

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

IN THE MATTER OF

██████████,

COMPLAINANT

AND

OFFICE OF PERSONNEL MANAGEMENT

RESPONDENT

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Docket No. 0120161068
Agency No. 2015024

**COMPLAINANT MR. ██████████’S
BRIEF IN SUPPORT OF NOTICE OF APPEAL**

Mr. ██████████ is a transsexual man, diagnosed with gender dysphoria. Mr. ██████████’s underlying formal EEO complaint contains six discrete claims alleging various forms of sex and disability discrimination committed by a Federal Employee Health Benefits (“FEHB”) plan administrator in connection with its treatment of ██████████’s request for a gender reassignment surgery. ██████████’s formal EEO complaint also contains a claim alleging that OPM failed to take meaningful steps to ensure that the FEHB plan administrator complies with federal EEO laws that prohibit sex and disability discrimination in health benefits plans, and specifically failed to ensure the FEHB did not discriminate against transsexuals and/or persons with gender dysphoria.

There are three issues on appeal. First, OPM’s failure to timely investigate ██████████’s formal EEO complaint. Second, OPM’s failure to provide rationales for dismissing five of ██████████’s seven claims of discrimination in the Final Agency Decision, effectuating improper dismissals of those five unaddressed claims. Third, OPM’s improper dismissal of ██████████’s claims alleging sex and disability discrimination in connection with the FEHB plan administrator’s initial denial of pre-authorization and denial of ██████████’s appeal challenging the denial of pre-authorization.

RELEVANT BACKGROUND

Events Precipitating this Appeal

Mr. ██████████ requested pre-authorization for ***male chest reconstruction surgery*** from his FEHB plan administrator, Aetna, in early 2015. Male chest reconstruction surgery is a form of gender reassignment surgery used to treat gender dysphoria in female-to-male transsexuals. The aim of male chest reconstruction surgery is to transform a female assigned at birth person’s chest

into a chest that appears typical of a male assigned at birth individual. (The medical necessity and efficacy of male chest reconstruction surgery as a form of treatment for gender dysphoria in female-to-male transsexuals is well settled by medical experts.¹) Male chest reconstruction is comprised of two procedures—simple mastectomy and nipple-areola reconstruction. Where a simple mastectomy is performed and the patient desires to retain natal nipple-areola tissue, a nipple-areola reconstruction must be performed at the same time as the mastectomy. (The medical necessity and efficacy of nipple-areola reconstruction for transsexual and nontranssexual men undergoing chest reconstruction surgery is also well-settled.²) For calendar year 2015, Mr. ██████'s FEHB plan's Explanation of Benefits document proffered that the plan covered all medically necessary components of "gender reassignment surgery."

On January 30, 2015 AETNA granted pre-authorization for the simple mastectomy procedure but denied pre-authorization for nipple-areola reconstruction. In its denial letter AETNA asserted that it considered nipple-areola reconstruction to be purely "cosmetic."

On April 9, 2015, ██████ appealed the January 30 denial. ██████'s letter of appeal pointed to several infirmities in Aetna's January 30 denial letter.³ The crux of ██████'s appeal was that Aetna had treated ██████ differently than nontranssexual plan enrollees seeking nipple-areola reconstruction for diagnoses other than gender dysphoria.

¹ See, e.g., E. Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, Version 7, 13 INT'L J. TRANSGENDERISM 165, 201 (2011) (noting that it is undisputed that all components of male chest reconstruction surgery are medically necessary); Press Release, WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.* 2 (June 2008) available at http://www.wpath.org/uploaded_files/140/files/Med%20Nec%20on%202008%20Letterhead.pdf ("Medically necessary sex reassignment procedures also include . . . chest reconstruction or augmentation as appropriate to each patient"); *id.* at 3 ("These medical procedures and treatment protocols are not experimental . . . [female-to-male transsexuals who have] undergone chest reconstruction had significantly higher scores for general health, social functioning, as well as mental health").

