

HEARING OFFICER, CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER,
COLORADO

Appeal No. 141-02

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

GABRIEL GUERECA, Appellant

Agency: DEPARTMENT OF AVIATION, DENVER INTERNATIONAL AIRPORT,
and THE CITY AND COUNTY OF DENVER, a municipal corporation.

INTRODUCTION

This matter comes before the Career Service Board Hearing Office on appeal by Gabriel Guereca filed July 24, 2002. He challenges the Department of Aviation, Denver International Airport's decision to terminate his employment based on disqualification resulting from his inability to renew his Commercial Driver's License ("CDL") and on certain physical restrictions placed on Mr. Guereca after he returned from extended leave resulting from heart surgery.

For purposes of this Decision, Mr. Guereca shall hereinafter be referred to as "Appellant." The Department of Aviation, Denver International Airport shall be referred to as "DIA" or "the Agency." The rules of the Career Service shall be referenced as "CSR" with a corresponding numerical citation. The Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.* (1990) shall be abbreviated as "ADA."¹

A hearing in this matter was held before Personnel Hearing Officer Joanna Lee Kaye ("hearing officer") on October 14, 2002 at the Career Service Authority Offices. The Agency was represented by Assistant City Attorney Robert A. Wolf, with the Aviation Department's Human Resources Assistant Manager, James Thomas, present for the entirety of the proceedings as advisory representative for the Agency. Appellant was present and was represented by Cheryl Hutchinson of the AFSCME.

¹ In both his appeal and Prehearing Statement, Appellant cited CSR 19-10 c) and the ADA both of which address disability discrimination. Oddly, neither of the parties address this charge either way in their closing statements. This issue could be seen as having been abandoned. However, the hearing officer has erred on the side of caution and addressed this charge herein.

Witnesses for the Agency included Mr. Thomas, the City's Equal Employment Opportunity Coordinator Rita Murphy, and the Department's Acting Director of Maintenance, Dan G. Brown.

Witnesses for Appellant included Appellant, Mr. Thomas, Mr. Brown, Denver Health and Medical Plan Clinic's Melanie M. Boyer, M.D., and OHSC's Ricky Artist M.D. (by deposition dated October 22, 2002).²

The parties stipulated to the admission of the following exhibits: Agency's Exhibits 1 through 15, and Appellant's Exhibits B through D.³ Exhibits E and F were offered and admitted without objection during the hearing.

During the deposition of Dr. Artist, the parties further stipulated to the admission of Joint Exhibits 1 through 4.

No additional exhibits were offered or admitted.

PRELIMINARY MATTERS

1. The Hearing Officer's Jurisdiction

The hearing officer finds she has jurisdiction to hear this case as a disqualification case, pursuant to CSR Rule 19-10 b), as follows in relevant part:

Section 19-10 Actions Subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

- ...b) Actions of appointing authority: Any action of an appointing authority resulting in... disqualification... which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

Jurisdiction over Appellant's disqualification was not disputed by either party to this case.

In his appeal and Prehearing Statement, Appellant alleged violation of CSR 19-10 c) and the ADA, which both address claims of disability discrimination. The hearing officer finds she has jurisdiction over such charges under CSR 19-10 c) as follows in relevant part:

² Dr. Artist was not available to testify in person during the hearing as it was originally scheduled. The parties stipulated to take his testimony by deposition. Since this substantial evidence was not yet in the record at the close of the proceedings, the hearing officer requested that the parties provide written closing statements after Dr. Artist's testimony had been taken. The parties timely did so on November 20 and 25, 2002.

³ Exhibit A was duplicative of one of the Agency's exhibits and was not offered or admitted.

Discriminatory actions: Any action of any officer or employee resulting in alleged discrimination because of...disability including:

- 2) Not attempting to make reasonable accommodations to the known physical or mental disability of a job applicant or an employee unless the accommodation would impose an undue hardship...
- 3) Using tests, standards or criteria that screen out or tend to screen out individuals or groups of individuals with disabilities unless the criteria used are job related.

Situations where employees are affected by disabilities are further governed by CSR rules promulgated in accordance with federal law under the Americans with Disabilities Act, 104 Stat. 328, 42 U.S.C. 12101 *et seq.* (hereinafter "ADA") which protects disabled individuals from discrimination in the workplace, and requires that certain accommodations be made for them if those accommodations are not unduly burdensome.⁴

2. Burden of proof

The City Charter, C5.25 (4) and CSR 2-104(b) (4) require the hearing officer to determine the facts of the case "*de novo*." This means that she is mandated to make independent determinations of the facts and resolution of factual disputes. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.)

In civil administrative proceedings such as this one, the level of proof required for a party to prove its case is a *preponderance of the evidence*. See, 13-25-127, C.R.S (2001). In other words, to be meritorious, the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not.

It has previously been established that the Agency responsible for taking an action against a Career Service employee under CSR 19-10 b) affirmatively bears the initial burden of establishing, by a preponderance of the evidence, that the Agency's action was not arbitrary or capricious.⁵ See, In the Matter of the Appeal of Eugene J. Schaezel, Appeal No. 36-00 (Hearing Officer Michael L. Bieda, 9/29/00).⁶

⁴ The hearing officer does not have jurisdiction over ADA claims. Her jurisdiction is limited to the CSR rules. However, in In the Matter of Robert Stone, Appeal No. 12-01 (Decision entered 4/12/01) Mr. Brown testified that CSR Rules addressing disability, presumably to include CSR Rule 1, defining "disabled individual," and CSR 9-62 f), governing disability-related transfers, were promulgated to mirror federal ADA standards. Based on this express regulatory intent by one of its promulgators, the hearing officer found in Stone that she can look to federal regulations, interpretations and precedents in her application of the related CSR rules, and apply those standards to the Agency's actions under the corresponding CSR rules governing disability.

