OFFICE OF FEDERAL OPERATIONS
UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

[redacted],	
Complainant,	OFO Docket No: 0120121887
v.	DOJ No. 187-7-497
	Agency No: USMS-2010-00002
Department of Justice,	Date: June 13, 2012
Agency.	

COMPLAINANT'S APPEAL BRIEF

Complainant [redacted] submits this brief in support of his appeal to the Equal Employment Opportunity Commission ("EEOC") of a Final Agency Decision, pursuant to 29 C.F.R. §1614.401. The Department of Justice issued its Final Agency Decision on March 9, 2012, which it affirmed on April 13, 2012 in response to Mr. [redacted]'s request for reconsideration. Mr. [redacted] filed his Notice of Appeal on March 23, 2012, and the Commission extended the deadline for his appeal brief until May 30, 2012. On May 29, 2012, the Commission granted Mr. [redacted]'s consent motion for an extension until June 13, 2012.

Mr. [redacted], a decorated Iraq war veteran, challenges the decision to deny him employment with the U.S. Marshals Service ("USMS") based solely on the fact that he has a diagnosis of post-traumatic stress disorder (PTSD) that is "not in full remission." The decision to withdraw USMS's conditional offer of employment was made absent any evidence that Mr. [redacted] has specific symptoms of PTSD that would render him unable to perform the essential job functions of a Deputy U.S. Marshal (DUSM). This decision was made despite the unanimous opinion of Mr. [redacted]'s treating and evaluating professionals that nothing about his PTSD would

present any safety risks or render him unable to perform the duties of a Marshal. USMS's determination and the Final Agency Decision were based on a record review conducted by a contract psychiatrist who never interviewed Mr. [redacted], ignored the opinions of his treating and evaluating professionals, and concluded based on Mr. [redacted]'s *diagnosis* and the fact that he had *any remaining symptoms*—regardless of what they were—that he is "likely to suffer sudden or subtle incapacitation" while serving as a Marshal. This conclusion is unsupported by the record and based on unfounded assumptions about Mr. [redacted]'s PTSD. The Agency's reliance upon it to deny Mr. [redacted] a job violates Section 501 of the Rehabilitation Act.

I. FACTS

A. Mr. [redacted]'s Background

[redacted] is a decorated veteran of the United States Marine Corps, Artillery Division. He served from 2000 to 2004, attaining the rank of Corporal and obtaining a military occupation specialty as a field radio operator. From February to April 2003, Mr. [redacted] participated in the invasion of Iraq. He was honorably discharged in August 2004. In the course of his service, Mr. [redacted] received the Navy Unit Commendation Medal, the Presidential Unit Citation, the Combat Action Ribbon, the Good Conduct Medal, and the Global War on Terrorism Expeditionary Medal.

In May 2008, Mr. [redacted] graduated from [redacted] near Boston, Massachusetts with a degree in Business Management. Mr. [redacted] worked part-time while he attended college and graduated with a 3.4 grade point average. Soon after graduation, Mr. [redacted] began working full-time as a Veteran Service Representative and Military Service Coordinator with the Department of Veterans Affairs in [redacted], [redacted].

B. Mr. [redacted]'s Post-Traumatic Stress Disorder

In 2005, Mr. [redacted] applied to the Veterans Administration ("VA") for disability compensation related to various service-related disabilities, including Post-Traumatic Stress Disorder ("PTSD"). In January 2006, The VA assigned Mr. [redacted] a disability rating of 30 percent for his service-related PTSD and awarded him appropriate disability benefits. The VA rating decision stated that at Mr. [redacted]'s April 2005 Mental Health and PTSD examination, he reported the following symptoms: "occasional nightmares, easy startle response to loud noises, waking easily from sleep and episodic difficulty resuming sleep due to the nightmares," "irritability and moodiness," and some "organizational difficulties," as well as occasional panic attacks in the classroom that had subsided by the time of the examination. The rating decision reflected that Mr. [redacted]'s examination revealed "no evidence of a thought disorder or reported paranoid delusions."

In March 2005, Mr. [redacted] began receiving psychological treatment at the VA Medical Campus in [redacted], [redacted] to address his PTSD. From April 2005 through March 2007, he attended regular psychotherapy sessions with [redacted], Licensed Clinical Social Worker, except for a six-month period when he moved temporarily out of state. During this time he was also prescribed medications by a psychiatrist, Dr. [redacted].

When Ms. [redacted] left the PTSD clinic, Mr. [redacted] continued psychotherapy and medication management with Dr. [redacted] from March 2007 through March 2008. By the time Mr. [redacted]'s course of treatment concluded, Dr. [redacted]'s notes indicate that the only remaining trigger of Mr. [redacted]'s PTSD symptoms occurred when fellow students or others would make disparaging remarks about the military or the Iraq war, and that Mr. [redacted]'s responses to this

trigger were limited to feelings of anger and anxiety, resulting in increased heart palpitations and an inability to articulate a response to the negative comments.

C. Mr. [redacted]'s Application to the United States Marshals Service

In July 2009, Mr. [redacted] applied for a job as a Deputy United States Marshal (DUSM) with the United States Marshals Service (USMS), a federal law enforcement agency within the Department of Justice. The job description of a DUSM includes receiving "formal and on-the-job training in the use of firearms; self-defense techniques; restraint and control of prisoners; first aid; use of surveillance, detection, and communications equipment; movement of prisoners; courtroom functions, such as maintaining order in the court, administrative arrangements for guarding jurors or court officials, presenting and guarding prisoners in court;" assisting in the provision of "in-court security in criminal and civil proceedings;" "guard[ing] sequestered juries;" and performing "body searches of prisoners and persons who are under arrest…."