² See, e.g., Miodrag M. Colic & Milan M. Colic, *Circumareolar Mastectomy in Female-to-Male Transsexuals and Large Gynecomastias: A Personal Approach*, 24 ASETH. PLASTIC SURGERY 450 (2000) (discussing necessity of nipple and areola reconstruction in trans male patients); G.M. Beer et al., *Configuration and Localization of the Nipple-Areola Complex in Men*, 108 PLASTIC & RECONSTRUCTIVE SURGERY 1947 (2001) (same); L. Nelson et al., *Transgender Patient Satisfaction Following Reduction Mammoplasty*, 63 J. PLASTIC RECONSTRUCTIVE & AESTHETIC SURGERY 331 (2009) (same); Yuzaburo Namba et al., *Mastectomy in Female-to-Male Transsexuals*, 63 ACTA MEDICA OKAYAMA 243 (2009) (same); M.G. Berry et al., *Female-to-Male Transgender Chest Reconstruction: A Large Consecutive, Single-Surgeon Experience*, 65 J. PLASTIC RECONSTRUCTIVE & AESTHETIC SURGERY 711 (2012) (same). See also Terrence Murphy et al., *Nipple Placement in Simple Mastectomy with Free Nipple Grafts for Severe Gynecomastia*, 94 PLASTIC & RECONSTRUCTIVE SURGERY (1994) (discussing necessity of nipple reconstruction in male patients generally).

³ Among other things, ██████ noted that: his Plan (1) expressly covers all medically necessary treatment for gender dysphoria, (2) that he had demonstrated that he met the Plan's express requirement for medical necessity, and (3) that the Plan's express coverage of nipple-areola reconstruction for nontranssexual women for other medical conditions but denial of the same procedure to transsexual men who sought treatment for gender dysphoria violated federal EEO laws. Mr. ██████'s appeal further argued that AETNA could not treat similarly situated transsexual men and nontranssexual women differently—if both groups had a medical need for nipple-areola reconstruction, AETNA must either cover both groups or cover neither. Mr. ██████ also pointed out that deeming the same procedure simultaneously cosmetic for one diagnosis (gender dysphoria), but medically necessary for another diagnosis (nontranssexual women who have had their breasts removed in cancer treatment), is discriminatory. Lastly, Mr. ██████ appended a letter from his surgeon Dr. Medalie attesting to the medical necessity of nipple-areola reconstruction for transsexual men generally and Mr. ██████ specifically.

Aetna denied ██████'s appeal via a letter dated May 11, 2015. Among other things, Aetna asserted that ██████'s FEHB plan excluded "Gender reassignment services that are not considered medically necessary" and further held that "Nipple/areola reconstruction is considered cosmetic and not a medically necessary component of a gender reassignment."

██████ contacted OPM to initiate the informal EEO complaint process on May 11, 2015.

On May 15, 2015 ██████ underwent male chest reconstruction surgery with Dr. Daniel Medalie. Because Aetna denied ██████'s pre-authorization request as well as his appeal, Manning was forced to pay for the nipple-areola reconstruction procedure out of pocket (approximately \$1375).

On May 26, 2015, OPM EEO counselor Yasmin Rosa conducted a combined "intake" and "final interview" with Manning and his legal counsel via telephone. During the intake/final interview, ██████ summarized the seven claims he later included in his formal EEO complaint. At the end of the call Ms. Rosa notified ██████ and his counsel that OPM was unable to resolve Manning's EEO complaint through the pre-complaint process and advised that ██████ could seek OPM review of the "exclusionary clause" (██████'s counsel clarified that there was no "exclusionary clause" in ██████'s FEHB plan) and/or file a formal EEO complaint against OPM.

On June 12, 2015, Mr. ██████ transmitted a formal EEO complaint to OPM. ██████'s counsel supplied both a completed OPM Form 1580 as well as a five-page signed document labeled "Statement of Mr. ██████, Supplementing EEO Formal Complaint." Between these two documents, ██████ raised seven discrete claims of discrimination:

1. The FEHB plan contains terms of coverage which discriminate on the basis of sex (transgender status; transsexual men) and disability (gender dysphoria);
2. The FEHB plan administrator took into account both ██████'s sex and disability when making benefits determinations;
3. The FEHB plan administrator improperly denied ██████'s request for pre-authorization for nipple-areola reconstruction because of ██████'s sex and/or disability;
4. The FEHB plan administrator improperly denied ██████'s appeal of the denial of pre-authorization for nipple-areola reconstruction because of ██████'s sex and/or disability;
5. The FEHB plan administrator relied upon discriminatory terms of coverage and/or discriminatory underwriting practices when it repeatedly denied ██████'s request for pre-authorization of nipple-areola reconstruction;
6. OPM 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 transsexual persons and/or persons with gender dysphoria; and

