



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

[REDACTED]  
Alonzo N.,<sup>1</sup>  
Complainant,

v.

Kevin McAleenan,  
Acting Secretary,  
Department of Homeland Security  
(Immigration and Customs Enforcement),  
Agency.

Appeal No. 0120180739

Agency No. HSICE272132016

**DECISION**

On December 19, 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 November 29, 2017, final decision concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq.

**BACKGROUND**

At the time of events giving rise to this complaint, Complainant worked as a Border Patrol Agent, GS-1896-12, with the Agency's Customs and Border Protection in Deming, New Mexico.

On January 2, 2017, Complainant filed an EEO complaint alleging that he was discriminated against based on disability (Aortic Valve Replacement) when, on September 16, 2016, after he was tentatively selected by the Agency's Immigration and Customs Enforcement (ICE) for the position of Deportation Officer, GS-1801-11 in York Pennsylvania, advertised under vacancy announcement LAG-FPA-1637467-MB-084, the ICE Medical Review Board refused to waive the medical standards for the position, so he was denied the job.

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<sup>1</sup> 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.

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). In accordance with Complainant's request, the Agency issued a final decision pursuant to 29 C.F.R. § 1614.110(b).

In its final decision, the Agency found no discrimination. It found that Complainant is an individual with a disability because he received a mechanical artificial aortic heart valve replacement in 1995, and regularly takes the anti-blood clotting medication warfarin to prevent clotting in and around the valve. The Agency found that the Chair of the Medical Review Board, the Medical Officer in its Office of Human Capital, in Washington, D.C., articulated a legitimate, non-discriminatory reason for why Complainant was denied a medical waiver from the Medical Standards – an increased risk of severe injury or death from blunt or sharp force trauma in performing law enforcement duties, and Complainant failed to prove pretext.

The instant appeal followed. On appeal, Complainant argues that the Agency relied on generalizations to make their determination, and failed to account for his past work history and personal doctor's professional opinion. He asserts that the Medical Review Board relied on the medical opinion of the Medical Officer, a doctor who did not specialize in the concerned area, and improperly medically disqualified him.

In opposition to the appeal, the Agency reiterates the findings in its final decision.

### ANALYSIS AND FINDINGS

In finding no discrimination, the Agency used the three-part evidentiary scheme to prove disparate treatment by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This analysis does not apply in this case. Instead, the direct threat analysis applies.

The Rehabilitation Act prohibits discrimination against qualified individuals with disabilities. 29 C.F.R. § 1614.203(b). An "individual with disability" is a person who has, has a record of, or is regarded as having a physical or mental impairment which substantially limits one or more of that person's major life activities. 29 C.F.R. § 1630.2(g). The Agency concedes that Complainant is an individual with a disability, and does not contest he was qualified to be a Deportation Officer, except medically.

In response to the Dallas ICE Medical Unit request for more medical information, Complainant submitted a September 11, 2015 "progress note" by a cardiologist which reflected Complainant was following up on test results and voiced his need for a medical clearance. The doctor wrote that Complainant was asymptomatic with excellent functional capacity, he saw no contraindications for his employment in law enforcement, and that Complainant understood he is on warfarin and this implies an increased risk of bleeding.

On September 30, 2015, the Medical Officer wrote a determination that Complainant's health did not meet Medical Standards due to his mechanical heart valve and the need for anti-coagulant medications that would present an excessive hazard to Complainant due to the risk of injury related to blunt or sharp force trauma inherent in performing duties in law enforcement.

Specifically, the Medical Officer determined that Complainant's health did not meet Medical Standards promulgated by the Immigration and Naturalization Service in 1999 (a predecessor agency of ICE). Specifically, under the cardiovascular conditions system standard, it stated that the following, in relevant part, may result in disqualification:

**PACEMAKERS** or **PROSTHETIC VALVES** are generally disqualifying. Any other condition or post-surgical management that requires the use of coumadin or other anti-coagulants are generally disqualifying.

The Medical Standards were established for the positions of Deportation Officer and five other law enforcement jobs because of the arduous and hazardous occupational, functional and environmental requirements of these positions. The Medical Officer stated that Coumadin is a brand name for warfarin.

