

*** DARIN B., COMPLAINANT, v. KATHLEEN..., EEOC DOC...

EEOC DOC 0120161068 (E.E.O.C.), 2017 WL 1103712

U.S. Equal Employment Opportunity Commission (E.E.O.C.)

*** DARIN B., COMPLAINANT,

v.

KATHLEEN MCGETTIGAN, ACTING DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, AGENCY.

Appeal No. 0120161068

Agency No. 2015024

March 6, 2017

DECISION

*1 Complainant filed a timely appeal with this Commission from the Agency's decision dated January 11, 2016, dismissing his complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, [42 U.S.C. § 2000e et seq.](#) and [Section 501](#) of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, [29 U.S.C. § 791 et seq.](#) The Commission accepts the appeal pursuant to [29 C.F.R. § 1614.405\(a\)](#). For the following reasons, the Commission REVERSES the Agency's final decision.

ISSUE PRESENTED

The issue presented is whether Complainant's claim that he was subjected to unlawful discrimination when his insurance carrier denied him coverage states a claim although he did not appeal the matter to the Agency.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Tax Examining Technician for the Internal Revenue Service (IRS), Department of the Treasury, in Chamblee, Georgia. Complainant identifies as transsexual² male.

In early 2013, Complainant requested pre-authorization for nipple-areola reconstruction surgery from his Federal Employee Health Benefits (FEHB) carrier, Aetna. This chest reconstruction surgery is a form of gender reassignment surgery commonly used to treat gender dysphoria in transgender persons transitioning from female to male. Male chest reconstruction is typically comprised of two procedures; simple mastectomy and nipple-areola reconstruction. On January 30, 2015, Complainant received a letter from Aetna denying his request for pre-authorization for nipple-areola reconstruction. The letter explained that Aetna considers nipple-areola surgery to be a purely cosmetic procedure. The letter also informed Complainant that he was granted pre-authorization for a simple mastectomy.

On April 9, 2015, Complainant submitted an initial Level 1 appeal to Aetna requesting pre-authorization for nipple-areola reconstruction, in accordance with the procedure for appealing denial of health insurance claims found at 5 C.F.R. § 890. In a letter to Complainant dated May 11, 2015, Aetna upheld its decision to deny coverage for nipple-areola reconstruction. The May 11, 2015, letter explained that gender reassignment services are not considered ““medically necessary”” and therefore are not covered by Aetna. The letter further notified Complainant that he had the right to appeal Aetna's decision to the Agency for further review within 90 days of receipt of the letter. On May 15, 2015, Complainant underwent the male chest reconstruction surgery, for which he paid out of pocket.

*** DARIN B., COMPLAINANT, v. KATHLEEN..., EEOC DOC...

EEO Complaint

*2 On June 12, 2015, Complainant filed a formal complaint in which he alleged that the Agency subjected him to discrimination on the bases of sex (transsexual male) and disability (gender dysphoria) when:

1. On January 30, 2015, Complainant's Federal Employee Health Benefits (FEHB) insurance plan, Aetna, denied pre-authorization for nipple-areola reconstruction; and
2. On May 11, 2015, Aetna denied Complainant's first-level appeal regarding the denial of pre-authorization for the nipple-areola reconstruction.

Final Agency Decision

The Agency dismissed Complainant's complaint on the basis that Complainant was not aggrieved under EEOC regulations because he did not challenge Aetna's denial of his claim with the Agency. The Agency noted that Complainant was informed that he had 90 days from receipt of Aetna's decision to request further review by the Agency, but there was no evidence that he submitted a request for review to the Agency. "Therefore, Complainant has again failed to state a claim because he has not shown that the Agency caused him to suffer harm or loss with respect to a term, condition, privilege of employment for which there is a remedy," the Agency concluded. Agency's Final Decision, pp. 8, 9.