7. That the discrimination ██████ endured gave rise to a hostile work environment.

OPM confirmed receipt of the formal EEO complaint via a letter dated June 12, 2016. However, OPM's letter warned Mr. ██████ that OPM had not yet decided whether it would "accept or dismiss the complaint." Between June 12 and December 2015, ██████'s counsel repeatedly sought updates from OPM as to whether it had decided to "accept" ██████'s formal EEO complaint.⁴

On January 13, 2016—215 days after ██████ filed his formal EEO complaint—OPM dispatched a Final Agency Decision ("FAD"). The FAD, dated January 11, 2016, purported to dismiss ██████'s claim alleging discrimination in the FEHB plan's denial of pre-authorization and denial of ██████'s appeal. The FAD asserts that these two claims were dismissed because ██████ had "fail[ed] to state a claim." The FAD did not acknowledge ██████'s five other claims.

EEO Laws Prohibit Sex and Disability Discrimination in Employer Provided Health Benefits

Title VII prohibits sex discrimination in all fringe benefits, including health benefits.⁵ Where provided, employers must ensure that the health benefits do not discriminate on the basis of sex. Under Title VII an employer is liable for discriminatory conduct by a third party administrator, even where the discriminatory terms and coverage determinations are made by and/or influenced by a third party administrator.⁶ The Rehabilitation Act prohibits disability discrimination in FEHB plans.⁷

⁴ Ezra Young sent emails to Ms. Yasmin Rosa on August 12, 2015 (61 days after filing), September 23, 2015 (103 days after filing), October 16, 2015 (126 days after filing), November 13, 2015 (154 days after filing), and December 21, 2015 (192 days after filing) requesting notice of whether OPM had "accepted" ██████'s formal complaint. Jillian Weiss sent a letter to OPM general counsel via facsimile and first class mail inquiring as to the status of Manning's formal EEO complaint on December 29, 2015 (200 days after filing).

⁵ See, e.g., *Newport News Shipbuilding and Dry Dock Company v. EEOC*, 462 U.S. 669 (1983) (recognizing generally that differential coverage of the same covered condition on the basis of the employee's or their dependent's sex violates Title VII).

⁶ See, e.g., *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1090–91 (1983) ("It would be inconsistent with the broad remedial purposes of Title VII to hold that an employer who adopts a discriminatory fringe benefit plan can avoid liability on the ground that he could not find a third party willing to treat his employees on a nondiscriminatory basis. An employer who confronts such a situation must either supply the fringe benefit himself, without the assistance of any third party, or not provide it at all.").

⁷ See generally *Polifko v. OPM*, EEOC DOC 05940611, 1995 WL 1901834 at *3 (Jan. 4, 1995) (holding that insurance coverage is a "fringe benefit of employment" and that the Rehabilitation Act prohibits "indirect discrimination on the basis of a disability in the provision of health insurance"). See also *Cynthia Cummings v. OPM*, EEOC DOC 01A22203, 2004 WL 1144577 at *3 (May 13, 2004) (noting that disability discrimination in an employee health plan is typically cognizable under the Americans with Disabilities Act, but that where "dealing with a federal agency employer" such discrimination is cognizable under the Rehabilitation Act); *James v. OPM*, EEOC DOC 0120054026, 2007 WL 1393631, at *3 (May 3, 2007) ("[A]n employer may not discriminate against an individual with a disability with regard to job applications, hiring, advancement and other terms, conditions and privileges of employment. . . . [I]t is unlawful to discriminate based on an individual's disability in an

An EEO health benefits discrimination violation is shown where: a plan includes terms or conditions which discriminate on the basis of a protected status⁸; a plan administrator uses a particular covered disability as a basis for denying care under the plan⁹; a plan administrator utilizes underwriting practices which discriminate on the basis of a protected status¹⁰; a plan denies a discrete request for benefits coverage for discriminatory reasons¹¹; OPM enters into health insurance contracts with a FEHB plan administrator which “do not provide equal benefits” to persons in protected statuses¹²; and/or discriminatory health benefits practices give rise to a hostile work environment.¹³

ARGUMENTS

I. OPM failed to timely investigate Mr. ██████’s formal EEO complaint.

Mr. ██████’s filed his formal EEO complaint with OPM on June 12, 2015. Without conducting an investigation, OPM dispatched a FAD dismissing two of ██████’s seven claims on January 13, 2016—215 days *after* the formal EEO complaint was filed. OPM’s declination to initiate an investigation of the claims contained in ██████’s formal complaint as well as its failure to complete the investigation within 180-days clearly runs afoul of EEO laws.

employer's provision of fringe benefits available by virtue of employment whether or not administered by an employer” (emphasis added).

