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U.S. OFFICE OF PERSONNEL MANAGEMENT

5 CFR PART 339

RIN: 3206-AL14

Medical Qualification Determinations

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a final rule to revise its regulations for medical qualification determinations. The revised regulations update references and language; add and modify definitions; clarify coverage and applicability; address the need for medical documentation and medical examination and/or testing for an applicant or employee whose position may or may not have medical standards and/or physical requirements; and recommend the establishment of agency medical review boards. The final rule provides agencies guidance regarding medical evaluation procedures.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: On December 27, 2007, OPM issued a proposed rule at 72 FR 73282 to revise regulations on medical qualification determinations. The public comment period on the proposed rule ended February 25, 2008. OPM received written comments from four agencies, a union, and an individual pertinent to the proposed rule. A discussion of the comments is provided under the respective subpart below.

The final rule also replaces the verb “shall” with “must” for added clarity and readability. Any provisions in this part using the verb “must” have the same meaning and effect as previous provisions in this part using “shall.” The final rule also adds four authority citations to clarify the scope of applicability: (1) 5 U.S.C. 3312 Preference eligibles; physical qualifications; waiver; (2) 5 U.S.C. 3318 Competitive service; selection from certificates; (3) 5 U.S.C. 3320 Excepted service; government of the District of Columbia; selection; and (4) 5 U.S.C. 3504 Preference eligibles; retention; physical qualifications; waiver.

Summary

Background – Summary

The summary covers the basis for OPM issuance of the final rule and outlines the revisions that have been made to its regulations for medical qualification determinations.

Subpart A

Background – Subpart A

Subpart A covers general information. The proposed subpart A added wording to clarify applicability of this regulation to excepted service positions; updated references to the Rehabilitation Act of 1973, as amended (Rehabilitation Act), and to portions of the

Americans with Disabilities Act (ADA) of 1990, as amended by the ADA Amendments Act of 2008 (ADAAA), that are applicable to the Federal Government through the Rehabilitation Act; added examples to the definition in § 339.104 of “medical evaluation program”; added the definition of “medical restriction,” and separated and moved definitions of “subtle incapacitation” and “sudden incapacitation.”

In response to the comments on the proposed rule, which are discussed below, we have revised subpart A to –

(1) Retain an example regarding removal of a preference eligible in § 339.101.

(2) Replace the word “suitable” with “appropriate” in § 339.102(c) to more accurately reflect the proper administrative action that an agency may render when an individual fails to meet an established condition of employment and to avoid confusion with suitability determinations.

(3) Add language to § 339.102(c) that failure of an applicant to be examined, after a tentative job offer is extended, may result in an applicant not being considered further for the position.

(4) Add language to § 339.102(c) that failure of an applicant, who received a tentative offer of employment, to provide medical documentation requested by the agency medical review officer or related hiring agency medical or human resources personnel, following a pre-placement medical examination, may result in an applicant not being considered further for the position.

(5) Add the term “applicant” where appropriate in subpart A.

(6) Revise § 339.103 to remove the phrase “to the extent consistent with” from the section in the proposed rule on compliance with disability laws and regulations. The

new language clarifies that the statutory provisions of the Rehabilitation Act and the ADA apply to actions under this section.

(7) Correct the reference to the definition of “qualified individual with a disability” in § 339.103.

(8) Clarify the definitions of “medical documentation” and “medical restriction” in § 339.104.

(9) Add the definition of “medical surveillance” in § 339.104.

(10) Clarify the definition of “physical requirement” in § 339.104.

Discussion of Comments – Subpart A

Section § 339.101

One agency stated that § 339.101 of the current regulation provides an example, “removal of a preference eligible employee in the excepted service under part 752,” of a situation when medical issues arise in connection with an OPM regulation that governs a particular personnel decision. The agency stated the example did not appear in the proposed rule and recommended that it be retained because the example provides clarity. OPM agrees this example assists the reader in understanding the intent of the regulation and is retaining that example in the final § 339.101.

Section 339.102

One agency proposed adding the term “physical fitness standards or testing” to § 339.102(c). The agency rationale was that this change clarifies the applicability of this provision. OPM has decided not to accept this comment. As discussed below, OPM has decided to remove the terms “physical fitness standards” and “physical fitness testing” from the final rule at this time.

One agency proposed amending the language in proposed § 339.102(c) to delete the word "suitable" and replace it with the word "indicated." The word "suitable" was contained in the portion of the proposed rule that read failure to meet properly established medical standards or physical requirement under this part means that the applicant or employee is not qualified for the position unless a waiver or reasonable accommodation is "suitable." The rationale of the commenter was that the word "indicated" more accurately reflected the appropriate administrative action that an agency may render when an individual fails to meet an established condition of employment. OPM agrees with the agency that the word "suitable" could lead to confusion, especially in relation to the suitability function administered by OPM pursuant to part 731 of this title. Instead of the word "indicated," however, OPM has revised the section with the word "appropriate." The use of the word "appropriate" makes it clear that a waiver or a reasonable accommodation under § 339.102(c) must meet certain conditions. OPM also revised the sentence to "reasonable accommodation or a waiver is appropriate" to track the order of the citations.

OPM included an additional clarification to § 339.102(c) by adding the phrase "which may include psychological" after "medical" to the sentence noting, when there are established medical standards and/or physical requirements for the position, the failure of an applicant to be examined may result in an applicant no longer being considered for the position. OPM receives frequent inquiries from agencies relative to proper handling of such instances. This clarification will enable Federal agencies to obtain applicants' cooperation with examination requirements in appropriate circumstances. This additional language also informs the reader of the possible scope of

an agency-offered examination as well as the consequences of refusal to report. The provision now clearly states that such failure may be a basis for the agency to determine the applicant is not qualified when there are established medical (which may include psychological) standards and/or, physical requirements for the position.

