

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2011 MSPB 92**

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Docket Nos. SF-0752-09-0864-R-1  
SF-0752-10-0111-R-1

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**Robert Southerland,**

**Appellant,**

**v.**

**Department of Defense,**

**Agency.**

October 5, 2011

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Cindi Fox, Esquire, San Francisco, California, for the appellant.

Christine J. Kim, Stockton, California, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mary M. Rose, Member

**OPINION AND ORDER**

¶1 Upon further consideration, we hereby REOPEN the appeals pursuant to [5 C.F.R. § 1201.118](#), VACATE our August 25, 2011 Opinion and Order in its entirety, and SUBSTITUTE the following decision.

¶2 The agency has petitioned for review of the initial decision that reversed the appellant's suspension and removal. For the reasons set forth below, we GRANT the agency's petition, AFFIRM the initial decision with respect to the charges of absence without leave (AWOL) and failure to request leave in accordance with established procedures under the removal action, VACATE the

initial decision with respect to the charges of insubordination and the findings of disability discrimination under the suspension and the removal actions, and REMAND the appeals to the regional office for further consideration consistent with this Opinion and Order.

### BACKGROUND

¶3 The appellant, who has been employed by the federal government for over 22 years, worked as a Distribution Process Worker for the agency. MSPB Docket No. SF-0752-09-0864-I-1, Suspension File (SF), Tab 5, Subtab 4B; Hearing Transcript (HT) at 140. In July 2008, the appellant suffered a work-related injury. SF, Tab 5, Subtab 4I at 1. Upon his return to work in late September 2008, the appellant was assigned to perform administrative duties as a Transportation Assistant because his medical restrictions prohibited him from lifting more than 10 pounds and his Distribution Process Worker position required repetitive lifting of heavy items. *Id.*; MSPB Docket No. SF-0752-10-0111-1, Removal File (RF), Tab 4, Subtab 4I; MSPB Docket No. SF-0752-09-0864-I-2, Refiled Suspension File (RSF), Tab 10, Subtab A at 4. On January 22, 2009, the agency requested additional medical information seeking clinical findings, a diagnosis, and a prognosis. SF, Tab 5, Subtab 4J.

¶4 The appellant met with his physician, Dr. Kulendu Vasavda, on January 27, 2009, showed the January 22, 2009 letter to Dr. Vasavda and asked him to provide the requested information. RSF, Tab 14 at 7; HT at 16-17, 146. Dr. Vasavda told the appellant that he could not provide the requested information without further tests and instead provided the appellant with a prescription slip stating that the appellant should continue light duty and lift no more than 10 pounds, which the appellant provided to his supervisor, Henry Martin. RSF, Tab 10, Subtab A at 5; HT at 13, 17.

¶5 On March 17, 2009, the agency gave the appellant another letter, again requesting a prognosis and a date for his return to full duty and stating that the

appellant had failed to provide medical documentation since he returned to duty. SF, Tab 5, Subtab 4I. The appellant met with Dr. Vasavda again on March 20, 2009, RSF, Tab 14 at 8, and Dr. Vasavda again provided the appellant with a prescription slip ordering light duty until May 1, 2009, *id.*, Tab 10, Subtab A at 7. The appellant provided Mr. Martin with the updated slip, informing him that Dr. Vasavda could not give a prognosis, and a February 24, 2009 letter from Dr. Vasavda to Marc Coby, the appellant's workers' compensation lawyer. SF, Tab 5, Subtab 1 at 2; *id.*, Subtab 4L at 1-2; HT at 11-13. On March 23, 2009, Dr. Vasavda referred the appellant to an orthopedist and for physical therapy. RSF, Tab 10, Subtab C; *id.*, Subtab D at 2.

¶6 On April 28, 2009, the agency proposed to suspend the appellant for 30 days, charging him with insubordination for failing to provide the requested medical information. SF, Tab 5, Subtab 4F. Also on April 28, 2009, Dr. Vasavda again provided documentation that the appellant should continue on a 10-pound lifting restriction and that an orthopedist consultation was pending. *Id.*, Subtab 4G. At some point, the appellant provided Dr. Vasavda with a copy of the proposed suspension. HT at 28. The agency issued a decision letter on June 22, 2009, suspending the appellant for 30 days. SF, Tab 5, Subtab 4D. The decision letter also noted that the appellant claimed he tried to obtain the requested information but had not been able to do so. *Id.* The appellant served the suspension from July 6 through August 4, 2009, and filed an appeal with the Board. SF, Tab 1; *id.*, Tab 5, Subtab 4B.