Thereafter, Complainant requested a "waiver" from the Medical Standards. Pursuant to this, the ICE Dallas Medical Unit requested from Complainant information about his current job duties as Border Patrol Agent. Among other things, in his March 2016 response, Complainant submitted his description of the job, as follows: the duties of a Border Patrol Agent include detecting, preventing and apprehending undocumented aliens at or near land borders, and performing traffic checks. The job is considered a primary, rigorous law enforcement position with daily duties in arduous conditions such as rough, isolated terrain, and inclement weather. The vast majority of his area of responsibility was isolated, and the terrain consisted of desert, canyons, and mountains. The station motto is "alone and unafraid." At his station, they track groups and apprehend individuals.<sup>2</sup> He is required to traverse mountains and other rugged terrain to locate bundles of narcotics, with average weights of 85 pounds, and carry them back down the mountain or across rugged terrain for processing. He submitted information that he had been in this job since 2009 in Deming, New Mexico, and graduated from the U.S. Border Patrol Academy.

The Medical Review Board met on June 2, 2016, to rule on Complainant's waiver request. It was chaired by the Medical Officer as a non-voting member, and also made up of one representative each from the Office of Professional Responsibility, Homeland Security Investigations, and Enforcement Removal Operations. This includes someone who understands the risks of the job because they do or have done the job – one member was a Deportation Officer. The members of the Board vary depending on availability.

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<sup>2</sup> In his EEO investigatory affidavits, Complainant wrote that he tracked, apprehended, and walked out groups, sometimes up to 15 people distances of up to several miles. He stated that in certain encounters he had to draw a weapon since some individuals did not want to be arrested and were uncooperative, and he has engaged in numerous physical violent encounters during work.

The Medical Review Board Chair stated Complainant was not granted a waiver because he takes warfarin. He explained that the labeling for warfarin reads “Warning: bleeding risk” in a “Black Box”, the strictest labeling warning required by the Food and Drug Administration when there is reasonable evidence of an association of a serious hazard with medication. The Chair stated that the primary source of information the Board considered in denying Complainant a medical waiver was the manufacturer’s package insert for warfarin, which in addition to the Black Box warning, recommended that prescribers counsel those taking it to “avoid any activity or sport that may result in traumatic injury.” Also, in Complainant’s case, prolonged therapy is a risk factor further increasing the risk of hemorrhage. The Chair stated that the risk was not just to Complainant, but to his law enforcement colleagues and the mission of protecting national security because, if he was hemorrhaging after a violent encounter, his colleagues might feel compelled to stop law enforcement efforts to attend to Complainant.

EEOC regulations define “qualification standards” as “the personal and professional attributes including the skill, experience, education, physical, medical, safety, and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.” 29 C.F.R. § 1630.2(q). “The term ‘qualification standard’ may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace.” 29 C.F.R. § 1630.15(b)(2). The ICE Medical Standards are qualification standards.

To prove direct threat, the Agency must show more than that a person stands some elevated risk of future injury. Rather, a person is a “direct threat” if he poses a “significant risk of substantial harm” to the health and safety of himself or others which cannot be eliminated or reduced to an acceptable level by reasonable accommodation. 29 C.F.R. § 1630.2(r). Candi R. v. Dep’t of Defense, EEOC Appeal No. 0120172238 (Feb. 28, 2019). The direct threat evaluation must be based on an *individualized* assessment of the person’s present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (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. *Id.* The burden is on the Agency to prove direct threat. Massingill v. Dep’t of Veterans Affairs, EEOC Appeal No. 01964890 (July 14, 2000).

A determination as to whether an individual poses a direct threat cannot be based, except in cases of the most apparent nature, merely on medical reports. Selix v. United States Postal Service, EEOC Appeal No. 01970153 (March 16, 2000). 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).

In this case, the medical information from Complainant's cardiologist that there were no contraindications for his work in law enforcement. In his EEO investigative affidavit, Complainant stated that in 2008, he was granted a waiver by Customs and Border Protection, and expressed surprise that ICE, which like Customs and Border Protection is part of the Department of Homeland Security, denied him a waiver for a less physically demanding job.

The Medical Review Board Chair stated in his EEO investigative affidavit that agencies allow or not allow different levels of risk, and the Medical Officers use their judgment to make the risk acceptance decision based on the medical condition in conjunction with their understanding of the risks related to a specific job and its requirements which they know more about than the treating physician.