OPM included an additional clarification to § 339.102(c) that failure of an applicant to provide medical documentation requested by the hiring agency medical or human resources personnel as part of a pre-placement medical examination also may result in an applicant not being considered further for the position. OPM receives inquiries from agencies relative to proper handling of such instances, and this clarification will enable Federal agencies to obtain applicant cooperation with appropriate examination requirements and prevent delays in filling critical vacancies. In addition, after a tentative job offer, agencies may request relevant documentation to determine whether there is a medical condition that will affect safe and efficient performance of the essential duties of the position. The clarifying language in this provision informs the reader of the consequences of failure to submit requested medical documentation.

Section 339.103

One agency requested that the definition of “qualified individual with a disability” in proposed § 339.103 be corrected, noting that the section misquoted 29 CFR 1630.2(r), which relates to the definition of direct threat. OPM agrees that the proposed rule inadvertently referenced 29 CFR 1630.2(r). OPM also notes that citing to specific regulations of other agencies within this part poses a risk of future ambiguity because the text of the cited regulations are subject to change, as has occurred with the existing provisions. The final rule has been revised to reference the definition of “qualified

individual with a disability” contained within the Rehabilitation Act, as amended, and the ADA, as amended as well as their implementing regulations for the Federal sector. In interpreting the meaning of these statutes, agencies can and should refer to current regulations and guidance promulgated pursuant to these Acts, see, e.g., 29 CFR part 1630, as well as case law construing these Acts, in consultation with agency counsel.

One agency recommended the term “applicants” be added along with “employees” to § 339.103. The agency noted that 29 CFR 1630.13 included references to both applicants and employees. As revised, § 339.103 no longer makes reference to either employees or applicants. OPM still agrees, however, that including applicants in the final rule was appropriate and has revised the entire rule accordingly.

One agency recommended revising the language in proposed § 339.103 to remove the phrase “to the extent consistent with” from the section in the proposed rule on compliance with disability laws and regulations. The section stated “the Equal Employment Opportunity Commission (EEOC) has issued regulations covering the equal employment provisions of the ADA in 29 CFR part 1630, which must be followed to the extent consistent with the Rehabilitation Act.” The agency stated that under the Rehabilitation Act, agencies must follow the standards applied under title 1 of the ADA and the EEOC regulations reflect the ADA’s nondiscrimination standards. OPM agrees that further clarification is needed and has amended the section to refer directly to compliance with the Rehabilitation Act, the ADA, as it applies to the Federal government, and their implementing regulations for the Federal sector. This language clarifies that the statutory, non-discrimination provisions under the Rehabilitation Act and the ADA apply to actions under this section.

One agency proposed adding three citations to the language on compliance with disability laws and regulations in § 339.103. The agency concurred with the inclusion of specific sections of the EEOC's ADA regulations within this OPM regulation and suggested three additional citations relevant to medical qualification determinations. Two other citations, 29 CFR 1614.203(a) and 29 CFR 1614.203(b), were enforcement regulations and outside of the scope of this regulation. OPM has declined to accept this change. Upon further consideration, OPM has decided to remove all references to specific regulations of other agencies, because, as occurred with the current regulations, the outside citations changed, making the cross- references in the OPM regulations difficult to interpret. To avoid perpetuating this sort of ambiguity, OPM has decided to refer directly to compliance with the non-discrimination provisions of the Rehabilitation Act, the ADA, including the ADA Amendments Act of 2008, and their implementing regulations for the Federal sector.

An individual proposed adding clarifying language to the definition of "qualified individual with a disability" in § 339.103. The rationale of the commenter was that there may be job demands (e.g., overtime work) and conditions of employment (e.g., requirement of frequent travel) that are not, of themselves, essential functions of the job. OPM did not accept this comment but has revised the definition. As noted above, the meaning of "qualified individual with a disability" comes from the Rehabilitation Act, the ADA, and their implementing regulations for the Federal sector.

One agency proposed that proposed § 339.103 be revised to include a specific reference to the definition of "direct threat" contained in the EEOC's regulations, 29 CFR 1630.2(r). The agency did not provide a supporting rationale for this revision. OPM did

not adopt this suggestion because the proposed rule only inadvertently referenced 29 CFR 1630.2(r). As noted above, the final rule references the definition of “qualified individual with a disability” contained in the Rehabilitation Act, the ADA, and their implementing regulations for the Federal sector.

Section 339.104

Medical documentation

One agency requested that OPM insert the words “as defined below” after “other appropriate practitioner” under the definition of the term “medical documentation” to alert the reader that there is a definition of the term “practitioner” in § 339.104. OPM agrees with the commenter but changed “other appropriate practitioner” to “licensed health practitioner” for clarity and inserted the words “as these terms are defined below” in the final rule to direct the reader to the applicable definitions.

One agency requested that the words “which have been obtained” be removed from the sentence under the definition of “medical documentation” in proposed § 339.104(2). The agency rationale was that the information may not have been initially provided by the applicant or employee, but the information may still be needed by the agency. Further, if the applicant or employee does not provide the information, the agency can request the applicant to obtain it, at his/her expense, in order to be considered for the position. The agency indicated that if the definition is not changed, and the agency requests the information because it may not have been obtained, the agency will have to pay the associated costs for attaining the information. OPM agrees that this is a legitimate concern and has accepted the proposed change and deleted the term “which have been obtained” from item (2) in the definition of “medical documentation” to

remove any suggestion that the agency would be expected to incur any costs associated with obtaining medical information the agency deems necessary when the agency needs to request an applicant or employee to submit additional information in order for the agency to render an informed employment decision. By changing “and” to “and/or” in the appropriate places, OPM also clarified that any, but not necessarily all, of the clinical findings listed in item (2) may need to be provided.