¶7 On August 12, 2009, the appellant provided the agency with medical documentation from Dr. Anh Le at Alpine Orthopaedic Medical Group. RSF, Tab 10, Subtab E; SF, Tab 5, Subtab 4A at 1. On August 20, 2009, the agency issued a request for medical documentation, stating that the documentation from Alpine Orthopaedic did not sufficiently respond to the agency's request. SF, Tab 5, Subtab 4A at 1. On August 27, 2009, the appellant saw Dr. Vasavda, but apparently did not receive any further information. RSF, Tab 14 at 9.

¶8 On September 16, 2009, Mr. Martin proposed to remove the appellant for: (1) insubordination for not providing the requested medical documentation; (2) 1 hour of AWOL on August 25, 2009, when he was 1 hour late for work, for which he had previously received a counseling memorandum; and (3) failure to request leave in accordance with established procedures when the appellant did not follow correct call-in procedures on September 8 and 14, 2009. RF, Tab 4, Subtab 4F. Following the appellant's oral reply, Clarence Allen, Jr., the deciding official, issued his decision letter on October 20, 2009, removing the appellant effective November 6, 2009. *Id.*, Subtab 4D; HT at 80. The appellant filed a timely appeal of his removal with the Board. RF, Tab 1.

¶9 On December 11, 2009, the agency moved to compel the appellant to produce his medical records in order to dispute the appellant's assertions that he diligently tried to comply with the agency's requests for medical information. RSF, Tab 6 at 2. After receiving a statement of account from the appellant noting the dates of each of the appellant's appointments with Dr. Vasavda, *see* RSF, Tab 14 at 4-11, the agency formally requested a written ruling on its motion to compel, asserting that the statement of account was an inadequate response as it provided "nothing about the substance of the discussions that the Appellant and his physician had regarding the Agency's medical requests." RSF, Tab 16 at 1. The administrative judge did not rule on the motion to compel prior to holding the hearing requested by the appellant.

¶10 Following the hearing, the administrative judge reversed the agency's actions.<sup>1</sup> RSF, Tab 24, Initial Decision at 1, 16. The administrative judge basically collapsed the insubordination charges under the suspension and removal actions into one charge with two specifications. *Id.* at 1-2. He then implicitly

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<sup>1</sup> The administrative judge joined the appellant's appeals of his 30-day suspension and his removal for hearing purposes only and issued a single initial decision. *See* RSF, Tab 3.

found that neither specification was sustained, finding that the appellant did not willingly and intentionally refuse to obey instructions to provide specific medical documentation, the appellant made efforts to comply with the agency's instructions, and Dr. Vasavda testified that he was unable to provide the appellant with a prognosis. *Id.* at 7-8. The administrative judge further found that, while the sufficiency of the medical documentation was irrelevant to the insubordination charge, the medical documentation provided by the appellant arguably addressed the agency's requests as it provided a history, clinical findings, diagnosis, and a prognosis. *Id.* at 8. He thus reversed the suspension and found that the agency failed to prove insubordination under the removal action. *Id.* at 7-8. The administrative judge sustained the AWOL charge, finding that the appellant did not dispute it, and sustained the charge of failure to request leave in accordance with established procedures. *Id.* at 9-10.

¶11 The administrative judge found that the agency established a nexus between the sustained misconduct and the efficiency of the service and that, because the agency issued counseling memoranda to the appellant for the 1 hour of AWOL on August 25, 2009, and for his failure to follow call-in procedures on September 8 and September 14, 2009, and in light of the de minimis nature of these incidents, further discipline for the incidents was unreasonable and unwarranted. *Id.* at 10-11. The administrative judge concluded that, even though Mr. Martin testified that he would have proposed the appellant's removal even without the insubordination charge due to the appellant's prior discipline, the penalty of removal for the sustained de minimis charges, even in light of a prior 15-day suspension for an unrelated offense, exceeded the bounds of reasonableness. *Id.* at 12. He found that the sustained charges warranted no more than the written counseling memoranda that the appellant already received. *Id.*

¶12 The administrative judge determined that the appellant was a qualified individual with a disability, that the deciding official considered the appellant's

disabled status when deciding to remove him for alleged misconduct, and that, based on the preponderant circumstantial evidence, the agency would not have taken the same action in the absence of the impermissible discriminatory motive. *Id.* at 14-15. Thus, the administrative judge found that the appellant proved his affirmative defense of disability discrimination. *Id.* at 16. The administrative judge ordered the agency to cancel the suspension and the removal. *Id.*

¶13 The agency has filed a petition for review. Petition for Review (PFR) File, Tab 1. The appellant has filed a response in opposition. *Id.*, Tab 3.

### ANALYSIS

The administrative judge's findings regarding the charges of AWOL and failure to request leave in accordance with established procedures are affirmed.

¶14 Neither the agency, nor the appellant, disputes the administrative judge's decision to sustain the charges of AWOL and failure to request leave in accordance with established procedures. We also discern no reason to disturb the administrative judge's findings on these issues, and therefore we AFFIRM the administrative judge's findings in the removal appeal regarding the charges of AWOL and failure to request leave in accordance with established procedures.