⁸ See, e.g., *Cummings v. OPM*, EEOC DOC 01A00726, 2000 WL 550397 (Apr. 24, 2000) (finding claim alleging that FEHB plan “denied complainant total insurance coverage and benefits for her infertility” properly states a claim under EEO laws).

⁹ See, e.g., *Heitner v. OPM*, EEOC DOC 019554455, 1996 WL 528816 at *3 (Sept. 6, 1996) (“a ‘disability based distinction’ in a health insurance plan, *i.e.*, one which singles out a particular disability, discrete group of disabilities, or disability in general, is unlawful unless it is justified”); *Klein v. OPM*, EEOC DOC 0120062444, 2007 WL 879266 at *2 (Mar. 16, 2007) (allegation of “discrimination in the provision of insurance coverage for [a] specific disability” raises “justiciable claim”).

¹⁰ See, e.g., *James v. OPM*, EEOC DOC 0120054026, 2007 WL 1393631, at *4 (May 3, 2007) (“underwriting criteria used to deny [enrollee] coverage . . . falls squarely within the Commission’s jurisdiction under the Rehabilitation Act”).

¹¹ See, e.g., *Heitner v. OPM*, EEOC DOC 019554455, 1996 WL 528813 at *4 (Sept. 6, 1996) (“claims alleging unlawful denials are properly made against [OPM]”); *Polifko v. OPM*, EEOC DOC 01960976, 1997 WL 165687 (Apr. 3, 1997) (similar); *Haendel v. OPM*, EEOC DOC 01963851, 1997 WL 241727 (May 1, 1997) (similar).

¹² *Barta v. OPM*, EEOC DOC 01991959, 2000 WL 1218136 (Aug. 17, 2000). See also *Complainant v. OPM*, EEOC DOC 0120142797, 2015 WL 755116 (Feb. 9, 2015) (finding that claim alleging that FEHB plan denied claims for out-of-network providers for enrollee with disability and thus effectively denied access to such care, states viable claim for disability discrimination); *id.* at *2 (“an employer may be liable for any disability discrimination that results from its contract with an insurance company to provide or administer a health insurance plan on behalf of its employees”) (*citing* 29 CFR §1630.6(b)).

¹³ See, e.g., *United States v. Southeastern Oklahoma State University*, No. CIV-15-324-C, 2015 WL 4606079 (W.D. Okla. July 10, 2015) (Cauthron, J.) (denying motion to dismiss hostile work environment claim predicated in part on the existence of a transgender specific exclusion in an employer provided health benefits plan). See also Consent Decree, *EEOC v. Deluxe Financial Services*, 0:15-cv-02646, ECF. 37, ¶ 30 (D.Minn. Jan 20, 2016), available at <http://tinyurl.com/jetqrh9> (settling Plaintiff-Intervenor’s Title VII and ADA claims alleging health benefits exclusions gave rise to a hostile work environment by mandating that defendant-employer eliminate terms which discriminate on the basis of “sex (including transgender status) and gender dysphoria” from all health benefits plans provided to employees and “take steps to ensure that employees can meaningfully report health benefits related discrimination [on the basis of sex and gender dysphoria] directly to Defendant”).

Compliance with 29 C.F.R. §1614.108(e), which sets forth the 180-day limit on agency investigations (unless the parties agree in writing to extend the period for not more than an additional 90 days), is mandatory.¹⁴ Neither Mr. ██████ nor his counsel expressly agreed to an extension during the regulatory 180-day period. OPM never gave notice that it had “accepted” ██████’s formal EEO complaint. OPM never assigned an investigator to ██████’s formal complaint. (Indeed, it appears that OPM never initiated an investigation, much less completed one, within the 180-day period.¹⁵) OPM’s only action after ██████ filed his complaint was the dispatch of a FAD, 213 days after the complaint had been filed. These facts plainly evidence that OPM failed to comply with §1614.108(e).

II. OPM failed to address five of ██████’s seven claims in the FAD, which is tantamount to an improper dismissal of five claims.

