discussing the difference between climbing a step or two versus climbing a full flight of stairs. Accordingly, S1A's credibility is at issue. Not only does S1A's statements raise questions of credibility, they also support Complainant's assertion that S1A was aware that Complainant was not supposed to be working a route with stairs, which ultimately undermines the AJ's position that it was reasonable for management to request clarifying medical documentation before changing the route assignment.

²⁰ However, the record is not clear as to whether the accommodations provided to Complainant went through the DRAC or whether Complainant was provided modified job assignments solely in accordance with his physical restrictions as reflected in his CA-17s. The record is devoid of testimonial and/or documentary evidence that can explain whether, or not, Complainant was referred to DRAC, and if so, the history of such referral. In addition, if Complainant was not referred to DRAC, the record does not explain the basis. The EEO investigator should have obtained clarification of these issues. We note that HRS and Complainant's former postmaster (PM1) were not questioned by the EEO investigator. Presumably, they could have provided some of this history.

The record also contains documentary evidence in the record in the form of Complainant's contemporaneous notes of March 7, 2011, wherein he describes TB's March 3, 2011 effort to get Complainant to consider the Agency's NRP²¹ and even retirement and S1A's March 7, 2011 efforts to instruct him that he can climb up to three steps, despite everything that had occurred on February 17, 2011 and having just receiving a clarifying CA-17 that explicitly stated Complainant's medical restrictions as "no stairs (climbing)." Such contemporaneous notes clearly raise questions whether S1A and other management officials knowingly and intentionally took steps to thwart Complainant's ability to perform his job by removing his accommodations.

Viewing the evidence in the light most favorable to Complainant, we find there is a genuine issue of material fact on the question of whether, or not, the Agency intentionally denied Complainant his accommodation of an assigned route without stairs

Claims 4 and 5 – Confidential Medical Information

Section 102(d) of the Americans with Disabilities Act, and by extension Section 501(g) of the Rehabilitation Act, specifically prohibits the disclosure of medical information except in certain limited situations. Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC Notice No. 915.002, Question 42 (Oct. 17, 2002). Information obtained regarding the medical condition or history of any employee is subject to the requirements of subparagraphs (B) and (C) of Paragraph (3). 42 U.S.C. § 12112(d)(4)(C). In particular:

B. Information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate files and is treated as a confidential medical record, except that:

- i. Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- ii. First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
- iii. Government officials investigating compliance with this chapter shall be provided relevant information on request.

C. The results of such examination are used only in accordance with this subchapter.

²¹ We note that the NRP was created to remove limited duty and rehabilitation employees off the Injured-On-Duty rolls regardless whether, or not, they were qualified individuals with a disability. See Velva, Class Agent v. U.S. Postal Ser'v., EEOC Appeal No. 0720160006 (Sept. 25, 2017)

42 U.S.C. § 12112 (d)(3); 29 C.F.R. § 1630.14(c).

To the disclosure exceptions listed above, our policy guidance adds two more: (a) the information may in certain circumstances be disclosed to workers' compensation offices or insurance carriers; and (b) agency officials may be given the information to maintain records and evaluate and report on the Agency's performance in processing reasonable accommodation requests. Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation, Question 20 (Oct. 20, 2000).

All medical information that an Agency obtains in connection with a request for reasonable accommodation must be kept in files separate from the individual's personnel file. Id. Those who have access to employees' medical information may not disclose that information except under the five circumstances listed above. See id.

As with medical inquiries, the confidentiality requirement is not limited to individuals with disabilities. Pleasant v. Dep't of Hous. & Urban Dev., EEOC Appeal No. 0120083195 (July 2, 2012); Hampton v. U.S. Postal Serv., EEOC Appeal No. 01A00132 (Apr. 13, 2000). Anyone whose confidential medical information has been disclosed in a manner other than pursuant to one of the five disclosure exceptions listed in the statute, the regulations or our policy guidance may bring an action for violation of the Rehabilitation Act. Baker v. Soc. Sec. Admin., EEOC Appeal No. 0120110008 (Jan. 11, 2013) (the limited exceptions for disclosure apply to confidential medical information concerning any employee).

The Commission regards documentation of the individual's diagnosis or symptoms as confidential medical information. Tyson v. U.S. Postal Serv., EEOC Appeal No. 01992086 (Aug. 23, 2002), citing ADA Enforcement Guidance: Pre-Employment Disability-Related Questions and Medical Examinations n. 26 (Oct. 10, 1995). In addition, the Commission has held that the Form CA-17 contains information about symptoms and diagnoses and therefore constitutes confidential medical information. See Velva B., Class Agent v. U.S. Postal Serv., EEOC Appeal No 0720160006 (Sept. 25, 2017) (noting that question 5 of the CA-17 form asks for a description of how the injury occurred and the parts of the body affected; question 8 asks the physician whether the history of the injury given by the employee corresponds to the description in question 5; question 9 asks for a description of clinical findings; question 10, asks for a diagnosis due to the injury; and question 11 asks about other disabling conditions).