The administrative judge failed to make credibility findings necessary to decide the insubordination charges.

¶15 Insubordination is the willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed. *Phillips v. General Services Administration*, [878 F.2d 370](#), 373 (Fed. Cir. 1989); *Alvarado v. Department of the Air Force*, [103 M.S.P.R. 1](#), ¶ 23 (2006), *aff'd*, *Alvarado v. Wynne*, [626 F. Supp. 2d 1140](#) (D.N.M. 2009). Part of the agency's burden is to establish that the appellant's refusal to obey any such order was intentional and willful disobedience. *Gallagher v. Department of Labor*, [11 M.S.P.R. 612](#), 614 n.3 (1982). Thus, if an employee attempted to comply with an order, he was not insubordinate. *Phillips*, 878 F.2d at 373-74.

¶16 In the initial decision, the administrative judge found that “it is clear that the appellant made efforts to comply with the agency’s instructions . . . in that, each time he received a request for documentation, he made and kept an appointment with Dr. Vasavda within a week, at which he requested documentation of him.” Initial Decision at 7. The agency asserts in its petition for review that the administrative judge’s finding that the appellant made appointments with Dr. Vasavda in an effort to comply with the agency’s instructions is contradicted by Dr. Vasavda’s testimony. PFR File, Tab 1 at 9-16. Specifically, the agency asserts that Dr. Vasavda testified that the appellant did not ask for documentation in response to the agency’s request for medical information during his appointments and further asserts that the administrative judge ignored testimony from Dr. Vasavda that the appellant never showed him the agency’s March 17, 2009 and August 20, 2009 requests for medical information. *Id.* at 8, 10-11. The agency contends that Dr. Vasavda’s testimony makes clear that the appellant requested documentation to support his workers’ compensation claim and to support his performance of light duty, but not in order to comply with the agency’s requests for medical documentation. *Id.* at 10. The agency also claims that the consistent testimony of Mr. Martin and Mr. Allen that the appellant informed them that he did not need to provide the requested medical information due to privacy concerns demonstrates the appellant’s intent not to comply with the agency’s requests for medical information. PFR File, Tab 1 at 17; *see* HT at 39, 82-83.

¶17 We agree that the administrative judge failed to address testimony by Dr. Vasavda that contradicted the appellant’s assertion that he tried and failed to obtain medical documentation responsive to the agency’s specific requests. The administrative judge also failed to consider testimony by Mr. Martin and Mr. Allen suggesting that the appellant had no intention of providing the agency with the requested medical documentation. It is well settled that an initial decision must identify all material issues of fact and law, summarize the evidence, resolve

issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler v. Office of Personnel Management*, [1 M.S.P.R. 587](#), 589 (1980). Thus, the administrative judge erred.

¶18 The record shows that the agency provided the appellant with written requests for medical information regarding his work-related injury, specifically seeking information about clinical findings, diagnosis, prognosis, and “[a]n explanation of the impact of the medical condition on the activities of [his] job,” on January 22, 2009, March 17, 2009, and August 20, 2009. SF, Tab 5, Subtabs 4A, 4I, 4J. The record also shows that the appellant had appointments with Dr. Vasavda shortly after he received each of these documents from the agency, in particular on January 27, 2009, March 20, 2009, and August 27, 2009.<sup>2</sup> RSF, Tab 14 at 7-9.

¶19 The appellant testified that he took the January 22, 2009 request for medical information to Dr. Vasavda, noted his concern about being fired, and received a slip dated January 27, 2009, indicating that he should continue on light duty. HT at 145-46. The appellant also testified that he saw Dr. Vasavda on March 20, 2009, that he had discussions with Dr. Vasavda about a prognosis, that Dr. Vasavda was unable to give him a prognosis, and that Dr. Vasavda provided another slip indicating that the appellant should continue on light duty. *Id.* at 149-51. The appellant testified that, after receiving the April 28, 2009 notice of proposed suspension, he called Dr. Vasavda, “talked to him about it,” and gave Dr. Vasavda the notice, but that Dr. Vasavda said the appellant still needed further evaluation and provided the appellant with a brief letter stating that an orthopedist consult was pending. *Id.* at 151; *see* SF, Tab 5, Subtab 4G. The

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<sup>2</sup> The record shows that the appellant also had appointments with Dr. Vasavda on March 5, 2009, April 24, 2009, September 11, 2009, and October 8, 2009. RSF, Tab 14 at 7-8, 10-11.



appellant also testified that he took the agency's August 20, 2009 request for medical information to Dr. Vasavda and "talked to [him] regarding that" and that Dr. Vasavda again provided him with a slip to continue on light duty. HT at 155.