Despite alleging seven discrete claims in his Formal EEO complaint filings, OPM’s FAD proffers that ██████ raised only two claims, and gives rationales for dismissing only two claims—the pre-authorization denial claim (which OPM labeled as “Claim 1” in the FAD) and the appeal denial (which OPM labeled as “Claim 2” in the FAD).

OPM’s failure to provide rationales for dismissing each and every one of ██████’s claims in the FAD is improper. It is well settled that “[a]n agency may not dismiss an EEO complaint, in whole or in part, without providing the complainant with a FAD and appeal rights to the Commission.”¹⁶ The Agency is required to ensure that the FAD addresses each and every claim raised by the complainant.¹⁷ If the Agency decides to severely limit the scope of a formal EEO complaint, it must make this decision expressly in the FAD.¹⁸ The Agency’s obligation is not discharged where it “mischaracterize[s] the bases of appellant’s allegations of discrimination” and/or fails to include one or more of the complaint’s claims of discrimination in

¹⁴ See, e.g., *Dacosta v. Department of Education*, EEOC DOC 01995992, 2000 WL 283709, at *5 (Feb. 25, 2000) (failure to initiate an investigation and failure to complete an investigation within 180-day period evidence non-compliance with §1614.108(e)); *Mayes v. United States Postal Service*, EEOC DOC 01831758, 1985 WL 568692 (Jan. 28, 1985) (“We find that the agency’s final decision does not properly address the allegation raised by appellant in his complaint and that no investigation was conducted by the agency. Consequently, the agency has failed to comply with its duty to perform a thorough investigation of the circumstances under which the alleged act of discrimination occurred as the Regulations require.”).

¹⁵ *Complainant v. OPM*, EEOC DOC 0120142797, 2015 WL 755116 at *2 (Feb. 9, 2015) (noting that OPM must investigate a health benefits discrimination claim and address the allegations on the merits, not merely subject the claim to a “procedural dismissal”). See also 29 CFR §1614.108(b) (“the agency shall develop an impartial and appropriate record upon which to made findings on the claims raised by the written complaint. An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.”).

¹⁶ See, e.g., *Smith v. United States Postal Services*, EEOC DOC 01961705, 1996 WL 637315 at *2 (Oct. 25, 1996) (citing *Smith v. United States Postal Service*, EEOC DOC 05921017, 1993 WL 1509615 (Apr. 15, 1993) (agency shall not dismiss allegations, *de facto*, by failing to define or address allegations)).

¹⁷ *Id.*

¹⁸ *Allgary v. United States Postal Service*, EEOC DOC 05970640, 1999 WL 33882034 at *2 (Jan. 4, 1999) (agency’s determination to severely limit the scope of complaint “clearly ought to have been made in a final agency decision, with an explanation of the basis for the rejection and appropriate appeal rights”).

the FAD.¹⁹ Indeed, “an agency’s failure to address an allegation raised in a complaint is tantamount to an improper dismissal of that allegation.”²⁰

OPM’s declination to recognize all seven of ██████’s claims, and OPM’s dismissal of ██████’s formal EEO complaint without providing rationales for five of seven claims, runs afoul of EEO laws.

III. OPM’s dismissal of ██████’s claims alleging (a) improper denial of pre-authorization for nipple-areola reconstruction and (b) improper denial of his appeal of the pre-authorization request was improper.

Pre-Authorization Denial Claim

In the FAD, OPM reasons that ██████’s pre-authorization denial allegation fails to “state a claim” because ██████ was not “aggrieved,” did not suffer a “loss or harm,” and “failed to show that he raised this concern with the Agency and the Agency took an action that caused him to suffer such a harm or loss” (FAD at 2–3). OPM woefully misapprehends both the facts underlying ██████’s claim as well as binding Commission precedents.

As a preliminary matter, a claim alleging sex and/or disability discrimination in the adjudication of a health benefits by an FEHB plan administrator plainly states a cognizable claim under the EEO laws.²¹ Binding Commission precedent teaches that claimants who are denied health benefits by an FEHB plan administrator are “aggrieved” since denial of benefits due to the claimant results in a “harm or loss.”²² (Indeed, ██████ expressly notified OPM during the pre-complaint process and in the text of his formal EEO complaint filings that, as a result of Aetna’s denials, he suffered emotional distress *and* was forced to pay for the nipple-areola reconstruction procedure out of pocket.²³)

¹⁹ *Strickland v. United States Postal Services*, EEOC DOC 01961745, 1996 WL 637247 at *2 (Oct. 25, 1996).