On December 4, 2009, the USMS extended Mr. [redacted] a conditional offer of employment. In the offer letter, the USMS told him to bring his VA rating decision to his physical examination. At his medical examination on January 19, 2010, Mr. [redacted] gave his examiner a copy of his VA rating decision, which disclosed the 30 percent rating due to service-related PTSD.

On January 30, 2010, Dr. [redacted], a Medical Review Officer for the USMS, sent Mr. [redacted] a notification (also called a "Review of Case") that a determination about his medical fitness for the position of DUSM had been deferred to allow Mr. [redacted] to submit additional information about his PTSD and VA disability rating. Ex. A. The letter specified that a treating specialist should provide a report addressing "any restrictions of activities (such as no arming, reduced complexity of tasks, reduced stress level, avoidance of crowds, or no solo

work); any limitations for exposure to extreme physical and psychological stresses associated with law enforcement; [and] the medical basis for the treating specialist's opinion that the examinee will be able to handle the extreme stresses of the position and the training (prolonged high physical and mental stress, extended hours of work, need to remain calm and make quick and reasoned decisions under adverse circumstances) … ." *Id.*

On March 8, 2010, Mr. [redacted] underwent a psychiatric evaluation by Dr. [redacted], Psy.D., at Massachusetts General Hospital. Dr. [redacted] is the Associate Clinical Director of the Veterans' Clinical Program of the Red Sox Foundation and Massachusetts General Hospital's "Home Base" program. She is also an Instructor of Psychology at Harvard Medical School. Dr. [redacted] specializes in the treatment of PTSD, and the "Home Base" program is dedicated to improving the health of service members, veterans and families who are affected by combat and deployment-related stress.

Dr. [redacted]'s report indicated that, in addition to conducting an in-person diagnostic interview, she had reviewed Mr. [redacted]'s 2005 to 2008 treatment records. Her report indicated that Mr. [redacted]'s symptoms of PTSD were "minimal," and limited to "becoming mildly upset when reminded of experiences in Iraq, mild avoidance of reminders, some difficulty remembering stressful military experiences, and moderate feelings of emotional numbing." Ex. B. During her interview of Mr. [redacted], Dr. [redacted] reported that he "denied experiencing intrusive thoughts or disturbing dreams related to his military service" and that he "denied experiencing any hyperarousal symptoms of PTSD." *Id.*

Dr. [redacted]'s report responded directly to the concerns laid out in Dr. [redacted]'s January 30, 2010 letter, concluding that Mr. [redacted]'s "minimal" symptoms no longer met the diagnostic criteria of PTSD and that "there is no concern that he could not perform any of the

'essential job functions' listed in the medical determination request by the US Marshals with appropriate training from that organization." *Id*.

On March 31, 2010, Dr. [redacted] asked Dr. [redacted], a contract psychiatrist who provides recommendations to the USMS, to review Mr. [redacted]'s medical records and make a recommendation as to his qualification for the position of Deputy U.S. Marshal. On April 16, 2010, Dr. [redacted] submitted his report to Dr. [redacted]. Ex. C. To prepare the report, he reviewed Dr. [redacted]'s one-page Request for Psychiatric Opinion; Dr. [redacted]'s March 8, 2010 report; Mr. [redacted]'s 2005-08 treatment records; the January 2006 VA rating decision; Dr. [redacted]'s Review of Case, dated January 30, 2010; and the Certificate of Medical Examination, dated December 27, 2009. *Id*. Dr. [redacted] did not conduct a diagnostic interview of Mr. [redacted], or speak to Mr. [redacted], Dr. [redacted], Dr. [redacted], or Ms. [redacted].

Dr. [redacted] concluded in an April 16, 2010 report that, because Mr. [redacted] had been "diagnosed with PTSD and anxiety which is not in full remission and for which he continues to receive disability benefits," Mr. [redacted] "is not psychiatrically appropriate as a candidate with the U.S. Marshals Service." *Id*. Dr. [redacted] further concluded that Mr. [redacted]'s "psychiatric disability would put his safety, the safety of his colleagues, and the general public, at risk." *Id*. The risk Dr. [redacted] perceived was that Mr. [redacted] was "likely to suffer sudden or subtle incapacitation in the performance of the tasks or duties of the Deputy U.S. Marshal position." Ex. C at 2. Dr. [redacted] did not specify how or why he anticipated Mr. [redacted] was likely to become incapacitated.

Dr. [redacted] stated that his conclusion was based simply on the fact that Mr. [redacted] continued to have "some symptoms" of PTSD—albeit symptoms not meriting a diagnosis of the disorder—and that he received disability benefits in compensation for a VA disability rating

assigned to him more than four years prior. *Id*. Dr. [redacted] did not specify what symptoms gave rise to his concern that Mr. [redacted] might experience incapacitation. Most importantly, Dr. [redacted] found it "likely" that Mr. [redacted] would become incapacitated despite the fact that that Mr. [redacted] has *never experienced a single episode of incapacitation since his PTSD was diagnosed seven years ago*.

Dr. [redacted] also opined that Mr. [redacted]'s discontinuance of psychiatric medications "would likely affect his ability to cope with the potential stresses of law enforcement … ." *Id*. Dr. [redacted] did not mention that Mr. [redacted]'s treating psychiatrist, Dr. [redacted], had determined that Mr. [redacted] could discontinue psychiatric medication in March 2008 if he chose to do, recommending only that he "taper off gradually … to avoid [withdrawal]."