In response to the EEO investigator's question alluding to the information Complainant submitted about his job duties as a Border Patrol Agent, the Chair conceded that the risk of being attacked as a Deportation Officer might be less, but a risk of a physical altercation is still present, and it only takes one severe blow or sharp trauma to result in a fatal hemorrhage. The Chair stated that there is no agency guidance on how the degree of the risk of injury should be considered, but ultimately the risk or hazard to the individual, coworker, and the mission are all considered individually case by case.

The position description for Deportation Officer indicates that they perform in one or more specialized duties in four subject matter areas. Half of areas are sedentary in nature, i.e., deportation case management and investigative program liaison activities. The Chair stated that in some cases, the Medical Review Board considers demonstrated performance in the same or similar jobs, but the candidate must have performed the specific duties considered at risk and such performance must be well documented.

Under the facts as presented in this case, we find that the Agency did not demonstrate a significant risk of substantial harm to the health and safety to Complainant or that the Medical Officer or Medical Review Board used this standard by weighing factors such as the likelihood that the potential harm will occur. The Chair of the Medical Review Board expressed the belief that agencies choose to allow or not allow different levels of risk and there is no Agency guidance on how the degree of the risk of injury should be considered. This is inconsistent with the Rehabilitation Act requirement concerning the direct threat standard. That standard does not appear in the 1999 Immigration and Naturalization Service Medical Standards used by ICE. The record shows that the Medical Review Board relied on its blanket determination that warfarin users have an increased risk of harm, and that a Deportation Officer's duties could expose Complainant to a greater risk of injury, all while ignoring his unique work history and discounting the opinion of his cardiologist. Moreover, the Agency did not consider potential accommodations that could mitigate the alleged direct threat. As such, we conclude the Agency failed to meet its burden of proving direct threat.

Accordingly, the Agency's final decision is **REVERSED**. The Agency is ordered to comply with the Order set forth below.

ORDER

The Agency is ordered to take the following remedial action:

1. Within 60 calendar days of the date of this decision, the Agency shall offer in writing to hire Complainant as a Deportation Officer, GS-1801-11, with ICE in York, Pennsylvania, or a substantially equivalent position agreeable to Complainant. Complainant will have 15 days after receiving the offer to accept it, and must do so in writing. If Complainant declines the offer, his entitlement to back pay, if any, will cease on the date he declines.
2. If Complainant accepts the offer, the Agency shall place him in the Deportation Officer position retroactive to the date he was denied the position for the purposes of seniority and other employment benefits (including within grade salary increases and career ladder promotions) tied to seniority.
3. Within 60 calendar days of the date of this decision, determine the appropriate amount of back pay (if any),<sup>3</sup> with interest, and other benefits due Complainant, pursuant to 29 C.F.R. § 1614.501, no later than 65 calendar days of the date of this decision. 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 the 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 using the address in the header of this decision, or via the EEOC Public Portal for federal sector complainants.
4. The issue of compensatory damages is REMANDED to the Agency. On remand, the Agency shall conduct a supplemental investigation on compensatory damages and provide Complainant an opportunity to submit evidence of pecuniary and non-pecuniary damages. For guidance on what evidence is necessary to prove pecuniary and non-pecuniary damages, the parties are directed to EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991 (July 14, 1992) (available at [eeoc.gov](http://eeoc.gov).) The Agency shall complete the investigation and issue a FAD appealable the EEOC determining the appropriate amount of damages within 125 calendar days of the date of this decision.
5. Within 60 calendar days of the date of this decision, the appropriate Agency EEO component shall request technical assistance from the EEOC, Office of Federal

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<sup>3</sup> We note that at Complainant was a GS-12 Border Patrol Agent at the time of his application for the Deportation Officer, GS-11, position.

Operations (OFO), Federal Sector Programs (FSP), on revising the applicable Medical Standards to include language regarding the direct threat standard. Once the standards are revised, the Agency shall provide training to its Medical Officers and Medical Review Board members on the direct threat standard.

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

#### ATTORNEY'S FEES (H1016)

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

#### IMPLEMENTATION OF THE COMMISSION'S DECISION (K0618)

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.

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).

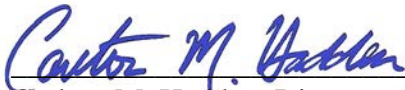
#### COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

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

June 21, 2019

Date