²⁰ *Horvath v. Department of Justice*, EEOC DOC 01990509, 2001 WL 337600 at *2 (Mar. 29, 2001) (citing *Kapp v. Department of the Navy*, EEOC DOC 05940662, 1995 WL 43981 (Jan. 23, 1995)).

²¹ See, e.g., *Haendel v. OPM*, EEOC DOC 01963851, 1997 WL 241727 at *3 (May 1, 1997) (“[H]ealth benefits for employees and their dependents are a fringe benefit available by virtue of employment, and as such, denial of health benefits for discriminatory reasons is within the ambit of the employment discrimination statutes enforced by the Commission. Therefore, claims alleging unlawful denials are properly made against [OPM]. . . .”).

²² See, e.g., *Heitner v. OPM*, EEOC DOC 01955445, 1996 WL 528813 (Sept. 6, 1996) (holding that claim alleging that FEHB plan administrator improperly denied coverage for treatment of wife’s breast cancer because of a covered disability asserts a “loss or harm involving a term, condition, or privilege of employment”), *reconsideration denied*, EEOC DOC 05970035, 1998 WL 429719 (July 22, 1998).

²³ See, e.g., ██████ Supplemental Statement ¶ 17 (“[T]he solution Aetna proposed [not covering nipple-areola reconstruction] would not adequately treatment [*sic.*] my gender dysphoria and unfairly deprives me of the full benefit of my ‘full coverage’ of all necessary sexual reassignment surgery as promised under the terms of the Plan.”); *id.* ¶ 22 (“I think it is unfair that I have to appeal denials and fight for medically necessary care just because I am a transsexual man”); *id.* ¶ 25 (“I underwent male chest reconstruction surgery on May 13, 2015 with Dr. Medalie in Cleveland, Ohio. Though Aetna covered the double-mastectomy portion of the procedure, I had to pay out of pocket for the nipple-areola reconstruction procedure.”); *id.* ¶ 26 (“The nipple-areola procedure denial caused me a lot of stress. . . . I feel like I have been singled out for being transsexual and needing medical care for gender dysphoria.”).

OPM's averment that █████ failed to raise his "concern" about the pre-authorization denial with OPM and also failed to show that OPM "caused him to suffer such a harm or loss" is directly contradicted by the record and in direct tension with binding Commission precedent. Among other things, █████ expressly notified OPM of his "concern" during the pre-complaint period²⁴ and again in the text of his formal EEO complaint filings²⁵. Moreover, whether █████ raised his "concern" to OPM goes to the merits of █████'s claim, and "is irrelevant to the procedural issue of whether [he] has stated a justiciable claim."²⁶

OPM's insistence that █████ did not "demonstrate," at the time of filing his formal EEO complaint, that OPM is responsible for the discrimination alleged is unavailing. █████ was not required to prove OPM's liability at the time he filed his formal EEO complaint.²⁷ █████ was entitled to file a complaint against OPM insofar as, at the time of filing, █████ honestly believed that OPM discriminated against him.²⁸ (Indeed, █████'s filings make clear that he believed OPM was responsible for the FEHB plan administrator's malfeasance.²⁹) Lastly, whether OPM actually discriminated against █████ is a question that can only be answered

²⁴ See, e.g., Ltr. from Ezra Young to Rosa Yasmin (May 13, 2015) (enclosing (a) copy of pre-authorization denial letter, dated January 30, 2015 and (b) copy of █████'s first level appeal, dated Apr. 9, 2015); EEO Counselor Report at 2 (June 5, 2015) (noting that "Counselee claims he is being discriminated against because of sex (Transgender) when on May 11, 2015, his insurance carrier upheld the decision to deny coverage for nipple/areola reconstruction surgery.").

²⁵ See, e.g., Statement of Mr. █████, Supplementing EEO Formal Complaint ¶ 13 (noting that Aetna denied the pre-authorization request on January 30, 2015); *id.* ¶ 15 (noting that Aetna denied █████'s appeal on May 11, 2015).

²⁶ *Wyatt v. Department of Health & Human Services*, EEOC DOC 01A53916, 2005 WL 2492781 at *4 (Sept. 28, 2005). See also *Ferrazzoli v. United States Postal Service*, EEOC DOC 05910642, 1991 WL 1189594 at *4 (Aug. 15, 1991) ("[T]he merits of the complaint allegations are irrelevant to whether the complainant has articulated a justiciable Title VII Complaint. . . . To file a justiciable complaint, it is only necessary that a complainant allege a belief that he has been subjected to adverse action because of his protected class. . .").