¶20 Dr. Vasavda testified that the appellant provided him with the agency's January 22, 2009 request for medical information and that he discussed with the appellant the limited nature of the information he could provide with respect to a prognosis until further testing was performed and the appellant saw a specialist. *Id.* at 17. Dr. Vasavda testified that on January 27, 2009, he provided the appellant with a note to continue light duty but that it was "not necessarily" in response to the agency's January 22, 2009 request for medical documentation as it "was strictly to take care of [the appellant] for his ongoing present problem." *Id.* at 10. He testified that the appellant never provided him with the agency's March 17 and August 20, 2009 requests for medical information and that the appellant did not discuss with him any additional requests for medical documentation at his March visits "other than he wanted to continue light duty." *Id.* at 11-12, 22. Dr. Vasavda further testified that he did not recall any other time that the appellant sought medical documentation from him in response to requests from the agency, but that the appellant sought medical documentation in response to a request from his workers' compensation attorney, Mr. Coby. *Id.* at 12; *see id.* at 150. He testified that the appellant gave him an April 28, 2009 notice of proposed suspension, that he did not recall why the appellant sent it to him, but that he "presume[d] [the appellant] just wanted [Dr. Vasavda] to keep it in the file . . . because he wasn't requesting anything." *Id.* at 28. He testified that, while he regularly discussed a prognosis with the appellant, the appellant never told him that the agency wanted a prognosis, that the appellant told him only that the agency wanted prescriptions for him to continue light duty, and that the appellant only asked him to speak with Mr. Coby. *Id.* at 12-13, 19-20. He stated that "the prognosis wasn't necessarily written on a prescription pad because there was nobody requesting it officially, per se." *Id.* at 15. Dr. Vasavda

also testified that the appellant requested copies of all his MRI results and the orthopedist's opinion but that he did "not know why [the appellant] would want those records." *Id.* at 13.

¶21 As noted above, the administrative judge found that the appellant clearly made efforts to comply with the agency's instructions based on his multiple appointments with Dr. Vasavda. Initial Decision at 7. The administrative judge further found that

Dr. Vasavda verified that he had the January 22, 2009 request from the agency in his files, and testified that the appellant frequently asked him to provide a prognosis, but that he was unable to do so. The appellant also provided a copy of the proposed suspension—which was explicitly based upon the appellant's failure to provide documentation from his doctor—yet Dr. Vasavda was still unable to provide additional or different documentation to the appellant.

*Id.* While the administrative judge's above-characterization of the testimony and documentary evidence is technically correct in that Dr. Vasavda testified that he and the appellant frequently discussed a prognosis and that the appellant provided him with the January 22, 2009 medical request and the proposed suspension, the administrative judge failed to recognize or address the testimony from Dr. Vasavda suggesting that the appellant did not seek a formal prognosis for purposes of fulfilling the agency's specific requests for medical information following the agency's initial request. Rather, Dr. Vasavda's testimony suggested that the appellant did not make him aware that the agency was still in need of a prognosis for the appellant and that the appellant's requests for information pertained to maintaining his light duty status and providing his workers' compensation attorney with information.

¶22 Not only did the administrative judge fail to acknowledge this contradictory testimony, he failed to make credibility findings in order to resolve the contradictions between the testimony of the appellant and Dr. Vasavda before making a finding regarding the insubordination charges. To resolve credibility

issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army*, [35 M.S.P.R. 453](#), 458 (1987). Resolution of the contradictory testimony regarding whether the appellant sought specific medical information from Dr. Vasavda that was responsive to the agency's requests is necessary in order to determine if the appellant willfully and intentionally refused to obey the agency's instructions and, consequently, if the charges of insubordination should be sustained. *See Phillips*, 878 F.2d at 373; *Alvarado*, [103 M.S.P.R. 1](#), ¶ 23.

¶23 As the administrative judge made findings on the insubordination charges without resolving these significant credibility issues, we VACATE his finding that the agency failed to prove the charges of insubordination by preponderant evidence. *See* Initial Decision at 7-8. Further, because credibility is the central issue in deciding whether the appellant was insubordinate, and since deciding issues of credibility is normally the province of the trier of fact, *see Mitchell v. Department of the Air Force*, [91 M.S.P.R. 201](#), ¶ 12 (2002), remand to the administrative judge for the required credibility determinations is the appropriate disposition. We note that the medical records sought in the agency's December 15, 2009 motion to compel, on which the administrative judge did not rule, should aid in the determination of whether the appellant diligently tried to comply with the agency's request for information, and are thus relevant to the insubordination charges. *See* RSF, Tab 6 at 2; *id.*, Tab 16; *see also Phillips*, 878 F.2d at 373-74. Accordingly, on remand, we ORDER the appellant to produce all

medical records relating to the agency's discovery requests for medical information, including but not limited to physician's charts and notes regarding his medical appointments.