When viewing the record in the light most favorable to Complainant, the record contains evidence to raise a dispute of material fact on the question of whether a violation of the Rehabilitation Act has occurred in two ways. First, Complainant, and his coworkers, assert that contrary to the testimony of S1A, S1B and PM, officials regularly left employees' (including Complainant's) CA-17 forms on the supervisors' desks where anyone could see them. Complainant could not provide exact dates but did state that it would usually occur right after he submitted his CA-17 or medical document following returning from leave. This evidence could meet the level of a confidentiality breach violation under the Rehabilitation Act, if found credible by a fact-finder.

See Velva B., Class Agent v. U.S. Postal Serv., EEOC Appeal No 0720160006 (Sept. 25, 2017) (Rehabilitation Act violation found where employees reported seeing their confidential medical information lying around on supervisors' desks and the workroom floor, and that this was going on "all the time").

The second manner where the evidence raises a genuine dispute of material fact with respect to a Rehabilitation Act violation is based upon S1A's testimony that the CA-17 medical information is stored in the "safety files." Title I of the ADA requires that all information obtained regarding the medical condition or history of an applicant or employee must be maintained on separate forms, in separate files, and treated as confidential medical records. 42 U.S.C. §§ 1212(d)(3)(B), (4)(C); 29 C.F.R. §1630.14. These requirements also extend to medical information that an individual voluntarily discloses to an employer. See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), No. 915.002, at 4 (July 26, 2000). The Commission has previously held that an agency's failure to maintain a complainant's medical information in a separate medical file violates the Rehabilitation Act and constitutes disability discrimination. See Denese L. v. Dep't of the Interior, EEOC Appeal No. 0120130297 (May 13, 2016) (holding that improperly filing employees' medical information violates the Rehabilitation Act, even if the medical information was not disclosed to third parties); See Mayo v. Dep't of Justice, EEOC Appeal No. 0720120004 (Oct. 24, 2012) (medical information was placed in a non-medical adverse action file in the Human Resources Department), req. for recon. den'd, EEOC Request No. 0520130124 (Apr. 25, 2014); Higgins v. Dep't of the Air Force, EEOC Appeal No. 01A13571 (May 27, 2003) (medical information was placed in a non-medical work file maintained by employee's supervisor); Brunnell v. U.S. Postal Serv., EEOC Appeal No. 07A10009 (July 5, 2001) (medical information was placed in the employee's personnel file).

Complainant asserts that his confidential medical information was left out on the supervisors' desks and the desks were on the workroom floor and accessible to the employees. However, even if the AJ did not find sufficient evidence to support Complainant's assertion, the fact that S1A describes the file where he keeps Complainant's medical records as a "safety file," rather than a confidential medical file, certainly leaves open sufficient questions as to whether the medical records were in fact properly secured. We note that management was not asked to describe the contents of the "safety file." Accordingly, it is unclear as to whether such file failed to safekeep Complainant's confidential medical records in accordance with the Rehabilitation Act or whether management simply poorly described a properly maintained medical file. However, considering Complainant's testimony, along with his coworkers' corroborating statements and management's, at best, poorly worded statement, we find sufficient evidence in the record to raise a genuine issue of material fact with respect to whether the Agency violated the Rehabilitation Act when it improperly stored confidential medical records. Accordingly, we find that the AJ erred in granting the Agency's motion for summary judgment on this issue.

Claims 2, 3 and 6 and Hostile Work Environment

To avoid fragmentation, we will not address the merits of Complainant's remaining claims at this time. However, we note that the complaint raises a claim of harassment which includes the incidents alleged in all five claims.²²

With respect to Claim 2, we are concerned that the EEO investigator did not request documentary evidence pertaining to leave to determine whether, or not, the Agency requested and/or obtained medical/leave documentation on the dates noted. Additionally, we are concerned that the record is missing pages from the affidavits of DG and RF who were identified as individuals with information with respect to this claim.