⁵ Disqualification cases are distinct from other forms of action under CSR 19-10 b) involving discipline, in which cases the Agency is required to satisfy a slightly higher standard of proof. In disciplinary actions, the Agency must show 1) *just cause* for the disciplinary action (see, CSR 16-50, 16-51) and 2) that the severity of discipline is *reasonably related* to the severity of the offense (see, CSR 16-10). Cf., In the Matter of Mary Ann Mosquera, Appeal No. 118-02 (12/11/02).

Assuming the Agency has shown its decision to disqualify Appellant was not arbitrary or capricious, in cases such as this one where Appellant counterclaims discrimination, Appellant then bears the burden of affirmatively establishing a *prima facie* showing of discrimination (*i.e.*, a demonstration that the individual has an impairment of a major life activity qualifying him as “disabled” within the definition under the ADA, that he is capable of performing the essential functions of his job under reasonable accommodations notwithstanding the disability, and that the Agency failed to make reasonable accommodations, instead disqualifying him from the position). McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Appellant makes such a showing, the Agency must then demonstrate a legitimate, non-discriminatory business purpose for its actions. If the Agency makes such a showing, Appellant must then establish that the Agency's non-discriminatory business purpose is a pretext for discrimination. See, In the Matter of the Appeal of Leamon Taplan, Appeal No. 35-99 (Hearing Officer Michael L. Bieda, 11/22/99); *citing* McDonnell Douglas (above). See also, Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999), applying that standard in McDonnell Douglas to disability-related disqualifications.

ISSUES

1. Whether the Agency demonstrated its disqualification of Appellant was not arbitrary or capricious.
2. If so, whether Appellant has demonstrated a *prima facie* case of discrimination; *i.e.*, whether Appellant has shown:
 - a) that he is qualified as “disabled” as required by the definition under the ADA, and
 - b) that he remained capable of performing the essential functions of his job under reasonable accommodations notwithstanding the disability, and that
 - c) the Agency failed to make reasonable accommodations, instead disqualifying him from the position.
3. If so, whether the Agency has demonstrated a legitimate business reason for its allegedly discriminatory actions.
4. If so, whether Appellant has shown that the Agency's stated business reason is a pretext for discrimination.

FINDINGS OF FACT

1. Appellant was field maintenance operator for the Department since DIA's opening several years ago. He was classified as an Equipment Operator (Exhibit 1).
2. Equipment Operators are part of the work force responsible for maintaining the DIA infrastructure. International transportation may be affected if these repairs are not done.

⁶ If the Agency fails to demonstrate that its actions were just and not arbitrary, Appellant's discrimination claim is moot because the Agency decision must be reversed.

3. One of the primary duties of an Equipment Operator is the operation of vehicles and equipment necessary to achieve the required tasks, including trash removal and runway snow removal. (Exhibit 1; p. 1; Exhibit 5.) This includes driving vehicles in excess of 25,000 lbs., such as snow-removal trucks, which are defined by state and federal law as "heavy equipment." One of the requirements of the Classification Specifications for this position is therefore a valid Commercial Driver's License, or "CDL" (Exhibit 1, p. 5). Mr. Thomas testified that with one exception, all Equipment Operators presently employed by the Agency possess current CDL's and Medical Certification Cards.⁷
4. The State of Colorado issues CDL's based on the Federal Department of Transportation's ("DOT") guidelines and requirements. One of the requirements for a CDL is the procurement of a Medical Certification Card, which documents that the CDL applicant meets certain medical standards. In addition to the CDL, one must also have a copy of a current valid Medical Certification Card on his person at all times he is driving a commercial vehicle. (See, 49 CFR §391.41(a).) The Medical Certification Card must be renewed every two years, (49 CFR §391.45(b) (1)), or whenever a driver's "ability to perform his normal duties has been impaired by a physical or mental injury or disease." (49 CFR §391.45(c).) The examination must be performed by an individual qualified under the CFR to perform examinations for Medical Certification for the purposes of validating a CDL and must include determinations concerning certain physical abilities. (See, 45 CFR §391.43.)
5. The Department of Safety tracks the expiration of Medical Certification Cards for employees, and notifies the Agency every two years when an employee's Medical Certification Card is about to expire and needs renewal.
6. At the time of the hearing, Appellant was in possession of a CDL issued November 29, 2000 (Exhibit F). This license indicates it remains valid until August 14, 2004. It is undisputed that Appellant had to be in possession of a valid Medical Certification Card at the time he procured his CDL on November 29, 2000. Appellant did not produce a current Medical Certification Card at the time of the hearing.
7. The duties of an Equipment Operator also include a number of physically demanding tasks such as frequent climbing into heavy equipment vehicles, frequent lifting of objects between 50 and 100 lbs. such as bags of concrete, occasional response to emergency repairs requiring mixing concrete and the use of jackhammers weighing approximately 85 lbs., and occasional emergency response to "plant expansion joint failure repairs" (in other words, repairs to the structure of the airport facility) involving some heavy labor. (See, Exhibits 1; 2, p. 9; and 5.)
8. Appellant contends that as a graveyard-shift employee, he did very little heavy physical work. He asserts he frequently did not drive the heavy equipment, just warmed it up, that much of the time he used an ordinary pick-up truck to do trash runs, that lifting of heavy

⁷ The exception is an employee by the name of Robert Stone, who remains employed on a modified duty status under advice of counsel for the Agency. The hearing officer reversed his disqualification in In the Matter of Robert Stone, Appeal No. 12-01 (Decision entered April 12, 2001), for reasons not relevant to this case. His appeal is presently on judicial review in district court.

objects such as bags of concrete is frequently done by two people to avoid injury, and that he never used a jackhammer.