The administrative judge improperly analyzed the appellant's disability discrimination claim.

¶24 As a federal employee, the appellant's claim of discrimination on the basis of disability arises under the Rehabilitation Act of 1973. However, the regulatory standards for the Americans with Disabilities Act (ADA) have been incorporated by reference into the Rehabilitation Act, and the Board applies them to determine whether there has been a Rehabilitation Act violation. [29 U.S.C. § 791\(g\)](#); *Pinegar v. Federal Election Commission*, [105 M.S.P.R. 677](#), ¶ 36 n.3 (2007); [29 C.F.R. § 1614.203\(b\)](#). Further, the ADA regulations superseded the Equal Employment Opportunity Commission's (EEOC's) regulations under the Rehabilitation Act. *Collins v. U.S. Postal Service*, [100 M.S.P.R. 332](#), ¶¶ 7-8 (2005) (stating that [29 C.F.R. § 1614.203\(g\)](#) and other portions of the regulation at 29 C.F.R. § 1614.203 were repealed on June 20, 2002, and the ADA regulations at 29 C.F.R. part 1630 were made applicable to cases under the Rehabilitation Act); [29 C.F.R. § 1614.203\(b\)](#).

¶25 The ADA Amendments Act of 2008 (ADAAA), which liberalized the definition of disability, became effective on January 1, 2009. *Sanders v. Social Security Administration*, [114 M.S.P.R. 487](#), ¶ 17 (2010) (citing P.L. 110-325, 122 Stat. 3553 (2008), codified at [42 U.S.C. § 12101 et seq.](#)). Thus, in the appellant's appeals of his suspension, effective June 22, 2009, and of his removal, effective November 6, 2009, the ADAAA definition is applicable. While the ADAAA became effective on January 1, 2009, because the amended regulations implementing it did not become effective until May 24, 2011, the administrative judge did not have the benefit of the amended regulations or the guidance provided by the EEOC in the Appendix to Part 1630 when he issued his initial decision. See [29 C.F.R. § 1630.2](#); [Appendix to Part 1630](#)—Interpretive Guidance

on Title I of the Americans with Disabilities Act, 76 Fed. Reg. 16,978, 17,003-17,017 (Mar. 25, 2011).

¶26 The ADAAA defines a disability, in relevant part, as “a physical or mental impairment that substantially limits one or more major life activities”<sup>3</sup> or “[b]eing regarded as having such an impairment.” [42 U.S.C. § 12102\(1\)\(A\), \(C\)](#); *see* [29 C.F.R. § 1630.2\(g\)\(1\)\(i\), \(iii\)](#). With respect to the “regarded as having such an impairment” provision, both the ADAAA and the amended regulations explain that “[t]his means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both ‘transitory and minor.’”<sup>4</sup> [42 U.S.C. § 12102\(3\)](#); [29 C.F.R. § 1630.2\(g\)\(1\)\(iii\)](#); *see id.*, § 1630.2(1)(2).

¶27 The amended regulations further explain that

[w]here an individual is not challenging a covered entity’s failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the “actual disability” or “record of” prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. *In these cases, the evaluation of coverage can be made solely under the “regarded as” prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment.* An individual may choose, however, to proceed under the “actual disability” and/or

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<sup>3</sup> The amended regulations provide that “[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.” [29 C.F.R. § 1630.2\(j\)\(1\)\(ii\)](#). They explain that “the term ‘substantially limits’ shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for ‘substantially limits’ applied prior to the ADAAA.” *Id.*, § 1630.2(j)(1)(iv).

<sup>4</sup> The Appendix to Part 1630 clarifies that the “transitory and minor” exception to coverage under the “regarded as” prong is a defense to a claim of discrimination but that “this limitation on coverage should be construed narrowly.” [Appendix to Part 1630](#), 76 Fed. Reg. at 17,015; *see* [29 C.F.R. § 1630.15\(f\)](#).

“record of” prong regardless of whether the individual is challenging a covered entity’s failure to make reasonable accommodations or requires a reasonable accommodation.

[29 C.F.R. § 1630.2\(g\)\(3\)](#) (emphasis added); *see id.*, § 1630.2(j)(2) (“Whether an individual’s impairment ‘substantially limits’ a major life activity is not relevant to coverage under paragraph (g)(1)(iii) (the ‘regarded as’ prong) of this section.”).<sup>5</sup>