Dr. [redacted] relied on symptoms that Mr. [redacted] experienced when he initially began treatment,[1] despite the fact that Mr. [redacted] no longer experienced these symptoms given the success of his treatment. Dr. [redacted]'s report failed to mention that Dr. [redacted]'s report reflected that Mr. [redacted] *no longer met the diagnostic criteria for PTSD*. Ex. B at 3.

Dr. [redacted]'s report failed to acknowledge Dr. [redacted]'s March 2010 conclusion that "there is no concern that [Mr. [redacted]] could not perform any of the 'essential job functions' listed in the medical determination request by the US Marshals with appropriate training from that organization." *Id*. Dr. [redacted]'s report also failed to make any reference to Mr. [redacted]'s treatment records from 2005 to 2008, including the fact that nothing in them indicates that Mr.

[1] Dr. [redacted]'s April 16, 2010 report cited the following symptoms: nightmares, flashbacks, hypervigilance, depression, anhedonia, irritability, and insomnia. The report ignored that Dr. [redacted]'s March 24, 2010 evaluation found that these initial presenting symptoms *had subsided* with treatment. Dr. [redacted]'s 2010 evaluation indicated that Mr. [redacted]'s only remaining symptoms were "becoming mildly upset when reminded of experiences in Iraq, mild avoidance of reminders, some difficulty remembering stressful military experiences, and moderate feelings of emotional numbing," and that Mr. [redacted] no longer reported "experiencing intrusive thoughts or disturbing dreams … or any hyperarousal symptoms of PTSD." Ex. B.

[redacted] had ever presented a safety risk when his PTSD was triggered, or that he experienced impaired judgment or reliability as a result of his PTSD.

On April 27, 2010, Dr. [redacted] performed a cursory review of Dr. [redacted]'s report and adopted Dr. [redacted]'s conclusions that because Mr. [redacted]'s PTSD and anxiety was "not in full remission," because he was "not fully cured," and because he had discontinued medication and therapy, Mr. [redacted]'s "psychiatric disability would put his safety, the safety of his colleagues, and the general public at risk." Ex. D. The substance of Dr. [redacted]'s April 27, 2010 Medical Review Form is a block quote from Dr. [redacted]'s April 16, 2010 report. *Id*. Dr. [redacted], who is not a mental health professional, stated that she based her conclusion on the report provided by Dr. [redacted]. *Id*.

On July 15, 2010, [redacted], Chief of the Office of Operational Staffing at the Marshals Service, notified Mr. [redacted] that the USMS had revoked his conditional offer of employment. Mr. [redacted] stated that Mr. [redacted] had "been diagnosed with Post Traumatic Stress Disorder (PTSD) which exceeds the USMS threshold standards and/or impacts [his] ability to perform the essential duties of the position." Ex. E. Because Mr. [redacted] was a "preference eligible veteran with a disability rating of 30 percent or more," the USMS was required to send its determination to the Office of Personnel and Management ("OPM") for review.

On July 28, 2010, Mr. [redacted] met with [redacted], his prior treating therapist, to discuss the possibility of resuming psychotherapy. Mr. [redacted] requested this appointment because Dr. [redacted] had cited his cessation of therapy as one of the reasons for his recommendation that the USMS revoke its conditional offer of employment. Ms. [redacted] and Mr. [redacted] determined it might be helpful for him to resume treatment to work on relationship skills

due to his remaining "moderate feelings of emotional numbing," and they resumed regular therapy sessions. Ms. [redacted] entered a treatment note indicating that she had evaluated Mr. [redacted], reviewed his treatment record, reviewed the "essential job functions" of a DUSM, and recommended Mr. [redacted] "without reservation" for the position. Ex. F. Mr. [redacted] submitted a copy of this treatment note to OPM, along with an amended version of Dr. [redacted]'s report, which Dr. [redacted] signed and printed to letterhead. *See id.*; Ex. B.

After OPM asked Dr. [redacted] to review the supplemental information Mr. [redacted] provided, he prepared a follow-up report. In a September 5, 2010 report, Dr. [redacted] noted Mr. [redacted]'s resumption of therapy, as well as an observation in Ms. [redacted]'s treatment note that Mr. [redacted] "copes well with his PTSD by staying active, as well as having had the opportunity to gain insight into his triggers and anniversary reactions, and put into effect appropriate coping skills…." Ex. G. From this, Dr. [redacted] concluded that Mr. [redacted] "continues to have challenges from triggers and anniversary reactions," and that unspecified "challenges" indicate that "Mr. [redacted]'s condition is not cured or fully stabilized." *Id.*

Dr. [redacted] did not ask Ms. [redacted] or Mr. [redacted] what "triggers" or "anniversary events"—if any—Mr. [redacted] continued to experience, or to describe the nature of his responses to such triggers and anniversary events. Dr. [redacted] repeated his previous conclusion that Mr. [redacted]'s "psychiatric disability would put his safety, the safety of his colleagues, and the general public at risk." *Id.* On September 15, 2010, based on Dr. [redacted]'s report, Dr. [redacted] concluded that Mr. [redacted] was not medically qualified for the position of DUSM. The Medical Review Form she submitted again consisted primarily of a block quote from Dr. [redacted]'s letter. *See* Exhibit H.

On September 17, 2010, OPM issued a determination that Mr. [redacted] was not qualified for the position of DUSM. *See* Exhibit I. [redacted], Chief of the Office of Employee Health Programs, stated that she relied exclusively on Dr. [redacted]'s and Dr. [redacted]'s reports in revoking Mr. [redacted]'s conditional offer of employment. Ex. J, at 2. Mr. [redacted] admitted that Mr. [redacted] was otherwise qualified for the position. Ex. K, at 2.