One agency requested that the word “and” be changed to the word “or” between (6) and (7) in the list of items contained in the definition of “medical documentation” in proposed § 339.104 where it stated “an acceptable diagnosis must include the following information, or parts of this information identified by the agency as necessary and relevant to its employment decision.” The agency rationale was that the type and amount of medical information needed in each case may differ and the regulation does not require submission of documentation meeting all of the seven listed categories in this part. OPM has revised the section to insert the words “and, either of the following:” after the text for (5) and insert the word “or” between (6) and (7) to avoid any suggestion that all seven categories of information must be submitted. OPM made a similar change to item (2), by changing “and” to “and/or” to clarify and to be consistent with the opening statement of this item “including any of the following.”

Further, the same agency stated that the section conflicted with the Rehabilitation Act limitation on medical examinations because it effectively instructs agencies to obtain substantially more medical information than may be necessary to make an employment decision. OPM agrees that clarification was needed to eliminate any suggestion that documentation meeting all seven categories must be submitted. OPM has revised the

section to insert the words “and, either of the following:” after the text for (5) and insert the word “or” between (6) and (7).

One agency proposed amending the language in the definition of “medical documentation” in § 339.104 to state “such medical documentation must include as much of the following types of information as is necessary and relevant to making the job-related decision for which the information is being requested.” The agency rationale was that section 102(d)(4) of the ADA provides that an employer shall not require a medical examination or make inquiry of an employee unless such examination or inquiry is job-related and consistent with business necessity. The agency further stated any requirement for information outside of this express statutory limitation violates the Rehabilitation Act. OPM has clarified this section by revising the opening sentence to state medical documentation must contain “necessary and relevant information to enable the agency to make an employment decision.” OPM is retaining the remainder of the language in this sentence to maintain consistency with generally accepted medical practice and principle as to what constitutes an acceptable medical diagnosis. By limiting the scope of the requested information, however, to what is “necessary and relevant” the sentence also is consistent with the intent of the ADA and Rehabilitation Act with regard to the scope of an employer’s medical inquiry.

An individual proposed modifying the definition of “medical documentation” in § 339.104 to include new language that medical documentation should include copies of actual medical office or hospital records, in addition to a written statement from a physician. The rationale provided by the commenter was that a statement by a physician, written or oral, must be supported by clinical findings obtained through a medical history,

physical examination, and appropriate tests and diagnostic procedures. OPM agrees with the commenter that medical documentation includes copies of related medical office or hospital records and has amended the section to include these additional materials.

Therefore, OPM further clarified the definition by stating the medical documentation must be “dated” and contain “necessary and relevant” medical information to enable the agency to make an informed employment decision.

A union proposed clarification of the definition of “medical documentation” in § 339.104. The union stated the definition leaves agencies and supervisor’s wide berth to determine what constitutes necessary or appropriate medical documentation, particularly in regards to absences. The union further stated that medical documentation for sick leave, whether extended or not, is often left to the discretion of individual supervisors. The union requested that OPM delineate the baseline for appropriate medical documentation and identify practices that should be avoided. OPM did not accept this suggestion of delineating acceptable and unacceptable forms of documentation because medical documentation needed by an agency can vary according to the situation. The modification made to the “medical documentation” definition, as noted directly above, however, now clarifies that a dated written statement from a licensed physician or practitioner should contain necessary and relevant information to enable it to make an employment decision. This revised language provides agencies with needed discretion in obtaining necessary and relevant information while preventing overly broad requests for medical records, consistent with the Rehabilitation Act and the ADA.

OPM also will seek to issue guidance from time to time as to best practices with regard to working with healthcare providers to obtain appropriate information and

materials responsive to the agency's request for information necessary and relevant to making its employment decision.

Medical evaluation program

One agency proposed adding examples to the definition of "medical evaluation program" in § 339.104, such as age adjusted periodic medical examinations or anthrax testing for certain employees. OPM did not adopt this suggestion because "medical evaluation program" covers a broad category of medical examination and clinical and diagnostic testing procedures.

Medical record

An individual proposed a definition for the term "medical record" and requested the inclusion of this new definition in § 339.104, indicating that a physician's written statement should be supplemented with the medical history, physical examination and related testing and diagnostic procedures. The individual stated this will aid the reviewer in assessing the validity of the diagnosis and management plan for the medical or physical condition. OPM has not incorporated this proposed definition in the final rule. As noted above, the definition for medical documentation states that an agency may request necessary and relevant information to enable it to make an employment decision. OPM believes this revised definition is appropriate to allow an agency to obtain what is needed for its decision-making process while preventing overly broad requests for medical records, consistent with the Rehabilitation Act and the ADA.

Medical restriction

One agency noted that the definition of "medical restriction" in § 339.104 as written in the proposed rule was too narrow because it only addressed physical

requirements. The agency requested that the words “physical requirements” be replaced with the words “type or duration of work or activity” in order to cover both physical and medical requirements. OPM agrees with the agency proposal and has replaced the phrase “physical requirements” with the words “type or duration of work or activity” to clarify that the definition applies broadly to a variety of activities for which the individual is limited or prevented from performing due to medical conditions and/or physical limitations.

One agency requested revising the definition of “medical restriction” in § 339.104 to eliminate the phrase “operative event” or expound upon the meaning or intent for clarification purposes. OPM agrees with the proposed agency clarification and removed the term “operative event.” OPM revised the language to state that a medical restriction is a “medical determination” that an applicant or employee is limited or prevented from performing a certain type or duration of work or activity, or motion, because of a particular medical condition or physical limitation.

An individual requested modifying the definition of “medical restriction” in § 339.104 to include language that a restriction is medically warranted if the physician can support a conclusion that there is risk-avoiding or therapeutic value associated with the restriction. The rationale of the individual was that unless there is a risk-avoiding or therapeutic value inherent in a physician’s recommendation that a patient not engage in a particular kind of activity, the physician cannot justify the recommendation as medically warranted. OPM did not adopt this specific language. The modification made to the definition of “medical restriction,” as noted above, clearly defines the term without the

potential confusion to a reader who may not have the medical knowledge or expertise to accurately interpret and apply the language proposed by the commenter.