CONTENTIONS ON APPEAL

On appeal, Complainant maintains that the Agency improperly dismissed his complaint, which deprived him of an investigation of his claims. Complainant argues that his complaint "plainly states a cognizable claim" under EEO regulations, and Commission precedent establishes that claimants who are denied health benefits by an FEHB plan administrator are aggrieved. Complainant further argues that he notified the Agency of the denial of his claim for benefits in his EEO complaint, and the issue of whether he notified OPM of the denial is an issue regarding the merits of his complaint that is irrelevant to the procedural issue of whether he has stated a justiciable claim. Complainant maintains that he was not required to exhaust the FEHB claims review process before being able to assert a claim in the EEO process against the Agency. Complainant argues that the Agency is responsible for ensuring FEHB plans comply with federal laws, and therefore is culpable for FEHB plan discrimination in this case even if it does not directly administer the plan.

Complainant also argues that the Agency only addressed two of his claims, but did not address the following five other claims: 1) the FEHB plan contains terms of coverage which discriminate on the basis of sex ("transgender status"/"F""transsexual men") and disability (gender dysphoria); 2) the FEHB plan administrator took into account both Complainant's sex and disability when making benefits determinations; 3) the FEHB plan administrator relied upon discriminatory terms of coverage and/or discriminatory underwriting practices when it repeatedly denied Complainant's request for pre-authorization of nipple-areola reconstruction; 4) the Agency failed to take meaningful steps to ensure that the FEHB plan complies with federal EEO laws that prohibit sex and disability discrimination in health benefits plans, and specifically did not ensure that the FEHB plan did not discriminate against transgender persons and/or persons with gender dysphoria; and 5) the discrimination Complainant endured resulted in a hostile work environment.

*3 In response, the Agency requests that we affirm its final decision dismissing Complainant's complaint. Specifically, the Agency contends that Complainant's complaint fails to state a claim because it (OPM) has not acted in the matters at issue because Aetna exclusively made the decisions denying Complainant coverage. The Agency maintains that FEHB grants it statutory authority to order carriers to provide benefits, but Complainant failed to avail himself of the disputed claims process, which would have allowed the Agency to consider Complainant's claim. The Agency notes that the applicable Aetna health insurance plan provides for coverage of transgender transition surgery.

ANALYSIS AND FINDINGS

As an initial matter, we note that, although Complainant and the Agency parsed the instant complaint into multiple claims, Complainant essentially is alleging the single claim that in 2015, he was subjected to disparate treatment and harassment when he was denied pre-authorization for health insurance benefits to cover nipple-areola reconstruction.

The regulation set forth at [29 C.F.R. § 1614.107\(a\)\(1\)](#) provides, in relevant part, that an agency shall dismiss a complaint that fails to state a claim. An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age, genetic information, or disabling condition. [29 C.F.R. §§ 1614.103, 1614.106\(a\)](#). The Commission's federal sector case precedent has long defined an "aggrieved employee" as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. [Diaz v. Dep't of the Air Force, EEOC Request No. 05931049 \(Apr. 21, 1994\)](#).

In this case, Complainant alleges that he was subjected to unlawful discrimination and harassment on the bases of sex and disability when Aetna denied Ms request for pre-authorization for nipple-areola reconstruction surgery. We note that the Commission has long held that insurance coverage is a fringe benefit of employment, and the denial of insurance coverage concerns a term, condition, or privilege of employment. [See Polifko v. Office of Personnel Management, EEOC Request No. 05940611 \(Jan. 4, 1995\)](#) (Commission held that, based on the association provision of the ADA and the Commission's "Interim Guidance on Application of ADA to Health Insurance," Complainant had standing to bring a claim of discrimination on the basis of his relationship with his wife, an individual with a disability, who had been denied specific treatment for breast cancer by an insurance carrier).