¶28 In this appeal, the appellant has not asserted that the agency failed to accommodate him. Rather, he has asserted that the agency removed him on the basis of his impairment. Therefore, the administrative judge’s analysis of the appellant’s discrimination claim should have focused on whether the appellant meets the “regarded as” definition of disability as set forth in [29 C.F.R. § 1630.2\(g\)\(1\)\(iii\)](#) and as further explained in [29 C.F.R. § 1630.2\(l\)](#). That is, the administrative judge should have determined whether the appellant was “subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limit[ed], or [wa]s perceived to substantially limit, a major life activity.”<sup>6</sup> *See* [29 C.F.R. § 1630.2\(l\)\(1\)](#). However, the amended regulations explain that “[e]stablishing that an individual is ‘regarded as having such an impairment’ does not, by itself, establish liability. Liability is established under Title I of the ADA only when an individual proves that a covered entity discriminated on the basis of disability

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<sup>5</sup> We note that [29 C.F.R. § 1630.2\(j\)\(1\)\(iii\)](#) & (v) provide that “the threshold issue of whether an impairment ‘substantially limits’ a major life activity should not demand extensive analysis” and that this determination “usually will not require scientific, medical, or statistical analysis . . . .” Although the appellant’s medical records are relevant to resolving the insubordination charges, it is unlikely the administrative judge needs to consider these records in addressing the “regarded as” prong of the ADAAA and EEOC’s implementing regulations; there appears to be no dispute that the appellant has a 10-pound lifting restriction. *See infra* note 6 and accompanying text.

<sup>6</sup> The Appendix to Part 1630 notes that “[c]overage under the ‘regarded as’ prong of the definition of disability should not be difficult to establish.” [Appendix to Part 1630](#), 76 Fed. Reg. at 17,014.

within the meaning of section 102 of the ADA, [42 U.S.C. 12112.](#)” [29 C.F.R. § 1630.2\(1\)\(3\)](#); *see* [Appendix to Part 1630](#), 76 Fed. Reg. at 17,015 (“[E]vidence that a covered entity took a prohibited action because of an impairment will establish coverage and will be relevant in establishing liability, although liability may ultimately turn on whether the covered entity can establish a defense.”). Accordingly, on remand, the administrative judge should determine whether the appellant meets the requirements for the “regarded as” definition of disability.

¶29 The administrative judge’s analysis of the appellant’s disability discrimination claim is also problematic because he applied a mixed-motive analysis, and he cited, as support for his analysis, *Caronia v. Department of Justice*, [78 M.S.P.R. 201](#) (1998), *overruled on different grounds by* *Carter v. Department of Justice*, [88 M.S.P.R. 641](#) (2001). Recent Supreme Court and Seventh Circuit precedent have called such an approach under the ADA into question. *See* *Gross v. FBL Financial Services, Inc.*, [129 S. Ct. 2343](#) (2009) (holding that a mixed-motive analysis does not apply to age discrimination claims under the Age Discrimination in Employment Act (ADEA)), *Serwatka v. Rockwell Automation, Inc.*, [591 F.3d 957](#) (7th Cir. 2010) (finding that the Supreme Court’s rationale in *Gross* applies in ADA cases). In fact, in our recent opinion in *Brott v. General Services Administration*, [116 M.S.P.R. 410](#) (2011), we agreed with the Seventh Circuit’s rationale in *Serwatka* in holding that a mixed-motive analysis does not apply in ADA cases before the Board, and thus, we specifically overruled *Caronia. Id.*, ¶¶ 13-14 & n\*.

¶30 The relevant events in this matter occurred after the effective date of the ADAAA, and we are faced with the question – not addressed in either *Serwatka* or *Brott* – whether a mixed-motive analysis is appropriate in cases arising under the ADAAA. For the following reasons, we conclude that a mixed-motive

analysis is not appropriate in disability discrimination claims arising under the ADAAA.<sup>7</sup>

¶31 Our first task is to determine, by using “traditional tools of statutory construction,” if “Congress had an intention on the precise question at issue, [and if so,] that intention is the law and must be given effect.” *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, [467 U.S. 837](#), 843 n.9 (1984); see *Delverde SrL v. United States*, [202 F.3d 1360](#), 1363 (Fed. Cir. 2000) (explaining that the “traditional tools of statutory construction” include an examination of the statute’s text, structure, and legislative history, as well as an application of the relevant canons of interpretation). Thus, we begin our analysis with an examination of the statutory language itself. *Johnson v. Department of Health & Human Services*, [86 M.S.P.R. 501](#), ¶ 10 (2000), *aff’d*, *Delong v. Department of Health & Human Services*, [264 F.3d 1334](#) (Fed. Cir. 2001).

¶32 In the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3557, Congress changed the anti-discrimination language in the ADA from “[n]o covered entity shall discriminate against a qualified individual *with a disability because of the disability of such individual*” in certain employment decisions to “[n]o covered entity shall discriminate against a qualified individual *on the basis of disability*” in certain employment decisions. [42 U.S.C. § 12112\(a\)](#) (2008) (emphasis supplied); [42 U.S.C. § 12112\(a\)](#) (2009) (emphasis supplied). We did not find any other language in the ADAAA that directly addresses the applicability of a mixed-motive analysis, by either explicitly authorizing or prohibiting such an analysis. Thus, there is nothing in the plain language of the statute that resolves this issue.