Medical standard

An individual recommended replacing the term “medical standard” with “medical qualification standard” in § 339.104 as well as the remainder of the regulations. The commenter described a “medical qualification standard” as a written description of the clinical findings associated with a health status or level of fitness below which the individual would be at an unacceptable level of potential risk for injury, harm or performance failure. OPM has not adopted the term “medical qualification standard” because its intent is covered by the existing definition. OPM has, however, revised the definition of “medical standard” for clarity. As noted in the final rule, the term “medical standard” represents the minimum medical requirements necessary for an applicant or employee to perform essential job duties as a condition of employment. By referencing the phrase “condition of employment” rather than the descriptive phrase in the proposed rule, the definition makes it clear this is an agency-established qualification standard that must be met prior to appointment and/or maintained during employment for successful performance. In addition, just inserting the term “qualifications” in the title could lead to confusion with the more general employment qualifications for Federal positions.

Medical surveillance

One agency requested adding a new definition of “medical surveillance” to § 339.104 to clarify to the reader the distinction between medical surveillance, medical evaluation program, and medical examination and to ensure uniform application. OPM agrees that a clear understanding of the different terms is important and has incorporated

a definition for “medical surveillance” into § 339.104. “Medical surveillance” is the collection and analysis of health data and trends, such as injuries or illnesses, to improve and protect the health and safety of employees. A “medical evaluation program,” however, refers to an overall program of recurring medical examinations or testing, established by written agency policy, to monitor employees whose work may subject them to significant health or safety risks due to occupational or environmental exposures.

Physical requirement

An individual commented that the definitions of “physical requirement” and “physical fitness standard” in § 339.104 were virtually identical and suggested eliminating one of the definitions to avoid redundancy. OPM did not accept the comment but, as noted earlier, has decided to withdraw references to “physical fitness standard” and “physical fitness testing” from the regulations at this time. OPM has taken the matter of appropriate definitions of the terms “physical fitness standard” and “physical fitness testing” under further consideration. OPM did revise the definition of “physical requirement” in the final rule to provide better harmony with the underlying statute. See 5 U.S.C. § 3312.

Subtle incapacitation/ Sudden incapacitation

One agency recommended inclusion of a stand-alone definition for the term “static or well stabilized” along with the stand-alone definitions of “subtle incapacitation” and “sudden incapacitation.” In the alternative, the commenter recommended retaining all three terms only as part of the definition of the term “medical documentation” in § 339.104. The commenter believed that for consistency, these terms should appear in the same manner. OPM is not including a stand-alone definition for the term “static or

well stabilized” and is retaining, with some modification, the stand-alone definitions for the terms “subtle incapacitation” and “sudden incapacitation.” As stated in § 339.104, the term “static or well stabilized” is offered only for the purpose of clarification within the definition of “medical documentation.” In this context, the term is intended to mean a medical condition that is not likely to change as a consequence of the natural progression of the condition, specifically as a result of the normal aging process, or in response to the work environment or the work itself. In contrast, the terms “subtle incapacitation” and “sudden incapacitation” remain as stand-alone definitions because they are not limited only to clarification of the definition of “medical documentation.” These terms relate to the gradual or abrupt impairment of physical or mental function and are not only medical in nature, but also relate directly to safety, performance, and/or conduct issues that may undermine the agency’s commitment to maintaining a safe working environment for all employees and others. OPM revised these terms further in the final rule to make the additional related issues clear.

Subpart B

Background – Subpart B

Subpart B governs medical standards, physical requirements, and medical evaluation programs. We proposed changing the title of subpart B to clarify application of this part to medical evaluation programs. The proposed subpart B added language to clarify application of part 339 to arbitrary disqualification; added “medical surveillance” to policies agencies may establish to safeguard employee health; provided an example of an immunization program; and changed “incumbents” to “employees” to clarify § 339.205. As explained above, OPM has withdrawn the physical fitness standards and

physical fitness testing from the final regulation for further consideration. Consequently, these references have been removed from the title and other parts of this section, including § 339.203.

In response to the comments on the proposed rule which are discussed below, we have revised subpart B to –

(1) Correct an erroneous reference to subpart C of part 731 of this chapter in § 339.201.

(2) Add a requirement to § 339.202 that OPM approve medical standards established by agencies prior to implementation.

(3) Provide language to § 339.202 regarding performance and behavioral and personality characteristics.

(4) Add a requirement to § 339.202 that there must be a study validating medical standards to the specific occupation.

(5) Include language in § 339.204 on established timeframes for submission of medical documentation by an applicant or employee.

(6) Re-title § 339.204 as “Waiver of standards and requirements and medical review boards.”

(7) Change the term “vaccine” to “vaccination” and clarify the language relative to vaccinations in § 339.205.

(8) Change the term “candidate” to “applicant or employee” in § 339.206.

(9) Revise the reference to “substantial harm” in § 339.206 to provide that applicants and employees may be disqualified for positions based on medical history when the condition (or recurrence) would pose a significant risk of substantial harm.

(10) Change “reasonable probability of substantial harm” in § 339.206 to the ADA and Rehabilitation Act standard of “significant risk of substantial harm.”