II. THE FINAL AGENCY DECISION

On October 19, 2010, Mr. [redacted] filed a formal complaint of discrimination with the EEO officer for the USMS. In his complaint, he alleged that the Agency's failure to hire him constituted discrimination on the basis of disability, in violation of Section 501 of the Rehabilitation Act of 1973.

On March 9, 2012, after an internal EEO investigation of Mr. [redacted]'s complaint, the Department of Justice issued its Final Agency Decision (FAD) affirming the decision to revoke Mr. [redacted]'s conditional offer of employment. The Agency's analysis began with the inaccurate assertion that Dr. [redacted], Mr. [redacted]'s independent psychological evaluator, diagnosed him with "mild PTSD." FAD at 3. In fact, Dr. [redacted]'s March 2010 report clearly stated that Mr. [redacted] no longer met the diagnostic criteria for PTSD, a conclusion Dr. [redacted] reiterated in the declaration she submitted in support of Mr. [redacted]'s EEOC appeal. Ex. B and L.[2]

The FAD relied entirely on Dr. [redacted]'s conclusions based on his review of Mr. [redacted]'s medical records. FAD at 4. The decision reiterated Dr. [redacted]'s findings "that complainant's PTSD disqualified him because it was not fully controlled and that he could 'suffer sudden or subtle incapacitation' while serving as a DUSM" and concluded that Mr.

[2] Dr. [redacted]'s May 29, 2012 declaration was not part of record below, but Mr. [redacted] offers it should the Commission wish to supplement the record pursuant to 29 C.F.R. § 1614.

[redacted] was therefore "not a 'qualified individual' with a disability." *Id*. at 5. The decision acknowledged that "complainant produced medical reports indicating that he was capable of safely performing the essential duties of a DUSM." *Id*. at 6. Nonetheless, the decision stated, USMS acted appropriately "when it declined to be persuaded by these medical opinions." *Id*. The only reason given for why it was appropriate for USMS to ignore these medical opinions was that the most recent medical report noted that Mr. [redacted] "had requested to resume his psychological treatment for PTSD." *Id.* The decision reasoned that the desire to resume therapy "could very well suggest that [Mr. [redacted]] felt he needed additional treatment to control his PTSD symptoms." *Id*.

Finally, the decision observed that "this is a close question given the record in this case," but concluded that "there is no factual basis for finding that USMS' reliance on Dr. [redacted]'s opinion was unreasonable and not objective," and stated that the Agency is entitled to "resolve any close questions about [an applicant's] ability to safely carry out law enforcement duties in favor of safety rather than risk." *Id*.

In response to Mr. [redacted]'s request for reconsideration, the Department of Justice affirmed its Final Agency Decision on April 13, 2012, stating broadly that "there is no basis for concluding that USMS officials misunderstood or mischaracterized the potential dangers associated with allowing a candidate with PTSD to serve as a law enforcement officer." Ex. M. at 1.

III. ARGUMENT

The FAD affirmed USMS's decision to deny Mr. [redacted] employment based on unfounded, generalized assumptions about Mr. [redacted]'s PTSD. The decision impermissibly relied on speculation—unsupported by any evidence in the record—that the fact that Mr. [redacted]

had *any* remaining symptoms might cause him to experience sudden incapacitation. This is precisely the type of decisionmaking that the Rehabilitation Act forbids.

A. Standard of Review

The Office of Federal Operations reviews Final Agency Decisions *de novo*. 29 C.F.R. §1614.405(a). "The *de novo* standard requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker. On appeal the Commission will review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and the Commission will issue its decision based on the Commission's own assessment of the record and its interpretation of the law." EEOC Management Directive 110, Chapter 9, § VI.A.2 (November 9, 1999). The Commission will then "issue decisions on the appeals of decisions … based on a preponderance of the evidence." *Id*. at § VI.A.4.

B. The Agency Denied Mr. [redacted] Employment Based on His Disability.

Section 501 of the Rehabilitation Act prohibits covered entities from discriminating against qualified individuals based on disability. 29 U.S.C. § 791; 29 C.F.R. § 1614.203(b). There is no dispute that Mr. [redacted] has a disability or that his disability was the basis for USMS's decision to deny him employment.

The FAD acknowledges that "[c]ourts have identified PTSD as a covered disability under the Rehabilitation Act" and assumes that Mr. [redacted] has a disability. FAD at 4. Indeed, Mr. [redacted] was regarded as disabled because he was subjected to an action prohibited by the statute—refusal to hire—because of a perceived impairment. 29 C.F.R. §§ 1630.2(g)(iii), (l).[3] Mr. [redacted] also has a record of a disability. *Id*. § 1630.2(g)(ii). The EEOC's regulations list

[3] The perceived impairment of PTSD significant enough to render Mr. [redacted] incapacitated is not transitory and minor. The determination of whether an individual is regarded as disabled is made without regard to defenses. 29 C.F.R. § 1630.2(l)(2).

PTSD as an impairment that will "virtually always" be a disability and note that it should be "easily concluded" that PTSD substantially limits, at a minimum, the major life activity of brain function. *Id*. § 1630.2(j)(3)(ii), (iii). The record makes clear that Mr. [redacted] has a history of PTSD that substantially limited major life activities such as brain function and sleeping. Mr. [redacted]'s PTSD is also an "actual" disability that is in remission. *Id.* § 1630.2(g)(i). An impairment in remission is a disability if it would substantially limit a major life activity when active. *Id*. § 1630.2(j)(1)(vii).