¶33 Consequently, we have considered the legislative history behind the ADAAA. Notably, the legislative record contains broad expressions of intent by

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<sup>7</sup> We also see no basis for extending the reasoning in *Caronia* to disability discrimination claims arising under the ADAAA.



both the House and the Senate to make the disability discrimination law consistent with the anti-discrimination language of Title VII of the Civil Rights Act of 1964.<sup>8</sup> However, apart from these general statements, we see no other indication in either the plain language or history of the ADAAA that Congress specifically intended to authorize a mixed-motive approach to disability discrimination claims. Indeed, we find the absence of any explicit reference to mixed-motive particularly relevant, given that Congress was aware of a mixed-motive analysis when it enacted the ADAAA, having revised Title VII in 1991 to codify the Supreme Court’s holding regarding the applicability of a mixed-motive analysis to Title VII claims in *Price Waterhouse v. Hopkins*, [490 U.S. 228](#) (1989).<sup>9</sup> See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075, codified at [42 U.S.C. § 2000e-2\(m\)](#).

¶34 Specifically, we have considered whether the phrase “on the basis of” in the ADAAA has a different meaning than “because of” in the ADA so as to

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<sup>8</sup> See, e.g., 154 Cong. Rec. S-8840-01, S-8843 (daily ed. Sept. 16, 2008) (Statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008) (“The bill amends Section 102 of the ADA to mirror the structure of nondiscrimination protection provision in Title VII of the Civil Rights Act of 1964. It changes the language from prohibiting discrimination against a qualified individual ‘with a disability because of the disability of such individual’ to prohibiting discrimination against a qualified individual ‘on the basis of disability’”); H.R. Rep. No. 110-730, pt. 1 at 7 (2008) (“Aligning the construction of the [ADA] with Title VII of the Civil Rights Act of 1964, the bill amends the ADA to provide that no covered entity shall discriminate against a qualified individual ‘on the basis of disability’”).

<sup>9</sup> Interestingly, the House Committee Report reflected that the Committee was not unaware of the impact of the proposed legislation on the status of current discrimination case law, as it specifically noted that, in response to questions that had been raised during the hearing, “[i]t is the intent of the Committee that the [framework of shifting burdens for plaintiffs and defendants under *Texas Dep’t of Community Affairs v. Burdine*, [450 U.S. 248](#) (1981)] remains intact and is not affected by the amendments . . . .” H.R. Rep. 110-730, pt 1 at 17. The Committee Report further indicated that it did “not intend to alter the burden-shifting analyses in ADA employment cases involving qualification standards, tests, or other selection criteria, or contentions regarding reasonable accommodation. These analyses are intended to remain the same as articulated in existing case law.” *Id.*

suggest that in enacting the amendments, Congress intended to incorporate a mixed-motive approach to disability discrimination claims arising under the ADAAA. As a threshold matter, we note that the ADAAA does not define the term “on the basis of.” Moreover, unlike in the ADEA,<sup>10</sup> for example, the phrases “because of” and “on the basis of” in the relevant provisions of the ADA and ADAAA appear to modify the same terms and serve the same functions within their respective provisions. Nor is there any evidence in the legislative history to indicate that Congress intended a different meaning to apply to the phrase “on the basis of” in the ADAAA than to “because of” in the ADA, at least with regard to the question of mixed-motive analysis.<sup>11</sup> After an exhaustive

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<sup>10</sup> The U.S. Court of Appeals for the District of Columbia recently discussed the difference in terminology between the private and federal sector statutory provisions governing age discrimination claims under the ADEA. *See Ford v. Mabus*, [629 F.3d 198](#), 205-06 (D.C. Cir. 2010). The *Ford* court acknowledged that the Supreme Court in *Gross* found that the ordinary meaning of the phrase “because of” age” in the private sector ADEA provision at [29 U.S.C. § 623\(a\)](#) was that age was the reason for the action, and thus, a plaintiff must prove by preponderant evidence that age was the “but-for” cause of the adverse action; however, the *Ford* court rejected the application of a “but-for” test for a plaintiff claiming age discrimination under [29 U.S.C. § 633a\(a\)](#), the federal sector ADEA provision. *Ford*, 629 F.3d at 204-06 (citing *Gross*, 129 S. Ct. 2350-51). Instead, the *Ford* court concluded that a federal employee plaintiff may establish liability by showing that age was a factor in the agency’s decision, explaining, among other things, that the phrase “because of” in section 623(a) and “based on” in section 633a(a) serve “very different functions” within their respective provisions. *Id.* at 205-07. We discern no such functional distinction between the phrase “because of,” as used in the ADA, and “on the basis of,” as used in the ADAAA.