Discussion of Comments – Subpart B

Section 339.201

One agency stated there was a need to reference subpart B, rather than subpart C, of 5 CFR part 731 in § 339.201. The agency rationale was that subpart C relates to suitability action procedures, rather than the criteria authority used in making suitability determinations, which are covered in subpart B. After carefully considering the comment, OPM has decided to completely remove the reference to 5 CFR part 731 from 5 CFR 339.201. OPM has previously explained in four separate Federal Register notices that a sustained objection to an applicant, or a sustained request to pass over an applicant, is not a suitability determination. See 74 FR 30459 (June 26, 2009); 73 FR 51245 (Sept. 2, 2008); 73 FR 20149 (Apr. 15, 2008); 72 FR 2203 (Jan. 18, 2007). Regardless of whether a medical disqualification of an applicant is made under 5 U.S.C. 3312 or 3318, it is not a determination under 5 CFR part 731 that the applicant is unsuitable for employment in the competitive service. In fact, there is no suitability factor in 5 CFR part 731, subpart B, addressing medical disqualification. Further, as noted in 5 CFR part 339's authority citation, the part is issued only under rule II of E.O. 10577, as amended. It is not issued under rule V thereof, which authorizes OPM to order the removal of incumbent employees on grounds of fitness, pursuant to the President's standard-setting authority in 5 U.S.C. 3301, 3302, and 7301, and consistent with OPM's administrative authority in 5 U.S.C. 1103(a)(5)(A) and 1302(a). Accordingly, OPM also is amending § 339.201 to delete the text concerning directed removals of appointees

based on physical or mental unfitness. OPM is retaining the reference to exclusion of applicants from examinations, which falls under OPM's authority in 5 U.S.C.

1302(a). OPM also is adding text to clarify that the procedures applicable to a medical disqualification under 5 U.S.C. 3312 or 3318 are in 5 CFR 339.306.

Section 339.202

An individual proposed adding language to § 339.202 relative to performance and human reliability demands. The rationale of the commenter was that the need for standards is to minimize the risk of human failure, rather than to predict successful performance. OPM agrees with the commenter's rationale but has amended the language to more plainly note the direct relationship between performance and the requirements needed to perform the duties of the position.

One agency proposed revising § 339.202 to add language regarding the requirement for OPM approval of medical standards established by agencies prior to implementation. The agency rationale was that although the current language states an agency may establish medical standards in certain circumstances, definitive language on OPM approval would provide clarity and eliminate agency questions. OPM agrees and amended the section to state that agencies are required to obtain OPM approval of all medical standards within the competitive service prior to implementation.

One agency proposed revising § 339.202 to add the requirement that there must be a study validating medical standards to that specific occupation. The agency rationale is that this section should clearly state that a medical standard for an occupation should be supported by a job analysis. OPM agrees generally with the comment and revised this section to clarify that there must be a study(ies) or evaluation(s) establishing the medical

standard is job-related to one or more occupations (recognizing some medical requirements may be similar across occupations). A validation study generally is not required where there is no evidence of adverse action; therefore OPM did not wish to impose a higher legal standard here. See Uniform Guidelines on Employee Selection Procedures, 29 CFR part 1607. The “job-related” standard is consistent with the non-discrimination provisions under Part 300 of this title and Title VII. OPM made a similar change to the definition of physical requirement, as discussed below.

One agency stated that the language in parenthesis in § 339.202, “(i.e., where the agency has 50 percent or more of the position(s) in a particular occupation)”, is confusing and restrictive. OPM disagrees and has not amended this language. The regulation states that an agency may establish medical standards for positions that predominate in that agency and the parenthetical gives an example of what may constitute a predominance of a particular occupation.

Section 339.203

One agency proposed revising § 339.203 to clarify the difference between “physical requirements” and “physical fitness standards.” The agency rationale was to eliminate potential confusion concerning requirements when applying § 339.204, (re-titled “Waiver of Standards and Requirements and Medical Review Boards” to § 339.203. OPM agrees with the need to avoid confusion between these terms. Consequently, as noted above, OPM has withdrawn references to “physical fitness standards or testing” from the final rule for further consideration. This provision is revised and re-titled to “Physical requirements.”

A union proposed that in relation to the physical requirements and physical fitness standards or testing in § 339.203, OPM accept the role to carry out oversight and external validation for the positions to which agencies choose to apply a physical requirements standard. As a rationale, the union cited its experience with inconsistent use of the authority granted to agencies to establish physical requirements for individual positions without OPM approval. In addition, the union proposed that OPM further expand on procedures for the validation process. The union rationale was to provide consistency throughout the government of individuals who perform essentially the same functions, but work for different agencies. OPM has not accepted these comments. As noted, OPM has withdrawn the language related to “physical fitness standards or testing” at this time. In addition, as noted in the rule, approval by OPM remains available to agencies, but is not mandatory. Further, challenges to such policies or directives can be addressed through administrative processes or grievances or through the courts.

OPM revised this section in the final rule for the reasons noted in section 202, *supra*, to clarify that there must be a study(ies) or evaluation(s) that establishes the physical requirement(s) is job-related to one or more occupations (recognizing some physical requirements may be similar across occupations).

Section 339.204

One agency proposed adding to § 339.204, the waiver provision, examples of “sufficient evidence” and “additional information” that an applicant or employee may submit or any agency may obtain with regard to waiving a medical standard or physical requirement, to ensure uniform application and to provide clarity. OPM has not accepted

this comment because the regulatory language is clear and the standards are best elucidated by case law.

One agency proposed including language in § 339.204 to state the established timeframe an applicant or employee has to provide sufficient medical evidence or that an agency has to obtain additional information prior to rendering a final decision. The agency was concerned the existing language implied that documentation could be supplied at any time, which could tax the agency administrative workload and affect and/or indefinitely extend the timeframe for rendering an employment decision. OPM agrees with the agency concerns and has clarified the language to state that an agency may establish timeframes, in writing, for submission of initial or additional information for consideration, with allowance for reasonable extensions.

A union proposed mandating review panels at agencies. The union rationale was that these review panels will assist agencies in determining appropriate accommodation of a disability or review of medical ineligibility determinations. OPM agrees that medical review boards can assist agencies in making determinations under this section and included language permitting agencies to establish medical review boards. Consequently, OPM has re-titled § 339.204 as “Waiver of standards and requirements and medical review boards.” At this time, however, OPM believes agencies should be given discretion in determining whether and how best to use medical review boards, so the creation of such boards is not mandatory. OPM plans to confer periodically with agencies regarding their use of medical review boards. OPM also will seek to issue guidance from time to time as to best practices with regard to the composition and use of medical review boards.