9. Appellant underwent a coronary bypass in April of 2001.⁸ Appellant experienced "hypoxemia" (insufficient oxygen in the blood) postoperatively, requiring the use of an oxygen tank on an ongoing basis. He was on FMLA leave until his FMLA leave expired on July 9, 2001, and Appellant was then placed on long-term disability. Appellant contends that he was in contact with the payroll department and his supervisor, Ted Perales, during the time he was on leave.
10. Mr. Perales did not testify.
11. Director of Maintenance Dan G. Brown testified that he did not know what Appellant's status was during his leave. Mr. Brown testified he placed Appellant on leave without pay in July of 2001. He did not hear further from Appellant for several months thereafter. Mr. Brown testified that he tried to get in contact with Appellant after his FMLA expired to get an update on his medical condition, but could not reach him.
12. On January 8, 2002 Mr. Brown sent Appellant a letter notifying him the Agency considered him to have abandoned his job pursuant to CSR 14-51(d) (Exhibit E). This letter set a pre-disqualification meeting for January 16, 2002 (*see*, Exhibit 13).
13. Appellant appeared at the meeting on January 16, 2002 with his AFSCME representative, Cheryl Hutchinson. During the meeting, Ms. Hutchinson raised concerns that Appellant might qualify for coverage under the ADA, and requested that the Agency entertain the interactive process afforded to disabled individuals to determine whether they are covered under the ADA. *See*, CSR 9-62 f). The Agency subsequently rescinded the abandonment procedures.
14. On January 31, 2002 the Agency sent Appellant a letter resetting a meeting for February 12, 2002 to begin the interactive process. (Exhibit 2.) Attached to the letter were his Performance Enhancement Program Plan, a copy of the Equipment Operator Classification Specifications, and a form (*see*, Exhibit 2) with instructions to solicit information from Appellant's physician, concerning his ability to perform the essential functions of his job, and any restrictions that may persist.
15. Present at the first interactive process meeting on February 12, 2002 were Mr. Brown, Assistant Director Ron Morin, Human Resources Director Jim Thomas, EEOC's ADA Coordinator Rita Murphy, Appellant and Ms. Hutchinson. At the meeting, Appellant presented the requested documentation, which included indications of permanent restrictions

⁸ Appellant never returned to work after this operation. There are references in the record to this operation having occurred both in April of 2000 and April of 2001. However, Appellant's most recent CDL was issued in November of 2000. Since it is highly unlikely that Appellant had his CDL renewed only a few months after surgery when he was on disability leave and in need of oxygen, the hearing officer concludes that the correct date of surgery is April of 2001. This conclusion is further supported by Joint Exhibit 3, which is a sleep study performed in October of 2000, just before Appellant procured his most recent CDL in November that same year. While this study remarks on several of Appellant's medically significant conditions, heart surgery is mentioned nowhere in the document.

from Melanie Boyer, M.D. (*See*, Exhibit 9). He requested that the Agency explore reassignment to a position he was capable of performing.

16. As a result of discussions concerning Appellant's certification status at the February 12 meeting, on February 14, 2002 Appellant took the Medical Certification physical required to obtain a valid CDL. (Joint Exhibit 1.) He failed the test. (Joint Exhibit 1; Exhibit 6). Dr. Rick Artist of the DHMC, DIA Medical Clinic, performed the test. The reason set forth in the medical chart documenting Appellant's February 14, 2002 exam indicates that Appellant was "temporarily disqualified" due to sleep apnea (Joint Exhibit 1, p. 3). However, the only reason for disqualification set forth in the Medical Appointment Memo Dr. Artist prepared is that Appellant "takes medication that precludes/disqualified him for CDL." (*See*, Exhibit 6.)⁹ This medication was a "Valium-type drug" alternatively known as "benzodiazepine," "klonopin" and "clonazepan" (hereafter "clonazepan") (*See*, Deposition of Dr. Artist, p. 10; *cf.*, Exhibit C; *see also*, CFR § 391.41(b) (12) (A), (B).) Dr. Artist testified that this was the reason he was "most aware of" at the time of the exam. Deposition of Dr. Artist, pp. 8-10.¹⁰
17. Mr. Brown testified that the requirement of medical certification provides for a ninety-day grace period in the event of failure. The employee is removed temporarily from his position as Equipment Operator, and allowed to re-take the test and pass the physical within the ninety-day grace period. If the employee cannot pass the physical within a period of ninety days, disqualification typically results.
18. Ms. Murphy subsequently determined that Appellant was not disabled within the meaning of the ADA (which requires the substantial limitation of a major life activity). However, Ms. Murphy elected to make a good-faith effort to explore a reassignment to accommodate Appellant's inability to re-establish his CDL status pursuant to CSR 5-84.2 (*see*, Exhibit 14). Ms. Murphy testified that a period of ninety days is permitted, during which the interactive process and attempt to find a suitable transfer position is to take place.
19. On March 4, 2002 Career Service Senior Personnel Analyst, Tyrone Abeyta, sent Ms. Murphy a list of positions for which Appellant met the minimum qualifications (Exhibit 7). Appellant's interactive process period was considered to have commenced as of that date (*see*, Exhibit 9). The memo in Exhibit 7 indicates that the list did not take into account any accommodations Appellant needed to perform the duties of the positions listed.
20. Appellant and Ms. Murphy met on March 8, 2002, at which time she relayed to Appellant the list of positions for which Appellant was minimally qualified. (*See*, Exhibit 9.)
21. On March 12, 2002, Dr. Boyer had a telephone conversation with Ms. Murphy during which Dr. Boyer relayed information tending to lead Ms. Murphy to the conclusion that Appellant was capable of doing a "sedentary to light category of work." Dr. Boyer further gave Ms.