The FAD also acknowledges that admits USMS and OPM "relied directly upon complainant's disability to make an adverse employment decision." FAD at 4. The only question that is in dispute is whether Mr. [redacted] is qualified to be a DUSM. The FAD incorrectly concluded that USMS's reliance on Mr. [redacted]'s disability to deny him employment was not discriminatory because Mr. [redacted] posed a direct threat to the safety of himself and others, and thus was not qualified to be a DUSM. This decision is entirely unsupported by the record.

C. Mr. [redacted] is Qualified for the Position in Question.

Mr. [redacted] is qualified to serve as a DUSM. An individual is "qualified" for the position in question if he or she satisfies the requisite skill, experience, education and other job-related requirement of the job and, with or without reasonable accommodation, can perform the essential functions of the job. 29 C.F.R. § 1630.2(m). When USMS made Mr. [redacted] a conditional offer of employment as a DUSM, it determined that he satisfied these requirements.

D. Mr. [redacted] Does Not Pose a "Direct Threat."

The Agency wrongly contends, however, that Mr. [redacted] is not qualified because he poses a direct threat to the safety of himself and others. A covered entity may show that an

individual is not qualified if he poses a direct threat to the health or safety of himself or others. 29 C.F.R. § 1630.2(r).[4] As the FAD acknowledges, "complainant produced medical reports indicating that he was capable of safely performing the essential duties of a DUSM." The Agency ignored these reports, however, and relied on Dr. [redacted]'s unsupported determination that Mr. [redacted]'s remaining PTSD symptoms pose a direct threat.

1. Whether an Individual Poses a "Direct Threat" Must be Determined Based on an Individualized Assessment Using Current, Objective Medical Evidence.

A "direct threat" is defined as "a significant risk of substantial harm to the health or safety of the individual or others." 29 C.F.R. § 1630.2(r). "The determination that an individual poses a "direct threat" shall be based on an *individualized assessment* of the individual's *present* ability to safely perform the essential functions of the job." *Id*. (emphasis added). "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." *Id*. An employer's "belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability." *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998). The direct threat determination must be made based on an objective standard. *Id.* at 649-50.

Whether an individual poses a direct threat must be determined by considering the following factors: (1) the duration of the risk; (2) the nature and severity of the potential harm;

[4] Although the FAD states that "some courts" have held that plaintiffs bear the burden of proving the absence of a direct threat when law enforcement jobs are at issue, FAD at 6, it is "the EEOC's consistent and longstanding position that the employer bears the burden of 'proving direct threat.'" EEOC Amicus Brief in *Wurzel v. Whirlpool Corp.*, 2010 WL 6487918, at 23 (6th Cir. filed Jul. 27, 2010) (noting a circuit court split but stating that "[p]lacement of the "direct threat" provision within the ADA, the legislative history, and the overall purpose of the statute all confirm that where, as here, an employer seeks to use the "direct threat" defense to justify an employment decision based on disability, the employer must prove that the individual would, in fact, pose a direct threat."). *See* 29 C.F.R. § 1630.15, App.§ 1630.15(b). Regardless of which party bears the burden of proof, the record demonstrates that Mr. [redacted] does not pose a direct threat to either himself or others.

(3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. 29 C.F.R. § 1630.2(r).

2. The Agency Failed to Show that Mr. [redacted] Poses a Direct Threat.

The Agency's determination that Mr. [redacted] poses a direct threat because of his remaining symptoms of PTSD was based not on an individualized assessment of the likelihood, imminence, and severity of the asserted harm, but on speculation that Mr. [redacted] would become incapacitated and pose a safety risk simply because he continued to have "some symptoms" of PTSD and was assigned a VA disability benefits rating. The determination failed to specify which, if any, symptoms would pose a significant risk of harm, and failed to explain why Mr. [redacted] was likely to become incapacitated when he had never become incapacitated on a single occasion since he was diagnosed with PTSD in 2005. It was based solely on a contract psychiatrist's review of Mr. [redacted]'s medical records, and ignored the conclusions of Mr. [redacted]'s evaluating and treating professionals. For all of these reasons, the Agency's conclusion that Mr. [redacted] poses a direct threat of harm to either himself or others is entirely unsupported.

a. The Agency Failed to Consider the Factors Required for the "Direct Threat" Defense.

USMS did not conduct an individualized analysis of whether Mr. [redacted] posed a direct threat of harm considering the factors required by the law. While the FAD purported to apply these factors, it relied simply on the unfounded conclusion of USMS's contract psychiatrist that Mr. [redacted] was likely to become incapacitated and did not examine whether that conclusion was actually supported by the record. Had the Agency applied the factors based on the evidence in the record, it would have had to conclude that Mr. [redacted] did not pose a direct threat to himself or others. Mr. [redacted] had never become incapacitated and there was no evidence suggesting

that he was likely to become incapacitated. The Agency concluded that he would become incapacitated based simply on the fact that he had "some symptoms" of PTSD. This is precisely the type of analysis that Section 501 prohibits.

First, the Agency failed to show that the nature of any risk posed by Mr. [redacted] is severe. The Agency has not pointed to any evidence that Mr. [redacted] has ever become incapacitated, as Dr. [redacted] predicted he might, or that he has ever engaged in any other risky or threatening behaviors as a result of his PTSD. Second, the Agency failed to consider the likelihood that the potential harm of "sudden incapacitation" would actually occur and failed to identify any evidence showing that such incapacitation was, in fact, likely to occur in the future though it had never occurred before. Lastly, the Agency made no findings with respect to the imminence of the harm it believed Mr. [redacted]'s symptoms of PTSD would pose to the safety of himself or others. The record simply does not provide any basis for concluding that Mr. [redacted] would pose a significant risk of harm, that such a risk would be likely, or that it would be imminent.

b. The Agency Decided that Mr. [redacted] Posed a "Direct Threat" Based on Generalized Assumptions About His PTSD.