Section 339.205

An individual proposed replacing the term “vaccine” with “vaccination” and clarifying that the need for a medical evaluation program “must be clearly supported by the nature of the exposures incurred in the course of the work” in § 339.205. The commenter stated only that the need for these inclusions were “self-evident.” OPM agrees the term “vaccine” should be replaced with the term “vaccination” and amended the term to reflect the act of receiving a vaccine. OPM did not include the additional language above. The existing language conveys the same meaning and the commenter provided no supporting or convincing rationale for further change.

A union commented that although § 339.205 of the proposed rule would mandate that employees be vaccinated under certain circumstances limited to work, and although this requirement may be imposed only upon written notification, only limited guidance is provided in the regulation concerning the circumstance under which such vaccinations may be compelled. In addition, the union stated that agencies should be allowed to retroactively impose an immunization requirement on an employee only if the employee was notified of the requirement prior to acceptance of the position through the vacancy announcement or position description. OPM recognizes the need for some clarification and has amended the language to clarify that any vaccinations required by this section must be FDA-approved. OPM does not otherwise accept this comment. As noted in the rule, agencies that choose to implement one or more of the programs noted in § 339.205 must have written policies or directives. Challenges to such policies or directives can be addressed through administrative processes or grievances or through the courts.

One agency recommended that the proposed language in § 339.205 be expanded to read “this may include, but is not limited to the requirement to undergo vaccination with FDA approved vaccines (e.g. for national security reasons or in order to safely carry out an agency program.” The rationale of the agency was that the modification eliminated the possibility that an applicant or employee could challenge an agency requirement to undergo a vaccination under the contention that the FDA may have licensed the vaccination, but had not “mandated” its use.” OPM agrees with the rationale of the commenter and has amended § 339.205 to state vaccinations may include FDA-approved vaccines.

One agency requested clarification of what is meant by “mandatory vaccines” in § 339.205. Further, the agency states an example would be helpful (e.g., in the event of a pandemic flu when the position does not permit the accomplishment of work at home or in isolation). OPM has not accepted this comment. OPM has included situational examples but has not included specific vaccination examples to allow flexibility to address changes in environmental, situational, and other circumstances wherein agencies determine and document the need for certain vaccinations.

Section 339.206

An individual proposed replacing the reference to reasonable probability of substantial harm in § 339.206 with a provision that applicants and employees may be disqualified for positions only if the condition(s) at issue is disqualifying “and a recurrence would pose an unacceptable risk of injury or harm to the individual or others, or would present an unacceptable risk of human failure.” The rationale provided was that the decision in this type of situation must be based on minimum/maximum criteria, not

probability criteria. The commenter also noted that if a recurrence is possible and the consequences of a recurrence are unacceptable, it does not matter how small the probability. OPM recognizes the concern of the individual and based in part on this comment and another comment described below has amended the section to read that a history of a medical condition may result in medical disqualification only if the condition is itself disqualifying, “recurrence of the condition is a reasonable medical probability, and the duties of the position are such that a recurrence of the condition would pose a significant risk to the health and safety of the applicant or employee or others that cannot be eliminated or reduced by reasonable accommodation or any other agency efforts to mitigate risk.” This revised language is clearer and consistent with the ADA, as amended, and applied through the Rehabilitation Act.

One agency recommended referring to “significant risk” of substantial harm in § 339.206 instead of “reasonable probability of substantial harm” because the latter is less exacting than the ADA and Rehabilitation Act standard of “significant risk” of substantial harm. OPM disagrees with the commenter’s view as to which term is “less exacting.” OPM does agree, however, that, in order to avoid any ambiguity, § 339.206 should be consistent with the statutory language. Therefore, as discussed above, this provision has been revised.

One agency recommended changing the term “candidate” to “applicant or employee” for clarity and consistency. OPM agrees that using the phrase “applicant or employee” is clearer and should be used consistently throughout this regulation. OPM has amended § 339.206 accordingly.

One agency recommended adding an example of a disqualifying condition to § 339.206 for clarification purposes. OPM has not accepted this comment. Medical disqualifications must be made on a case-by-case, fact-based, individualized assessment prior to reaching a conclusion as to the applicant's or employee's qualifications for a particular position.

One agency recommended inclusion of a reference in § 339.206 to recent behavioral or mental health history as a subset for disqualification. The agency requested consideration of language that an individual's previous "mental health treatment shall not be a basis for a psychiatric examination or psychological assessment unless the individual has been hospitalized within the past seven years for a mental health related condition." The agency rationale was that this seems to be an area of potential employee medical disqualifiers that does not neatly fit into a category (i.e. medical standard) that applies to positions with and without medical standards and physical requirements, and where an employee may pose substantial harm to himself and others. OPM is not adopting this approach to amending § 339.206. With respect to mental health histories, mental health conditions are evaluated to determine whether they are temporary, transient, transitional or self-limiting, as opposed to mental health difficulties that are chronic and on-going with no perceivable end in sight. While behavioral traits, personality characteristics, temperaments, attitudes and biases, may be linked to mental health problems, they in and of themselves would not normally rise to a level supporting a clinical diagnosis of a mental condition. See, e.g. *Diagnostic and Statistical Manual of Mental Disorders(DSM)* published by the American Psychiatric Association. Moreover, medical disqualifications based on mental health must be made on a case-by-case, fact-based, individualized

assessment prior to reaching a conclusion as to the applicant's or employee's qualifications for a particular position.

Subpart C

Background – Subpart C

Subpart C governs medical examinations. The proposed subpart C incorporated minor corrections in references, spelling and punctuation; added wording to clarify examinations the agency may require and provide examples of “benefits” in § 339.304; and added wording to clarify applicability of this regulation to excepted service positions when requesting a medical disqualification or a passover of a preference eligible in § 339.306.