⁹ Dr. Artist testified that he gets Appellant confused with his brother, Patrick Guereca. *See*, Deposition of Dr. Artist, p. 9. This is why Exhibit 6 indicates the first name of "Patrick." However, as the document indicates, it was corrected to indicate Appellant's name and re-sent on March 5, 2002. It has not been specifically disputed that Appellant was the individual whose examination led to the generation of Exhibit 6.

¹⁰ Dr. Artist apparently did not have Appellant's patient chart with him at the time of his testimony.

Murphy information tending to lead her to conclude that Appellant was not capable of performing duties required in his present classification of Equipment Operator. (See, Exhibit 8.)

22. On March 28, 2002, Appellant was seen at University Hospital's Cardiology Clinic by Dr. Murphy Hoffman, Clinical Professor of Medicine, and Cardiology Fellow Michael W. Gen, M.D. At that time the doctors determined that Appellant's hypoxemia remained his "predominant limitation." (Exhibit D.)
23. Dr. Boyer referred Appellant to Lance Maloney, M.S., Senior Staff Occupational Therapist of Denver Health Medical Center, for a Functional Capacity Evaluation (Exhibit B). At that time she believed Appellant might qualify for "medium-capacity" work, and was trying to ascertain whether this was true through the Functional Capacity Evaluation. Dr. Boyer recalls that the form she used to determine the parameters of "medium-capacity" work was one provided by DIA (see, Exhibit 2, p. 4). However, to Dr. Boyer's knowledge, Mr. Maloney's evaluation of Appellant's capacity was independent of this document. He did not see this document or use it in his evaluation of Appellant's capacity. Dr. Boyer testified the focus of a Functional Capacity Evaluation is to ascertain an employee's abilities, not try to get him qualified for any given position.
24. On May 6, 2002 Appellant underwent a Functional Capacity Evaluation by Mr. Maloney (Exhibit 10). Appellant indicated to Mr. Maloney during the Functional Capacity Evaluation that he continued to intermittently need oxygen depending on the "cardiovascular demand/or repetitive nature of sustained activity." (Exhibit 10, p. 7.) However, Appellant did not use oxygen during the Functional Capacity Evaluation and the results therefore pertained to Appellant's abilities without it. Mr. Maloney determined that Appellant was capable of performing within the "medium work category." The recommendations included that Appellant "avoid significant repetitive overhead use of the upper extremities," and "highly recommended" that "pacing be an integrated component in any lifting or stair climbing on a repetitive basis." Appellant's lifting was further restricted to 25 pounds frequently, with occasional lifting of 50 pounds. (Exhibit 10, p. 5.)
25. On May 16, 2002 Ms. Murphy received the results of the Functional Capacity Evaluation. Based on that evaluation, the Agency determined that Appellant was not qualified to perform the duties of Equipment Operator at that time. Appellant was qualified for a few more alternate positions because his work capacity had been raised from "sedentary" to medium." However, there were not many alternate positions because most utility worker positions for which Appellant was qualified required the ability to lift greater than 50 pounds. Finally, there was only one opening in the alternate positions for which Appellant had now been determined qualified, a custodial position.
26. On or around May 21, 2002 Ms. Murphy called a meeting with Appellant in her office and told him about the custodial opening. Because there is a marked difference in the pay scales between this position and Appellant's Equipment Operator position, Appellant grew upset, and insisted he could do the duties of his Equipment Operator position.

27. Ms. Murphy testified that throughout the interactive process, Appellant insisted he could perform the functions of his job, and repeatedly asserted that he had a CDL. Because of Appellant's insistence that he could do all the duties of his position, Ms. Murphy sent a memo to Mr. Brown in an attempt to verify whether Appellant's restrictions actually precluded him from performing his duties. (Exhibit 11.) However, the description of duties in the memo is Appellant's version of his duties, and does not track the Classification Specifications for Equipment Operator in Exhibit 2. Ms. Murphy further testified that she called the Medical Clinic to verify that Appellant did not have a current Medical Certification Card.
28. The interactive period technically ended June 4, 2002 (*see*, Exhibit 9). However, Ms. Murphy extended the time to June 16 in order to assure that she could find no openings based on Appellant's abilities. Because Ms. Murphy and the Career Service were still unable to identify any other openings in positions for which Appellant was qualified, Ms. Murphy notified Appellant by letter of June 17, 2002 that they were unable to locate any alternative open positions into which Appellant could transfer. The letter further indicates Appellant remained unable to obtain the Medical Certification Card and CDL necessary for Appellant to perform essential functions of his existing position as Equipment Operator. Finally, the letter noted additional duties required of the Equipment Operator position, from which Appellant had been medically restricted (Exhibit 12.)
29. On or around June 27, 2002 Appellant provided Dr. Artist with a handwritten memo from Dr. Boyer that he had not been taking the medication "clonazepam" since April of 2002 (Exhibit C). Dr. Artist testified that this was the first time anyone had informed him that Appellant has stopped taking the drug (Deposition of Dr. Artist, p. 29). Dr. Artist testified it is the employee's responsibility to keep him informed of such critical developments. *Id.*
30. On June 28, 2002, Mr. Brown sent Appellant a Notice of Contemplation of Disqualification ("contemplation letter") (Exhibit 13). Primarily, the contemplation letter sets forth that Appellant had been unable to maintain the Medical Certification necessary to validate his CDL and thus remain qualified for the position. The contemplation letter cites CSR Rule 14-22 c), referencing "licensure, certification and other legal requirements." The contemplation letter further cites CSR 14-22 b), referencing inability to perform essential functions of the position because of physical incapacity. The contemplation letter set a meeting concerning Appellant's apparent disqualification for July 9, 2002.
31. Dr. Artist testified that on or around the time he received a copy of Exhibit C, he did receive a test from National Jewish concerning Appellant's sleep apnea, and that on this issue Appellant would have been cleared. (*See*, Joint Exhibit 2.) Based on conversations with Appellant, it was his understanding around that time that Appellant had a current treadmill test. (*See*, Joint Exhibit 4.) However, Dr. Artist never received further information on the treadmill test from Appellant. (Deposition of Dr. Artist, pp. 13-15.) Dr. Artist recalls anticipating another appointment with Appellant a day or two before he understood Appellant was to have another meeting with the Agency. Dr. Artist's dictation of these conversations (Joint Exhibit 4) indicates that Dr. Artist continued to believe that Appellant had a recent treadmill test within the last month or two that Appellant would bring with him