With respect to Claim 3, the AJ concluded that the alleged remarks were not sufficiently severe or pervasive to alter the terms of Complainant's employment and/or create a hostile work environment. We note that the AJ improperly analyzed this claim individually, instead of collectively with the other incidents alleged. We also note that DG and RF corroborate this allegation. More importantly, not only should S1A's alleged conduct in this claim be considered as part of Complainant's hostile work environment claim, it should be factored into with respect to his credibility and motivation with respect to his alleged conduct in Claims 1, 4 and 5.

We note that the hearing process is intended to be an extension of the investigative process, designed to ensure that the parties have "a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses." See EEO MD-110, 7-1 (Aug. 5, 2015); see also 29 C.F.R. § 1614.109(e). "Truncation of this process, while material facts are still in dispute and the credibility of witnesses is still ripe for challenge, improperly deprives Complainant of a full and fair investigation of her claims." Bang v. U.S. Postal Serv., EEOC Appeal No. 01961575 (Mar. 26, 1998); see also Peavley v. U.S. Postal Serv., EEOC Request No. 05950628 (Oct. 31, 1996); Chronister v. U.S. Postal Serv., EEOC Request No. 05940578 (Apr. 25, 1995). In summary, there are simply too many unresolved issues which require an assessment as to the credibility of the various management officials, co-workers, and Complainant, himself. Therefore, judgment as a matter of law for the Agency should not have been granted herein.

Collateral Estoppel

We note that the AJ incorrectly applied the doctrine of collateral estoppel to Claims 1, 3 and 4. Specifically, the record shows that on December 15, 2011, Complainant filed a separate complaint (Agency No. 4G-780-0015-12) against the Agency in which some of the claims he alleged in that complaint are similar to the claims he raised in the current complaint, except for the critical fact that the alleged incidents occurred approximately seven months after the events at issue herein.

²² Claim 6 seems to encompass Claims 1-5 into one claim of harassment.

For example, in the December 2011 complaint, Complainant asserted that between late October 2011 and late December 2011, he was told to work outside his medical restrictions; his medical information was discussed in front of co-workers; and he was instructed to deliver part of a route that had stairs. The Commission issued an appellate decision regarding this complaint finding that Complainant failed to establish, beyond a preponderance of the evidence, that the Agency discriminated against him, or subjected Complainant to a hostile work environment, as alleged. See Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120122829 (Feb. 13, 2015).

According to the doctrine of collateral estoppel “once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” Montana v. United States, 440 U.S. 147, 153 (1979) (citing Parklane Hosiery Co., Inc v. Shore, 439 U.S. 322, 326 n. 5 (1979)). A determination as to whether it is appropriate to apply the doctrine includes the following: (1) whether the issues presented in the present litigation were in substance the same as those resolved in the prior litigation; (2) whether controlling facts or legal principles have changed significantly since the prior judgment; and, (3) whether other special circumstances warrant an exception to the normal rules of preclusion. See Snead v. Pension Ben. Guar. Corp., EEOC Request Nos. 05970577 and 05990239 (Mar. 25, 1999) (citing Montana, 440 U.S. at 154-55). The practical effect of collateral estoppel is that it bars the re-litigation of previously adjudicated issues deemed necessary to the judgment in a prior litigation between the parties. Elias R. v. Office of Pers. Mgmt., EEOC Appeal No. 0120161707 (July 27, 2016); Complainant v. Dep’t of the Army, EEOC Appeal No. 0120123456 (Feb. 11, 2015), req. for recon. den’d, EEOC Request No. 0520150273 (July 30, 2015).

The December 2011 complaint is an entirely different matter than the present complaint. The only reason the overlapping claims in the two complaints seem similar is because the Agency is allegedly engaging in repeat offenses toward Complainant. The alleged failure of Complainant’s supervisors to acknowledge his medical condition and respect his restrictions on file by constantly failing to comply with those restrictions is the crux of his complaint. The fact that Complainant alleged that the same supervisors have engaged in the same offenses again, does not preclude Complainant from litigating those matters here, as they are new allegations.

CONCLUSION

Therefore, after a careful review of the record, including Complainant's arguments on appeal, the Agency's response, and arguments and evidence not specifically discussed in this decision, the Commission VACATES the Agency’s final action and REMANDS the matter to the Agency for further processing in accordance with this decision and the Order below.

ORDER

The Agency is directed to submit a copy of the complaint file to the EEOC San Antonio District Office Hearings Unit within fifteen (15) calendar days of the date this decision becomes final.

The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall hold a hearing and issue a decision on the complaint in accordance with 29 C.F.R. § 1614.109 and the Agency shall issue a final action in accordance with 29 C.F.R. § 1614.110.

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 CFR § 1614.503(f) for enforcement by that agency.

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

September 27, 2019

Date