²⁷ See sources cited, *supra* note 26.

²⁸ See, e.g., *Dow v. OPM*, EEOC DOC 0120073144, 2009 WL 1856344 at *3 (June 16, 2009) ("[C]omplainant's belief alone is enough to enable him to file a discrimination claim with OPM. See *Id.*, citing *Pion v. Office of Personnel Management*, EEOC Request No. 05880891 (October 18, 1988) (noting that the forerunner to current 29 C.F.R. § 1614.106(a) had once been amended precisely to guarantee the right of complainants "to bring a complaint against any agency they believed engaged in discriminatory conduct" [emphasis added]). Accordingly, based upon our findings and analysis above, we conclude that OPM erred when it dismissed complainant's complaint for failure to state a claim under 29 C.F.R. § 1614.107(a)(1). We conclude that complainant had the right to file his complaint initially with OPM, because he believed and alleged that OPM had discriminated against him pertaining to his non-selection.").

²⁹ See, e.g., Statement of Mr. █████, Supplementing EEO Formal Complaint at 1 ("I have written this statement to provide supplemental information to help OPM EEO Office personnel investigate my discrimination claims against OPM."); *id.* ¶ 23 ("I believe that OPM should take steps to ensure that transsexual people can access all medically necessary care."); *id.* ¶ 24 ("I believe that OPM should adopt rules that require insurers to use fair rules and evaluation processes, based upon medical expertise and peer review literature, for coverage of gender reassignment surgeries."); *id.* ¶ 27 ("I believe I was discriminated against because I am a transsexual man."); *id.* ¶ 28 ("I believe I was discriminated against because I have gender dysphoria."); *id.* ¶ 29 ("I believe that I was discriminated against because I am a transsexual man seeking gender reassignment services."); OPM Formal Complaint Form [OPM Form 1580] at 2 ("I also request that OPM immediately take steps to ensure that all federal health benefits plans, including those operated by Aetna, fully cover all medically necessary procedures for treatment of gender dysphoria and that coverage be dictated by prevailing medical standards and expertise and patient-specific evaluations of efficacy of care."); *id.* ("I request that OPM ensure that third-party administrators do not provide greater coverage for biological and/or psychological conditions other than gender dysphoria.").

after OPM conducted a thorough investigation of ██████'s claim, including but not limited to an evaluation of “[e]vidence, rather than mere assertions.”³⁰ As discussed above, no such investigation was conducted.

Denial of appeal of pre-authorization claim

In the FAD, OPM reasons that ██████'s appeal denial allegation fails to “state a claim” because ██████ was not “aggrieved,” did not suffer a “loss or harm,” and also failed to appeal Aetna’s May 11, 2015 decision to OPM through the FEHB claims review process delineated in 5 CFR §890 within 90 days of receiving notice of this option from Aetna. Once again, OPM misapprehends both the facts underlying ██████'s claim as well as binding Commission precedents.

For the same reasons discussed above with regard to the pre-authorization denial, ██████ was “aggrieved” and suffered a cognizable “loss or harm” in connection with the FEHB plan administrator’s denial of ██████'s appeal since this denial resulted in the withholding of health benefits due to ██████ under the FEHB plan.

OPM’s contention that ██████ must exhaust parallel FEHB claims review processes prior to pursuing an EEO claim is meritless. Though ██████ could, at his option, pursue a parallel §890 claim review with OPM, ██████ was not required to exhaust §890 review in order to preserve or initiate his EEO complaint. This matter is well settled—the Commission has unequivocally held that exhaustion of §890 claims review is not a prerequisite to filing an EEO complaint challenging health benefits discrimination.³¹ At bottom, ██████ was entitled to utilize the EEO process instead of the §890 claims review process to redress health benefits discrimination.