In response to the comments on the proposed rule which are discussed below, we have revised subpart C to –

(1) Add language to § 339.301(b) regarding return to work from medically based absence in addition to reemployment from medically based absence.

(2) Revise the language in § 339.301(b)(1) to be consistent with the ADA prohibition against employers making disability inquiries or conducting medical examinations of job applicants' prior to an offer of employment.

(3) Clarify § 339.301(b)(3) to state an agency may require an individual to report for a medical examination “whenever the agency has a reasonable belief, based on objective evidence, that there is a question about an employee's continued capacity to meet the medical standards or physical requirements of a position.”

(4) Add language to § 339.301(c) relative to the Federal Employees' Compensation Act.

(5) Include language in § 339.301(e) addressing vulnerability of business operation and information systems to potential threats.

(6) Add clarifying language to § 339.301(e) relative to the licensing of physicians conducting psychiatric examinations.

(7) Add language to § 339.303(a) that an agency may establish timeframes, in writing, for submission of medical documentation, with allowances for reasonable extensions dependent on the nature of the condition and the availability of qualified physicians.

(8) Add the term “applicant” to § 339.303(a).

(9) Revise § 339.303(a) and (b) to add the requirement that an applicant or employee must furnish and authorize the release of medical documentation generated as a result of a medical examination and relevant medical documentation from his or her private physician, to authorized agency representatives.

(10) Revise § 339.303(a)(2) in relation to above to further state an employee may be subject to adverse action if he or she fails or refuses to authorize release of the above referenced medical documentation.

(11) Revise the language in § 339.303(b) to address situations where medical documentation from the applicant or employee’s private physician or practitioner is contradictory to, and cannot be resolved by, documentation from the examining physician or the agency medical review officer.

(12) In § 339.304, clarify when an agency is financially responsible, versus when an applicant or employee is financially responsible, for the cost of medical examinations, testing and related documentation.

(13) Removed references to “physical fitness standards or testing” from throughout this section in light of OPM’s decision, as discussed earlier, to withdraw these terms for further consideration.

Discussion of Comments – Subpart C

Section 339.301

An individual proposed adding “appropriate for the purpose of obtaining and recording baseline medical information” following the term “pre-employment medical examination” in § 339.301(a). OPM did not include this language because the section is intended only to define when a routine pre-employment examination is appropriate, which is following a tentative offer of employment and only for a position with specific medical standards, physical requirements, or covered by a medical evaluation program.

An individual proposed adding language in § 339.301(b) concerning the return to work from medically based absence. The rationale provided by the individual was that if there is reason to suspect that a medical condition has caused or contributed to the failure of an employee to perform the essential functions of the position in an acceptable manner or meet the conditions of employment, including a demand for human reliability, then a complete medical evaluation may be appropriate. OPM agrees with the concerns noted by the commenter and has amended the section to include language to make clear that this provision includes employees returning to work from medically based absences.

One agency proposed revising the language in § 339.301(b)(1) to be consistent with the ADA prohibition against employers making disability inquiries or conducting medical examinations of job applicants’ prior to an offer of employment. OPM agrees that revising the language would eliminate any confusion as to when disability inquiries

can be made. Consequently, OPM has accepted the proposed language and amended the section to read “subsequent to a tentative offer of employment or reemployment,” rather than the previous language of “prior to appointment or selection,” to be more consistent with the Rehabilitation Act and ADA prohibition of disability inquiries or medical examinations prior to a tentative job offer.

One agency proposed revising § 339.301(b)(2) to state that regularly recurring examinations are to be limited to persons in positions affecting public safety. The agency rationale was that the language in the proposed regulation was overbroad in allowing an employer to conduct medical examinations of current employees “on a regularly recurring, periodic basis after appointment.” The agency stated that the standard that the examination be job related and consistent with business necessity applies to all employer efforts to obtain medical information from employees. Further, the agency noted that there is EEOC guidance stating that any such regularly occurring examinations should be limited to persons in positions affecting public safety. OPM did not accept this comment. As noted in the provision, this section applies to positions that have “medical standards and/or physical requirements” and must be applied in a manner consistent with disability laws. Thus, OPM intends this provision to apply to all positions that may require medical examinations due to the nature of the work and/or the vulnerability of business operation and information systems to potential threats. This includes, but is not limited to, public safety positions.

One agency proposed revising § 339.301(b)(3), which, in the proposed rule, stated that an agency may require an individual to report for a medical examination “whenever there is a direct question about an employee’s continued capacity to meet the physical or

medical or physical fitness requirements of a position.” The agency proposed clarifying language to define the above medical and physical components. Another agency proposed revising § 339.301(b)(3) to replace “direct question” with “reasonable belief based on objective evidence.” The agency’s rationale was that the section intended to specify the circumstances under which an agency may require an employee to undergo a medical or psychiatric examination. The agency noted that the basic rule establishing when an employee examination may be required is that the requirement must be job related and consistent with business necessity. The agency proposed revising the language to read “whenever the agency has a reasonable belief based on objective evidence, that there is a question about an employee’s capacity to meet the physical or medical or physical fitness requirements of a position.” OPM agrees with both comments that further clarification was appropriate and amended the section. The relevant clause now reads “whenever the agency has a reasonable belief, based on objective evidence, that there is a question about an employee’s continued capacity to meet the medical standards and/or physical requirements.” An example of where this section could be triggered includes a situation where medical opinions submitted by an applicant or employee are at variance with one another or there is insufficient medical documentation.

An individual proposed clarifying the language in § 339.301(c) to state that an agency may require an employee who has applied for or is receiving continuation of pay or compensation as a result of an injury or disease “covered under the provisions of the Federal Employee’s Compensation Act (FECA)” to report for an examination to determine medical limitations that may affect placement decisions. OPM agrees and has amended the section by inserting the specific reference to FECA in order to provide more

definitive guidance. An examination under FECA is ordered for compensation purposes. An examination under 5 CFR 339 is ordered to determine medical limitation that may affect job placement decisions.