Employers conducting an individualized assessment about whether someone poses a direct threat may not engage in generalized assumptions or speculations. Rather, they must "identify the specific risk posed by the individual;" a "speculative or remote risk is insufficient." 29 C.F.R. Part 1630, App., § 1630.2(r); *see also Katz v. Clinton*, 2009 WL 900711, at *11 (E.E.O.C. 2009) (State Department "made assumptions [about complainant] based on unfounded fears" about the care required by some people with complainant's rare congenital condition); *Smith v. Rice*, 2008 WL 281062, at *6 (E.E.O.C. 2008) (State Department did not assess the "specific medical issues concerning [the complainant's] experience with [HIV]" when it

concluded that he would not be able to get sufficient medical care at foreign posts); *Smith v. Winter*, 2006 WL 1667599, at *10-11 (E.E.O.C. 2006) (Department of the Navy's concerns about possible psychiatric relapse were speculative because it did not establish that the job actually involved exposure to conditions conducive to a relapse);[5] *Lewis v. Rumsfeld*, 2004 WL 1870641, at *7 (E.E.O.C. 2004) (Defense Logistics Agency's concerns of future harm were couched in "generalizations about what it means to have diabetes…"); *Henderson v. Potter*, 2003 WL 21372738, at *1 (E.E.O.C. 2003) (Postal Service's determination that an individual's weight posed a direct threat speculated that she "may have difficulty with prolonged standing and walking" but failed to point to any evidence that she had experienced difficulty with either activity).

Here, the Agency relied on exactly these types of generalized assumptions and speculation when it concluded that Mr. [redacted]'s unidentified symptoms posed a risk of "sudden or subtle incapacitation" because he continued to have "some symptoms" of PTSD and to receive disability benefits from the VA. Dr. [redacted], whose opinions formed the basis for the Agency's decision, cited Dr. [redacted]'s March 2010 report as the source of his information on Mr. [redacted]'s remaining symptoms of PTSD. Ex. C and G, at 1. Dr. [redacted] acknowledged that Mr. [redacted]'s remaining symptoms were "minimal" and "lower intensity." *Id*. From Dr. [redacted]'s report, Dr. [redacted] surmised that Mr. [redacted]'s PTSD was not "well stabilized." Ex. C, at 2.

[5] *Smith v. Winter* has many similarities to the instant case. The complainant had received a 100 percent VA disability rating after a diagnosis of paranoid schizophrenia, a suicide attempt, and several hospitalizations. Within a couple of years, however, he was on medication that allowed him to function well and he applied for position at a Naval Aviation Depot. The agency found him unfit for duty because of a perceived risk that he could experience a relapse and because of the critical "safety of flight" functions to which he would be assigned in the naval aircraft hangar. Despite the opinions of treating and evaluating doctors that he retained only minimal symptoms and could do the job, the agency doctor concluded that "the very nature of his condition is such that there is always the potential for relapse…, [making it] unsafe for him to work in any number of high responsibility/high risk/or environmentally challenging jobs where such symptoms may go unnoticed with catastrophic results." *Id*. at *4. The EEOC reversed the Navy's decision to revoke the complainant's conditional offer of employment because it had not established that "the re-emergence of complainant's symptoms would have been likely or imminent had he been hired." *Id*. at *11.

But Dr. [redacted]'s report indicated precisely the opposite. Her report stated that Mr. [redacted] "reported minimal symptoms of PTSD *that would not yield a diagnosis of such*." Ex. B, at 3 (emphasis added). Dr. [redacted] described these symptoms as "becoming mildly upset when reminded of experiences in Iraq, mild avoidance of reminders, some difficulty remembering stressful military experiences, and moderate feelings of emotional numbing." *Id*. Dr. [redacted]'s description hardly reflects a person who is "not well stabilized."

After reading that Mr. [redacted]'s treating therapist, [redacted], believed he "had gained insight into his triggers and anniversary reactions, and put into effect appropriate coping skills," ex. F, Dr. [redacted] unreasonably concluded that Mr. [redacted] "continues to have challenges from triggers and anniversary reactions" that indicate his "condition is not cured or fully stabilized." Ex. G, at 2. Certainly, "[a]ny fair reading" of Ms. [redacted]'s comment "would not lead one to conclude that she was warning the agency that there was a significant risk that a re-emergence of complainant's symptoms was likely or imminent." *Smith v. Winter*, 2006 WL 1667599, at *11 (rejecting agency physician's concern that complainant would relapse because his psychiatrist noted he was managing "ongoing psychological stressors … reasonably well"). Neither Ms. [redacted]'s comment, nor anything else in the record, demonstrates that the Agency's concern about sudden or subtle incapacitation is linked to symptoms Mr. [redacted] actually continued to have when he applied for the DUSM position.

For individuals with mental or emotional disabilities, an employer must identify "the specific *behavior* on the part of the individual that would pose the direct threat." 29 C.F.R. Part 1630, App., § 1630.2(r) (emphasis added); *see also Snyder v. Potter*, 2009 WL 4895377, at *5 (E.E.O.C. 2009) (invalidating agency's termination of an employee whose abnormal thought processes led her to make strange complaints and accusations and rummage through office trash

bins because such behaviors did not pose a risk of harm); *Meeker v. Potter*, 2002 WL 1999043, at *4 (E.E.O.C. 2002) (invalidating agency's termination of complainant, whose expression of "bizarre and paranoid-type feelings" did not cause his supervisor to fear that he would engage in harmful behavior).