<sup>11</sup> In the Appendix to Part 1630, the EEOC explained, among other things, that “revisions have been made to the regulations and . . . Appendix to refer to ‘individual with disability’ and ‘qualified individual’ as separate terms, and to change the prohibition on discrimination to ‘on the basis of disability’ instead of prohibiting discrimination against a qualified individual ‘with a disability because of the disability of such individual.’” The EEOC also noted that the revisions to the regulations and Appendix “ensure[] that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a ‘person with a disability.’” [Appendix to Part 1630](#), 76 Fed. Reg. at 17,005. Although the EEOC’s discussion is consistent with the legislative

review of the language, structure, and history of the ADAAA, we conclude that the phrase “on the basis of” in that statute means the same thing as “because of” in the analogous ADA provision.

¶35 Additionally, we note that the Supreme Court has repeatedly expressed the view that, at least in other statutory contexts, the terms “because of” and “on the basis of” have the same meaning. For instance, in *Safeco Ins. Co. of America v. Burr*, [551 U.S. 47](#), 63-64 & n.14 (2007), the Court stated that, “[i]n common talk, the phrase ‘based on’ indicates a but-for causal relationship and thus a necessary logical condition” and there was no indication that the change from “because of” to “based on” in the relevant statute was intended to be a substantive change. In *Meritor Sav. Bank, FSB v. Vinson*, [477 U.S. 57](#), 64 (1986), the Court noted that, “[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor ‘discriminate[s]’ on the basis of sex.”

¶36 In *Serwatka*, the Court of Appeals for the Seventh Circuit reasoned that the “importance that the [*Gross*] court attached to the express incorporation of the mixed-motive framework into Title VII suggests that when another anti-discrimination statute lacks comparable language, a mixed-motive claim will not be viable under that statute.” *Serwatka*, 591 F.3d at 961. The *Serwatka* court found that the ADA did not contain any provision that was “akin” to Title VII’s mixed-motive provision, and it further noted that, in [42 U.S.C. § 12117\(a\)](#), the ADA cross-referenced the remedies set forth in [42 U.S.C. § 2000e-5\(g\)\(2\)\(B\)](#) for mixed-motive cases under Title VII, but it did not cross-reference the provision of Title VII which held employers liable for mixed-motive employment decisions, [42 U.S.C. § 2000e-2\(m\)](#). *See id.* at 962. The *Serwatka* court concluded that, in the absence of any text bringing mixed-motive claims within the reach of the ADA, or any cross-reference to Title VII’s mixed-motive liability language, the

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history, it provides no guidance regarding the applicability of a mixed-motive analysis under the ADAAA.

ADA's "because of" language required a plaintiff to show that his or her employer would not have fired him "but for" his actual or perceived disability and found that a mixed-motive analysis would not apply. *See id.* at 962.

¶37 We find the *Serwatka* court's reasoning persuasive, even as applied to disability discrimination claims arising under the ADAAA. Specifically, the ADAAA did not change the language in [42 U.S.C. § 12117\(a\)](#), and there is no stand-alone provision that would otherwise make the Title VII mixed-motive analysis applicable to cases under the ADAAA. Nor is there any provision that cross-references the Title VII mixed-motive provision at [42 U.S.C. § 2000e-2\(m\)](#). For these reasons, we find that in enacting the ADAAA, Congress did not intend to authorize a mixed-motive analysis to disability discrimination claims arising thereunder and the appellant must prove by preponderant evidence that the agency took an action "on the basis" of his disability.

¶38 The language, structure, and legislative history of the ADAAA lead us to conclude that the phrase "on the basis of" in the ADAAA means the same thing as "because of" in the ADA and, therefore, requires application of the same "but for" test discussed in *Gross* and *Serwatka* to disability discrimination claims arising under the ADAAA. The burden of persuasion does not shift to the agency to show that it would have taken the action regardless of disability, even if the appellant produces some evidence on remand that disability was one motivating factor in the adverse employment action. *See, e.g., Gross*, 129 S. Ct. at 2352; *Brott*, [116 M.S.P.R. 410](#), ¶ 14. Thus, on remand, the administrative judge shall analyze the appellant's disability discrimination claim without relying on a mixed-motive framework. *See Brott*, [116 M.S.P.R. 410](#), ¶ 14.

#### ORDER

¶39 For the above-stated reasons, we REMAND the appeals to the regional office for further consideration consistent with this Opinion and Order. On remand, the administrative judge shall make credibility findings related to the

charges of insubordination, analyze the appellant's disability discrimination claim applying the amended regulations and without relying on a mixed-motive framework, and, if necessary, conduct a new penalty analysis on the suspension and removal actions. The administrative judge shall issue a new decision addressing these issues.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.