Though not articulated in the FAD, it is possible that OPM intended to argue that ██████ was required to pursue a §890 claims review because, without such a review, OPM would have no means of remedying his injury. If OPM were to make such an argument, it would also fail. First, OPM is culpable for FEHB plan discrimination since, as the Commission has repeatedly recognized, OPM is directly responsible for ensuring that FEHB plans comply with federal EEO laws.³² (This is why the Commission has repeatedly held that OPM is the proper

³⁰ *Complainant v. OPM*, EEOC DOC 0120142797, 2015 WL 755116 at *2 (Feb. 9, 2015); *Cummings v. OPM*, EEOC DOC 01A00726, 2000 WL 550397 (Apr. 24, 2000) (reversing OPM’s dismissal of a complaint alleging the discriminatory denial of health benefits for infertility treatments where OPM dismissed the claim for “failure to state a claim” thereby “improperly address[ing] the merits of the complainant’s complaint in a procedural dismissal without a proper investigation as required by regulations”).

³¹ *See, e.g., Lawrence et al. v. OPM*, EEOC DOC 01996217, EEOC DOC 01996553, 2000 WL 1172987 at *3 (Aug. 11, 2000) (acknowledging that EEO and FEHBP dispute process are parallel and that employees seeking to challenge claim denials through EEO process need not fully exhaust FEHBP remedies by submitting carrier’s denial to OPM for review; concluding that “Therefore the complainants failure to use the process set forth at 5 C.F.R. § 890 is not fatal to their claims.”).

³² *See, e.g., Polifko v. OPM*, EEOC DOC 01960976, 1997 WL 165687 at *1 n.2 (Apr. 3, 1997) (“Congress enacted the Federal Employee Health Benefits Act to provide uniform health benefits for all federal employees and their families. Administration of the FEHB Program is vested in the OPM (the agency), and that agency is responsible for negotiating and approving the terms of all insurance plans, which are offered to federal employees.”).

respondent for any EEO complaint alleging discrimination in FEHB plans, even if OPM does not directly employ the complainant.³³) OPM's liability for EEO violations for health benefits discrimination—even where OPM does not directly administer the plan—is well established.³⁴ Second, even if OPM contends that it can only remedy ██████'s claim through the §890 process, this is not grounds for deeming ██████ to have failed to state a claim under EEO laws.³⁵ Third, Commission precedent teaches that health benefits discrimination claims can be remedied through the EEO process.³⁶

CONCLUSION

For the foregoing reasons, Mr. ██████ respectfully requests that the Commission take appropriate actions to remedy OPM's failure to timely investigate ██████'s formal EEO complaint, including but not limited to issuing a finding of discrimination on the merits as a sanction against OPM for failing to timely investigate.³⁷ In the alternative, Mr. ██████ respectfully requests that the Commission reverse OPM's Final Agency Decision and direct OPM to process and investigate ██████'s formal complaint.

³³ See, e.g., *Lawrence et al.*, 2000 WL 1172987 at *3 (collecting Commission decisions wherein OPM is deemed the entity “responsible for the insurance carrier’s denial of benefits”).

³⁴ See, e.g., *James v. OPM*, EEOC DOC 0120054026, 2007 WL 1393631, at *3 (May 3, 2007) (“it is unlawful to discriminate based on an individual’s disability in an employer’s provision of fringe benefits available by virtue of employment whether or not administered by an employer ”); *Klein v. OPM*, EEOC DOC 0120062444, 2007 WL 879266 at *2 (Mar. 16, 2007) (“complainant state[s] a justiciable claim when alleging discrimination in the provision of insurance coverage for her specific alleged disability”).

³⁵ *Ferrazzoli*, 1991 WL 1189594 at *3 (“[I]t is inappropriate for an agency to reject a complaint because the remedies requested are not available under the regulations. The scope of the available remedial action is not limited by the relief requested in the complaint.”).

³⁶ *Polifkco*, 1997 WL 165687 at *11 (ordering OPM to “reimburse appellant for the past pecuniary losses associated with the agency’s decision to uphold the denial of coverage of ABMT treatment for the appellant’s wife’s breast cancer”).

³⁷ See, e.g., *Lomax v. Department of Veterans Affairs*, EEOC DOC 0720070039, 2007 WL 2981091 at *4 (Oct. 2, 2007) (affirming that ALJ did not abuse discretion when she issued a default judgment against the agency as a sanction for the “agency’s failure to conduct a timely investigation or to take other action in accord with our regulations”); *DaCosta*, 2000 WL 283709, at *10 (similar).

CERTIFICATE OF SERVICE

I hereby certify that on the 17 day of March, 2016 I transmitted copies of the foregoing document via facsimile and overnight mail to the following entities and persons:

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