In this case, Dr. [redacted] failed to identify a *single behavior of concern* that was symptomatic of Mr. [redacted]'s PTSD. Nor did he describe the manner in which Mr. [redacted]'s remaining symptomatic behaviors—if any—posed a direct threat to himself or others, or otherwise impaired his ability to perform the essential functions of the DUSM position. Dr. [redacted] stated only that Mr. [redacted] "continues to have challenges from triggers and anniversary reactions," without identifying the triggers and anniversary reactions, ascertaining the nature of Mr. [redacted]'s responses to such triggers and anniversary events, and showing how any problematic behaviors would interfere with his ability to perform the essential job functions of the job. Rather, Dr. [redacted] concluded that Mr. [redacted]'s psychiatric disability posed a generalized risk of unspecified significance, making him unfit for any armed law enforcement position.[6]

The FAD adopted wholesale the opinions of Dr. [redacted]. The assumptions on which Dr. [redacted] based his generalized conclusions are not supported by any evidence. Dr. [redacted] ignored entirely Dr. [redacted]'s conclusion that Mr. [redacted]'s "minimal" symptoms no longer met the diagnostic criteria of PTSD and that "there is no concern that he could not perform any of the 'essential job functions' listed in the medical determination request by the US Marshals with appropriate training from that organization." Dr. [redacted] also overlooked the treatment records of Mr. [redacted]'s treating psychotherapists and psychiatrist. Nothing in Ms. [redacted]'s or Dr. [redacted]'s

[6] The FAD noted at 7 that the outcome of Mr. [redacted]'s case may have been different had he applied for a non-law enforcement position. Although the nature of the position in question is relevant to whether an individual poses a direct threat on the job, the agency cannot lawfully create a blanket rule that anyone with any symptoms of PTSD cannot do any law enforcement job.

treatment notes—nor anything else in the record—indicates that Mr. [redacted] ever exhibited behaviors presenting a safety risk when his PTSD was triggered, or that he experienced impaired judgment or reliability as a result of his PTSD.

c. The Agency Relied on Symptoms Mr. [redacted] No Longer Experienced at the Time of His Application to Determine He Posed a Direct Threat.

The Agency improperly relied on past symptoms that Mr. [redacted] no longer experiences to conclude that he poses a direct threat. An individualized assessment of direct threat must consider the risks posed by the limitations of an individual's current condition, rather than past symptoms the individual no longer experiences. 29 C.F.R. § 1630.2(r) (determination "shall be based on an individualized assessment of the individual's *present ability* to safely perform the essential functions of the job") (emphasis added). *See also Smith v. Winter*, at *11-12 (agency's determination that the complainant posed a direct threat was based on an unfounded concern that the complainant's prior symptoms would re-emerge, rather than on his current level of functioning and performance); *Selix v. Henderson*, 2000 WL 310648, at *6 (E.E.O.C. 2000) (agency impermissibly "relied on the complainant's past record of a disability in finding her to be at moderate risk, rather than making an individualized assessment of her current condition.").

The Agency relied on Mr. [redacted]'s past record of a disability, rather than his current mental health status. Dr. [redacted]'s April 16, 2010 and September 5, 2010 reports cited the symptoms noted more than four years earlier in Mr. [redacted]'s January 2006 VA rating decision: nightmares, flashbacks, hypervigilance, depression, anhedonia, irritability, and insomnia. But Dr. [redacted]'s March 24, 2010 evaluation stated that Mr. [redacted]'s initial presenting symptoms had subsided due to treatment. She described remaining symptoms as "becoming mildly upset when reminded of experiences in Iraq, mild avoidance of reminders, some difficulty remembering

stressful military experiences, and moderate feelings of emotional numbing." Dr. [redacted] did not cite any of these remaining symptoms in his reports to the USMS, nor did he indicate that any of these remaining symptoms posed a risk of incapacitation or otherwise related to the DUSM position.

Nothing in the record indicates that Mr. [redacted]'s current, remaining symptoms of PTSD would pose a direct threat to himself or others while performing the essential functions of a DUSM.

d. The Agency Failed to Conduct a Psychological Examination and Consider Mr. [redacted]'s Successful Work History.

In addition to relying on symptoms that Mr. [redacted] no longer experiences, the Agency failed to use the "best available evidence" by relying only on a medical records review. Except in the most apparent cases, fitness for duty examinations based "merely on medical reports" are not sufficiently individualized to determine that an applicant or employee is not qualified. *Selix v. Henderson*, 2000 WL 310648, at *5, *Bitsas v. Clinton*, 2009 WL 3334684, at *8 (E.E.O.C. 2009). Moreover, federal employers must take into account and apply the input from treating and evaluating professionals who "ha[ve] the most thorough first-hand knowledge of [an individual's] diagnosis, prognosis and treatment." *Smith v. Winter*, 2006 WL 1667599, at *6, 10 (E.E.O.C. 2006); *Suprenant v. Potter*, 2001 WL 885325, at *6 (E.E.O.C. 2001).