*4 The Agency argues that it has taken no action to harm Complainant because he failed to appeal the matter to the Agency through the process set forth at 5 C.F.R. § 890. However, the Commission has held that employees' failure to use or exhaust the process set forth at 5 C.F.R. § 890 does not preclude them from asserting viable claims in the EEO process. [See Lawrence, et al. v. Office of Personnel Management, EEOC Appeal Nos. 01996217, 01996553 \(Aug. 11, 2000\)](#), req. for recons, denied, [EEOC Request No. 05A01233 \(Mar. 15, 2001\)](#) (Commission rejected OPM's assertion that denial of coverage for in-vitro fertilization treatment failed to state a claim because complainant did not request OPM review of insurance carrier's decision as provided for in 5 C.F.R. § 890). Moreover, we have held that the Agency administering the FEHB program (OPM) is responsible for an insurance carrier's denial of benefits. [See Polifko v. Office of Personnel Management, supra; Barta v. Office of Personnel Management, EEOC Appeal No. 01991959 \(Aug. 17, 2000\)](#), req. for recons. den., [EEOC Request No. 05A01232 \(Nov. 30, 2000\)](#). Therefore, we find that Complainant's complaint states a claim of discrimination under EEOC regulations.³

CONCLUSION

In summary, the Commission finds that the Agency improperly dismissed Complainant's complaint. Therefore, we REVERSE the Agency's dismissal and REMAND this matter for further processing consistent with this decision and the ORDER set form below.

ORDER (E0610)

The Agency is ordered to process the remanded claim as defined herein in accordance with [29 C.F.R. § 1614.108](#). The Agency shall acknowledge to the Complainant that it has received the remanded claims **within thirty (30) calendar days**

*** DARIN B., COMPLAINANT, v. KATHLEEN..., EEOC DOC...

of the date this decision becomes final. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights **within one hundred fifty (150) calendar days** of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision **within sixty (60) days** of receipt of Complainant's request.

A copy of the Agency's letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

***5** Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report **within thirty (30) calendar days** of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. 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 (M0416)

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 or **within twenty (20) calendar days** of receipt of another party's timely request for reconsideration. [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. The requests 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 request or opposition must also include proof of service on the other party.

***6** 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)

*** DARIN B., COMPLAINANT, v. KATHLEEN..., EEOC DOC...

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:

Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat

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.

Footnotes

- 2 Although the term “transsexua” is generally disfavored by the transgender community today, Complainant self-identifies as “transsexual” on appeal and in his formal complaint. Consequently, this decision reflects Complainant's preference for self-identification.
- 3 On appeal, the Agency raises for the first time alternative grounds for dismissal of Complainant's disability discrimination claim, arguing that such a claim is not cognizable pursuant to Section 705 of the Rehabilitation Act. Section 705 provides that: “[T]he term ‘disability’ shall not include “transvestism, transsexualism . . . gender identity disorders not resulting from physical impairments....” 29 U.S.C. § 705(20)(F)(i). Insofar as Complainant's claim was dismissed on a procedural basis before any investigation was undertaken, Complainant has not had the opportunity to adduce evidence, and accordingly the record is silent, as to whether, in this case, Complainant's gender dysphoria results from a physical impairment. Whether Complainant is an individual with a disability under the Rehabilitation Act is a question that goes to the merits of the complaint and is not properly dismissed on a procedural basis. See [Quintero v. Dep't of the Air Force](#), EEOC Appeal No. 0520130309 (My 31, 2013) (Commission has consistently held that whether a complainant is an “individual with a disability” within the meaning of the Rehabilitation Act goes to the merits of a complaint and is irrelevant to whether the complaint states a claim); [Simon v. Office of Personnel Management](#), EEOC Appeal No. 01A03748 (Nov. 15, 2002) (AJ who dismissed complaint for failure

*** DARIN B., COMPLAINANT, v. KATHLEEN..., EEOC DOC...

to state a claim because of determination that complainant was not an individual with a disability covered by Rehabilitation Act improperly addressed the merits of complaint in doing so).

EEOC DOC 0120161068 (E.E.O.C.), 2017 WL 1103712

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