to the appointment. However, the appointment never occurred. (Deposition of Dr. Artist, pp. 15-16.)

32. Appellant testified that Dr. Artist spoke with him on or around June 27, 2002 to arrange an appointment with Appellant on July 8, 2002 but that Dr. Artist subsequently contacted Appellant on or around July 7 or 8, 2002 and cancelled the appointment upon learning that the Agency was disqualifying Appellant. Appellant asserts he did not have time to have these tests done before the pre-disqualification meeting on July 10. Appellant testified this was the reason he still did not have a current Medical Certification Card at the time of the disqualification proceedings.
33. Dr. Artist testified he did not cancel the appointment scheduled for July 8, 2002, but he did speak with Appellant on or around July 7 or 8. He discovered at that time that Appellant's most recent treadmill test was from approximately August of 2001. Dr. Artist testified he told Appellant at that time that Appellant needed to have a more recent treadmill test done. In Dr. Artist's opinion, that would not have been sufficient time for Appellant to arrange to have another treadmill test done. However, Dr. Artist testified that because he was previously of the understanding that Appellant had had a recent treadmill test done, he did not believe during these interactions that he needed to tell Appellant to get a new treadmill test until he learned during these conversations there was no recent test (Deposition of Dr. Artist, pp. 16-27.) Dr. Artist testified it is more likely than not that that during the discussion with Appellant on July 7 or 8, he told Appellant the meeting would be useless without a current treadmill test. (Deposition, pp. 36-37.)
34. Appellant did not go to the appointment on July 8, 2002.
35. The parties met at the pre-disqualification meeting on July 10, 2002.¹¹ Appellant again appeared at this meeting with his representative. At that time Appellant did not produce a current Medical Certification Card. There is no evidence tending to suggest that Appellant requested a postponement of this meeting.
36. After the pre-disqualification meeting, the Agency determined that disqualification of Appellant was appropriate. Mr. Brown testified that there were two reasons for Appellant's disqualification: that Appellant did not have a valid Medical Certification Card, and that he has some other restrictions relevant to his medical condition. However, the Agency's main concern was Appellant's inability to get a current Medical Certification Card, and the physical restrictions were secondary. Mr. Thomas testified that Appellant's disqualification was based on his inability to procure a current Medical Certification Card. The physical considerations went more to the Agency's attempts to find Appellant an alternative position.
37. On July 15, 2002 the Agency sent Appellant a letter notifying him of his termination based on disqualification. The disqualification letter sets forth two bases for disqualification; first, the letter discusses Appellant's inability to maintain the Medical Certification necessary to validate his CDL and thus remain qualified for the position. The disqualification letter cites CSR Rule 14-22 c), referencing "licensure, certification and other legal requirements." The

¹¹ Apparently the meeting was postponed for one day.

disqualification letter also cites CSR 14-22 b), referencing inability to perform essential functions of the position because of physical incapacity.

38. On July 24, 2002, Appellant filed his appeal of the Agency's decision to disqualify him, citing 19-10 b) and c) as the CSR rules the Agency's action allegedly violated.
39. Mr. Brown admitted that the regulations would have allowed Appellant to go to another physician for a second opinion concerning his Medical Certification at Appellant's own expense, and that he did not ever tell Appellant this was an option. However, Mr. Brown testified that in light of Appellant's failure to pass the Medical Certification examination by Dr. Artist, he would have required Dr. Artist's review of any results to the contrary by another physician. He also testified that Appellant never asked him whether he could go to another physician.

DISCUSSION

1. The Agency's Case in Support of its Disqualification of Appellant.

The Agency asserts its disqualification of Appellant was proper under CSR Rule 14-22 Grounds for Disqualification, which states:

An employee shall be deemed to be disqualified if any of the following conditions occur:

- ...b) Physical or mental impairment or incapacity: When an employee becomes unable to perform the essential functions of the position because of mental or physical impairment or incapacity;
- ...c) Licensure, certification and other legal requirements: When laws require a license, certification, or other authorization by a federal, state or local governmental entity to perform the duties of a position and the employee does not have the required authorization.

The Agency first asserts that a primary duty of Appellant's classification as Equipment Operator is driving vehicles legally qualifying as "heavy equipment," requiring a CDL. This requirement is set forth in the Classification Specifications of Equipment Operator (Exhibit 1, p. 5):

Licensure and Certification	Possession of a valid Colorado Driver's License CDL "B" with appropriate endorsements at the time of application... License must be kept current as a condition of continued employment in this class.
------------------------------------	--

Under CFR § 391.41(a), the CDL requirement in turn gives rise to the requirement that Appellant be in possession of a current Medical Certification Card at the time he is driving such heavy equipment:

§ 391.41 Physical qualifications for drivers.