In Mr. [redacted]'s case, the USMS did not conduct an individualized assessment of his psychiatric fitness for duty before determining that he posed an unacceptable risk. Rather, it relied on a cursory review of Mr. [redacted]'s medical records by the Agency's contract psychiatrist, who ignored the conclusions and recommendations of his treating and evaluating mental health professionals and determined that he was not qualified because he posed a safety risk. At no point did Dr. [redacted] examine Mr. [redacted] in person or call him on the phone. Nor did Dr. [redacted]

call Ms. [redacted], Dr. [redacted], or Dr. [redacted] to confirm whether his assumptions about Mr. [redacted]'s PTSD symptoms were accurate or to learn more about why they recommended him for the DUSM position.

The Agency also overlooked Mr. [redacted]'s successful work history while he has had PTSD. *See, e.g., Bitsas v. Clinton*, 2009 WL 3334684, at *10 (agency failed to conduct individualized assessment of direct threat because it did not investigate whether complainant had ever worked under stressful conditions such as those posed by the job and how he dealt with such circumstances); *Lewis v. Rumsfeld*, 2004 WL 1870641, at *7 (agency failed to conduct individualized assessment of direct threat because it failed to consider complainant's successful work history that showed he was capable of performing the essential job functions despite his diabetes). Mr. [redacted]'s relevant work history includes the 15 months that he remained in the United States Marine Corps after his trauma-inducing exposure to combat in Iraq, as well as several years of employment as a Veterans Service Representative and Military Service Coordinator with the Veterans Administration. During Mr. [redacted]'s post-deployment military service, he frequently carried loaded weapons during training exercises, including regular target practice, without incident. Nothing in the record indicates that the Agency gathered information about or considered Mr. [redacted]'s post-trauma exposure work experience in a weapons-bearing position.

Although one of Mr. [redacted]'s initial PTSD symptoms was avoidance of reminders, throughout his tenure as a VA employee, he has been in daily contact with veterans whose stories are reminders of his own trauma experience. Mr. [redacted] meets regularly by phone and in person with veterans with disabilities and with service members being separated from service due to disability. He reviews their medical and personnel records, verifies their stories, and

determines the benefits to which they are entitled. Mr. [redacted]'s consistent ability to meet and exceed all job expectations at the VA demonstrates his ability to manage any remaining symptoms of his PTSD. The Agency failed to gather information about or considered Mr. [redacted]'s successful civilian work experience in an environment that requires daily exposure to reminders of his own trauma.

e. The Agency Improperly Applied a "100 Percent Healed" Rule.

The Supreme Court has cautioned that "few, if any, activities in life are risk free;" therefore, federal antidiscrimination law "do[es] not ask whether a risk exists, but whether it is significant" enough to constitute a direct threat. *Bragdon v. Abbott*, 524 U.S. at 649. "The risk can only be considered when it poses a significant risk, *i.e., high probability*, of substantial harm; a speculative or remote risk is insufficient." Interpretive Guidance on Title I of the ADA, 29 C.F.R. Pt. 1630, App. § 1630.2(r) (emphasis added). Thus, employers may not require that individuals with disabilities be "fully cured" as a condition of employment.

Each federal circuit that has definitively addressed whether rules that require individuals with disabilities to be fully cured, or "100 percent healed," before they are deemed not to pose a direct threat has held that such rules deny the individualized assessment to which such individuals are entitled. *See, e.g., Hohider v. United Parcel Service, Inc.*, 574 F.3d 169, 194-95 (3d Cir. 2009) (application of a "100 percent healed" rule to individuals with disabilities would deny individualized assessment); *Henderson v. Ardco, Inc.*, 247 F.3d 645, 653 (6th Cir. 2001) ("100 percent healed" rule would constitute a *per se* violation of the Kentucky Civil Rights Act, interpreted consonant with the Americans with Disabilities Act); *and McGregor v. National Railroad Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999) ("100 percent healed" rule would constitute a *per se* violation of the Americans with Disabilities Act).

When the Agency relied on Dr. [redacted]'s analysis, it applied a "100 percent healed" rule to Mr. [redacted]. The Agency's reliance on Mr. [redacted]'s minimal remaining symptoms of PTSD clearly violates Section 501 of the Rehabilitation Act and the holding of *Bragdon*.

IV. CONCLUSION

The preponderance of the evidence in this case clearly supports the conclusion that the Agency violated Section 501 when it denied Mr. [redacted] employment based on an asserted direct threat of harm due to PTSD that is not completely cured.

The Agency's conduct with respect to Mr. [redacted] not only violates Section 501 but is antithetical to the obligation of the federal government to be a "model employer of individuals with disabilities," 29 C.F.R. § 1614.203(a), and to Executive Order 13548 (July 26, 2010), which articulated the federal government's "important interest in reducing discrimination against Americans living with a disability, in eliminating the stigma associated with disability, and in encouraging Americans with disabilities to seek employment in the Federal workforce" and directed the federal government to hire 100,000 individuals with disabilities over five years.[7]

The EEOC should reverse the Final Agency Decision and award Mr. [redacted] appropriate relief, including offering him employment as a DUSM, back pay, attorneys' fees and costs, and any other appropriate relief.

[7] The Department of Justice employs the second lowest percentage of individuals with "targeted disabilities" (including psychiatric disabilities such as PTSD) of any cabinet-level agency. OFFICE OF FEDERAL OPERATIONS, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ANNUAL REPORT ON THE FEDERAL WORK FORCE PART II, WORK FORCE STATISTICS, FY 2010 I-23 (2011). Such individuals make up 0.39 percent of the Agency's employees, as compared with 0.88 percent of all federal employees. *Id.* at I-13, I-23. Just 3.24 percent of Department of Justice employees have "reportable disabilities" covered by Section 501. *Id.* at II-44. By contrast, 6.58 percent of all federal employees have reportable disabilities. *Id.* at II-3.

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