(a) A person shall not drive a commercial motor vehicle unless he is physically qualified to do so and... has on his person the original, or a photographic copy, of a medical examiner's certificate that he is physically qualified to drive a commercial motor vehicle.

* * *

§ 391.45 Persons who must be medically examined and certified.

... (c) Any (previously certified) driver whose ability to perform his normal duties has been impaired by a physical or mental injury or disease.

The Agency posits that the change in Appellant's medical status occurred after the issuance of his Medical Certification Card. Thus, based on the Agency's knowledge of the change in Appellant's medical condition, it determined as required under the above rules that Appellant's pre-existing Medical Certification Card was no longer valid, and that Appellant must procure a new Medical Certification Card for his CDL to in turn be considered valid. Appellant remained unable to do this, even after a protracted period of time including a lengthy leave of absence.

Appellant first argues that he has a valid CDL, and produced a copy during the hearing. The CDL Appellant produced is dated November 29, 2000 (Exhibit F). This license indicates it remains valid until August 14, 2004.

The hearing officer is unpersuaded by this argument. The CFR regulation governing the requirements of a CDL clearly states that in order for an individual to be physically qualified to drive a commercial motor vehicle, he must have "on his person" a medical examiner's certificate stating he is physically qualified to drive a commercial vehicle. *See*, 49 CFR § 391.41 (a) (*above*). Appellant clearly had a change in his medical condition requiring him to get re-certified. *See*, CFR § 391.45 (c) (*above*). Therefore Appellant's possession of a CDL, which he procured before the change in his medical condition, is meaningless.

Appellant next argues that the Agency, the DIA medical clinic and functional capacity evaluator repeatedly failed to tell Appellant exactly what he needed in order to re-establish his medical certification. Appellant underscores that the only grounds for the denial of the Medical Certification in Exhibit 6 was his prescription of the drug clonazepam. Appellant presented evidence that he was no longer on this drug at the time of the pre-disqualification meeting. He further argues that Dr. Artist did not request additional information on his oxygen desaturation until it was too late for Appellant to get the test before the disqualification proceedings, and further, that this information is not mentioned in the Medical Appointment Memo in Exhibit 6. Finally, Appellant argues that Dr. Artist withdrew his request for this information and cancelled the appointment when he learned that Appellant was undergoing disqualification proceedings. Therefore, Appellant argues, he was never given a fair chance to get the required Medical Certification.

The Agency responds that it gave Appellant every reasonable opportunity to procure a current Medical Certification Card, that this is ultimately Appellant's responsibility and no one

else's, but that Appellant failed to do so. The Agency further asserts that Appellant did not inform Dr. Artist that he had stopped the offending medication until June 27, and that Dr. Artist informed Appellant of what he needed based on his knowledge at that time that the tests already existed.

Further, the Agency argues that despite its determination that Appellant's condition did not qualify him for coverage under the ADA, the Agency nonetheless made a good-faith attempt to find Appellant a suitable accommodating transfer position. It proceeded with such an attempt under CSR 9-62, Transfers, which reads as follows in relevant part:¹²

- f) Disability related transfers: ... Any appointing authority contemplating the disqualification of an employee on grounds related to health or disability shall assist that employee in seeking a suitable transfer.
 - 1) On the day the initial notice of intent to disqualify is given to the employee, the appointing authority shall:
 - (a) Give written notice to the Career Service Authority of the intent to disqualify the employee on grounds of health or disability, and identify the position held by the employee;
 - (b) Request, in writing, from the Career Service Authority, a list of positions the employee is qualified to perform and a list of agencies having vacancies in the positions listed.
 - 2) The appointing authority shall, immediately upon receipt from the Career Service Authority of a list of positions for which the employee is eligible, transmit to the employee considered for disqualification the response of the Career Service Authority to the request for information.

Despite its attempt to find a suitable alternative position for a protracted period of time, the Agency was unable to do so. The Agency asserts that this series of events left the Agency with little choice but to pursue disqualification proceedings.

Again, the hearing officer is unpersuaded that Appellant's inability to get the information to Dr. Artist was either Dr. Artist's fault or the Agency's. While it is apparent that Appellant suffered frustration in trying to satisfy the various requests and requirements by Dr. Artist, it was nonetheless his responsibility to procure a current, valid Medical Certification Card. Appellant should have immediately informed Dr. Artist when he ceased taking the offending medication, but instead he waited until after receiving notice that the Agency had terminated the interactive process. This process had been going on for over three months by that time.

In turn, while the Agency could have given Appellant even more time than it already did, it also had experienced frustration in giving Appellant several opportunities to no avail, and could not wait forever. It had already provided Appellant an extensive period of absence, and it

¹² Mr. Brown testified in the Robert Stone case (above) that this regulation was also promulgated to mirror federal ADA requirements.

was only when it threatened to dismiss Appellant for job abandonment that Appellant began taking any steps to address his employment situation. It then provided Appellant with an accommodation period, despite that it did not consider Appellant disabled under the ADA and did not have to do this. During this time the Agency made every reasonable attempt to find Appellant a suitable transfer position, but was unable to do so. The fact is that the Agency provided Appellant with more time than was reasonably necessary to see to it he renewed his Medical Certification Card.

The hearing officer's conclusion on this issue is further supported by the fact that even as late as the time of the hearing in this case, Appellant still had not procured a Medical Certification Card. While it is true that Appellant may actually have been able to pass the Medical Certification test at the time of the hearing, for whatever reasons, Appellant had not done so.

Finally, Appellant posits that the actual duties of his position almost never require him to drive commercial vehicles or lift 100 pounds. He argues that therefore, the Agency's requirements of a CDL, and the ability to lift up to 100 pounds, are unreasonable. Appellant asserts that hearing officer has the authority to find that the Agency's disqualification is in turn unreasonable.

These arguments must fail. Appellant's assertions go to the heart of the requirements for qualification under the Classification Specifications. The hearing officer has no jurisdiction to change or overrule the qualifications under the Specifications. Hearings Office jurisdiction over classification issues in general has been repealed. *See, In the Matter of Liz Abromeit, et al.*, Appeals Nos. 105-01 through 216-01 (Decision entered 12/31/01). In addition, the Hearings Office has never had jurisdiction to modify existing Classification Specifications or create new ones. *See also, In the Matter of Margaret Gonzales*, Appeal No. 16-00 (Dismissal entered 3/14/00). Therefore, even if the Agency wrongly denied Appellant a sufficient opportunity to renew his CDL, Appellant would still have not been qualified based on the physical requirements of the position. Under these circumstances such error would have been found harmless.

In light of the totality of the evidence in this case, the hearing officer concludes that the Agency's decision to disqualify Appellant from his position was not arbitrary or capricious.

2. Appellant's *prima-facie* showing of disability discrimination.

Disability discrimination is prohibited by Federal law under the ADA (above), which protects disabled individuals from discrimination in the workplace, and requires that certain accommodations be made for them if those accommodations are not unduly burdensome.

It has been previously established that the CSR rules addressing disability discrimination were promulgated to mirror federal ADA standards. The hearing officer may therefore rely on federal interpretations and precedents in her application of the related CSR rules, and may apply those standards to the Agency's actions in this case. *See, In the Matter of Robert Stone*, Appeal No. 12-01 (Decision entered 4/23/01).

As in other discrimination cases, the case law on disability discrimination requires the party claiming discrimination to make an affirmative *prima facie* showing that the relevant protections apply to them. See, Poindexter v. Atchison, 168 F. 3d 1228 (10th Cir. 1999).

Appellant must therefore make a *prima facie* showing of disability discrimination; *i.e.*, a demonstration that: 1) he is qualified for ADA coverage under the definition of “disabled individual,” that 2) he is capable of performing the functions of his position given reasonable accommodations notwithstanding the disability, and that 3) the Agency failed to make reasonable accommodations, instead disqualifying him from the position.

In order to satisfy the first *prima facie* element, Appellant must show that he is qualified for coverage as a “disabled individual.” The definition of “disabled individual” under CSR Rule 1, in relevant part, is:

An individual who (1) has a physical or mental impairment which substantially limits one or more major life functions; or (2) has a record of such impairment; or (3) is regarded as having such an impairment....¹³

a. Appellant has not shown a “substantial limitation of a major life activity.”

The governing case law makes it clear that in order for Appellant to establish that he is “disabled” within the meaning of this definition, he must meet the threshold requirement of a showing that he is suffering from a *substantial limitation of a major life activity* (or is perceived as suffering from such limitation). Such a showing first requires that the employee show: 1) some “impairment,” and 2) that the activity the impairment “substantially limits” is a “major life activity.” Poindexter, above, at 1230.¹⁴

In determining what constitutes an “impairment,” the courts have looked to the regulations governing both the ADA, and the Rehabilitation Act of 1973. When the United States Department of Health issued regulations defining “impairment” under the ADA, it adopted the language of the Rehabilitation Act without change. That regulation states that a physical or mental impairment is:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal,

¹³ This language is virtually identical to that found in the ADA's definition of “disability,” at 42 U.S.C. § 12102 (2).

¹⁴ The issue of one's inability to maintain a current valid CDL as itself not being the “impairment of a major life activity” has already been settled by the United States Supreme Court in Vaughn L. Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999). In that case the employee was dismissed based solely on his inability to procure and maintain a CDL as an essential requirement of the position. In Murphy, high blood pressure was the underlying condition preventing the employee from keeping his CDL. However, no major life activity is substantially limited by high blood pressure, as required by the federal ADA standards. Therefore, the Supreme Court ruled that the ADA does not apply to an employee's disqualification when it is based solely on his inability to renew his CDL. Appellant must therefore still show an underlying impairment which “substantially limits a major life activity” as set forth herein.

special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or physical disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 CFR § 1630.2 (h) (1998). Furthermore, the impairment in question must be “substantial:”

According to the EEOC regulations, “substantially limit[ed]” means “[u]nable to perform a major life activity that *the average person in the general population* can perform;” or “[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which *the average person in the general population* can perform that same major life activity.”

Toyota Motor Mfg. Ky. Inc. v. Williams, 534 U.S. 184, 195-96 (2002) (emphasis added).

The regulations set forth guidance in determining what constitutes a “major life activity.” These are activities such as walking, seeing, hearing, speaking, breathing, learning, thinking, or working. *See, Bragdon v. Abbott*, 524 U.S. 624 (1998); *see also, Toyota Motor Mfg., above*, at 196. Further, if the claimed inability is “working,” significant restrictions must be shown “in the ability to perform either a class of jobs or a broad range of jobs in various classes...” *Id.*, *citing* 29 CFR § 1620.2 (j) (3) (i). *See also*, § 1630.2 (j) (3) (i) which states that “[t]he inability to perform a single, particular job does not constitute a substantial limitation on the major life activity of working.”

Finally, it is the employee’s responsibility to specifically plead or prove both the impairment in question, and the major life activity in question. Poindexter, *above*, at 1230.

In this case, the basis of Appellant’s argument against his disqualification is that the DIA Medical Center’s failure to re-certify him is erroneous because he has *no* significant restrictions on his ability to function. He argues that the only evidence of any restrictions, that concerning lifting restrictions, does not preclude him from doing the vast majority of duties required of his position at DIA, or any other class of jobs.

The hearing officer concludes that the heavy level of work required to be qualified for Appellant’s position (*i.e.* the ability to lift 50 to 100 pounds even occasionally) cannot be presumed to be that which “the average person in the general population can perform.” Thus, the limits on Appellant’s ability to perform this work (which Appellant himself disputes are not necessary) cannot be said to preclude him from any broad class of jobs which the average individual could be expected to perform. Therefore, even if Appellant had not disputed the restrictions on his ability to work in his position and such restrictions had specifically been pleaded, he has not shown by a preponderance that such impairments substantially limit his ability to perform any major life function.

b. Appellant has failed to show that the Agency “regarded” him as “disabled.”

Appellant further argues that, the CDL issue notwithstanding, the Agency also cited Appellant’s physical restrictions, including his ability to lift up to 100 pounds and similarly, his inability to climb into heavy equipment vehicles, as a partial basis for his disqualification. Appellant argues that the heavy-lifting requirement represented by the Agency is not an actual activity required in the performance of his duties, but that the Agency nonetheless regarded his restrictions as precluding him from being able to do the job.

Appellant’s arguments tend to suggest an assertion that the Agency “regarded” him as disabled. However, even in cases where the employee asserts the agency “regarded” the employee as disabled, it must still be clear that the agency perceives the employee as being impaired in a way that *substantially limits one or more major life activities*.

As we held in (Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999)), a person is “regarded as” disabled within the meaning of the ADA if a covered entity mistakenly believes that the person’s actual, nonlimiting impairment substantially limits one or more major life activities.

Murphy v. United Parcel Service, *above*, at 522.

The hearing officer is unpersuaded that the Agency regarded Appellant as suffering from any impairment that substantially limited a major life activity. Even notwithstanding the CDL requirement, Appellant’s position is not a simple stockroom job that virtually anybody in the general populace with average abilities could perform, even with significant restrictions. On the contrary, the Agency has successfully shown that physical fitness and heightened physical abilities are basic requirements of Appellant’s position. Even if the Agency perceived him as incapable of doing this particular job, this still would not show the Agency perceived him as physically disabled to the point of being incapable of working “a class of positions the average populace would be capable of working.” *See, Toyota Motor Mfg. (above)*. In addition, Mr. Brown credibly testified that he did not analyze this case under those terms because of Ms. Murphy’s determination that Appellant *was not disabled* within the meaning of the ADA. The hearing officer has no reason to suspect the Agency administrators had any reason to second-guess the determination by its agents that Appellant suffered from no impairment that substantially limited a major life activity.

Similarly, in the Murphy case, the agency demonstrated to the lower court that it “did not regard Murphy as disabled, only that he was not certifiable under DOT regulations” to possess a CDL. *Id.*, citing Murphy v. United Parcel Service, Inc., 946 F. Supp. 872, 882 (Kan. 1996). The Court of Appeals affirmed the lower court’s decision, that the Agency “did not terminate petitioner ‘on an unsubstantiated fear that he would suffer a heart attack or stroke,’ but ‘because his blood pressure exceeded the DOT’s requirements for driver’s of commercial vehicles.’” *Id.*, citing Murphy v. United Parcel Service, Inc., 141 F. 3d 1185 (CA 10 1999).

For the foregoing reasons, Appellant has not shown the Agency “regarded” him as disabled within the meaning of the ADA.

c. Appellant has not otherwise shown that the Agency's decision to disqualify him was made under circumstances tending to suggest disability discrimination.

Even assuming Appellant had shown a "record of" an impairment which substantially limited a major life activity, the circumstances do not tend to suggest that the Agency terminated Appellant because of this. On the contrary, Mr. Brown and Mr. Thomas both testified that even if Appellant had not had the additional work restrictions, the Agency would have had to disqualify him anyway based on his inability to procure a Medical Certification Card. Therefore, Appellant's history of impairment is irrelevant to the Agency's determination that Appellant was no longer qualified for his position.

For the foregoing reasons, Appellant has failed to make a *prima facie* showing of disability discrimination. His discrimination claim must therefore fail.

Because the Agency has already shown its decision to disqualify Appellant was reasonable and not arbitrary, and Appellant has not made a *prima facie* showing of discrimination, the burden does not shift back to Agency to demonstrate a legitimate business reason for its decision, and the analysis of the case ends at this point.


CONCLUSIONS OF LAW

1. The Agency demonstrated that its decision to disqualify Appellant from his position as Equipment Operator, based on his inability to procure the necessary Medical Certification to validate his CDL, as well as certain physical restrictions preventing Appellant from performing some of his duties, was not arbitrary or capricious.
2. Appellant failed to demonstrate a *prima facie* showing of disability discrimination:
 - a) Appellant failed to show a real or perceived "substantial limitation on a major life activity." He has therefore failed to demonstrate he is "disabled" under the CSR rules governing disability discrimination.
 - b) Even if Appellant had shown a "record" of such impairment, he has not offered any evidence tending to suggest that discrimination based on such a "record" was in any way a motivating factor in his disqualification.

DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Director's decision to disqualify Appellant from his position as Equipment Operator is AFFIRMED.

Dated this 16th day of December, 2002.


Joanna Lee Kaye
Hearing Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in the U.S. mail, postage prepaid, this 17th day of November, 2002 addressed to:

Cheryl Hutchison
AFSCME
3401 Quebec St. #7500
Denver, CO 80207

Gabriel J. Guereca
4972 Milwaukee St.
Denver, CO 80216

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in the interoffice mail, this 17th day of November, 2002, addressed to:

Robert A. Wolf
Assistant City Attorney
Employment Law Section

James Thomas
Denver International Airport

Viggo Granda