One agency proposed expanding § 339.301(d) to include the term “physical fitness standards or testing” to the existing terms “medical standards” or “physical requirements” for clarification purposes. OPM declines to adopt this comment. As noted previously, OPM has withdrawn these terms from the final rule for further consideration.

One agency proposed revising § 339.301(e)(1) to address when an agency may require an employee to undergo a medical or psychiatric examination. The agency states that the basic rule is that an examination requirement for employees must be job related and consistent with business necessity. The agency recommended revising the section to read “an agency may order a psychiatric examination (including a psychological assessment) only when it has a reasonable belief, based on objective evidence, that the employee appears unable to meet the physical or mental or physical fitness requirements of a position.” OPM did not accept inclusion of the proposed additional language. The existing provision limits a psychiatric examination or psychological assessment to circumstances where there is no physical-based reason for the employment-related difficulty or where such examination/assessment is an articulated condition of employment.

One agency proposed adding language relative to potential threats to Federal Government equipment and systems. The rationale provided by the agency was in relation to situations where an individual may not be a threat to individuals, but because of the nature of the position, could be a threat to agency equipment and systems. OPM

agrees that threats to infrastructure by individuals is within the scope of these regulations, and has amended § 339.301(e) to include a reference to vulnerability of business operation and information systems to potential threats to enhance understanding of the need to safeguard agency information and security systems.

An individual proposed that § 339.301(e)(1)(i) be revised to state that an agency may order a psychiatric examination including a psychological assessment only when “the physician who has performed a current general medical examination that the agency has the authority to order under this section identifies a basis upon which a psychiatric examination is medically warranted.” The individual also requested clarifying § 339.301(e)(2) relative to the licensing of physicians conducting psychiatric examinations to state that a psychiatric examination or psychological assessment must be conducted in accordance with accepted professional standards “by a licensed physician certified in psychiatry by the American Board of Psychiatry and Neurology.” The rationale of the commenter was that, if a medical qualification standard for a position includes criteria for mental status and function, and there is a reason to suspect that a medical condition has caused or contributed to failure of the employee to perform the essential functions of the position, including a demand for human reliability, then a complete medical evaluation may be appropriate. The commenter further explained that such an evaluation would begin with a complete medical examination by, most likely, a specialist in internal medicine who would determine what additional specialty evaluations are medically warranted, including a psychiatric examination. OPM declines to adopt the comment related to § 339.301(e)(1)(i). OPM believes the existing language in this section clearly states when an agency may order a psychiatric examination or

psychological assessment. OPM did modify the language in § 339.301(e)(2), and included references to clarify the licensing of physicians relative to psychiatric examinations. The language now states that the examination must be conducted by a licensed physician “certified in psychiatry by the American Board of Psychiatry and Neurology or the American Osteopathic Board of Psychiatry and Neurology,” “or by a licensed psychologist or clinical neuropsychologist.”

One agency proposed amending § 339.301(e) to provide that an individual’s previous mental health treatment will not be a basis for a psychiatric examination or psychological assessment unless the individual has been hospitalized for a mental health related condition within the past seven years. The agency stated that there “seems to be one area of potential employee medical disqualifiers that doesn’t neatly ‘fit’ into a category . . . that applies to positions with and without medical standards and physical requirements, and where an employee may pose ‘substantial harm’ to themselves and others” OPM is not adopting this approach to amending § 339.301(e). With respect to mental health histories, mental health conditions are evaluated to determine whether they are temporary, transient, transitional or self-limiting, as opposed to mental health difficulties that are chronic and on-going with no perceivable end in sight. While behavioral traits, personality characteristics, temperaments, attitudes and biases, may be linked to mental health problems, they in and of themselves would not normally rise to a level supporting a clinical diagnosis of a mental health condition. See, e.g. *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*; American Psychiatric Association, 2013).

Section 339.302

An individual recommended deleting the authority to offer examinations covered in § 339.302 and retain only the section on authority to order an examination. The commenter believed there are no circumstances under which an employer needs medical information to manage an employee's duty or employment status unless there are already medical qualification standards in place for the position. OPM has not accepted this comment. This regulation clearly distinguishes situations wherein an agency can order or offer an examination.

Section 339.303

One agency stated that, in § 339.303(a) of the proposed rule, a refusal or failure to report for a medical examination ordered by the agency could result in the agency determining that the employee is not qualified for the position. The agency proposed adding the term "applicant" along with "employee" to § 339.303(a) as this section also applies to applicants. OPM agrees and has amended this section on medical examination procedures to make clear the application of this rule to both applicants and employees.

One agency recommended language be added to § 339.303 that states that employees must be given a reasonable amount of time to provide medical documentation, based upon the nature of the condition and the accessibility of qualified individuals. The agency rationale is that this change would afford a level of protection to the employee and takes into consideration accessibility and availability of appropriate healthcare providers. OPM agrees with the needed clarification and has amended § 339.303(a) to state that "an agency may establish timeframes, in writing, for submission of medical documentation, with allowances for reasonable extensions."

One agency proposed adding language to § 339.303 requiring an applicant or employee to provide medical documentation generated as a result of a medical examination. The agency questioned whether an agency could find that an applicant or employee is not qualified for the position if the individual reported for the examination, but refused to authorize release of any resulting medical documentation to the agency. The agency also recommended adding the requirement that an individual must furnish and authorize release of relevant medical documentation from his or her private physician to authorized agency representatives. OPM agrees there is a need for clarification and has amended § 339.303 to state that refusal or failure by an applicant or employee to authorize release of any results from an agency ordered or offered medical examination, or the results of any previous medical treatments or evaluations relative to the identified issue, to authorized agency representatives, including the agency physician or independent medical specialists, may be a basis for disqualification for the position by the hiring agency. In addition, the employee may be subject to adverse action. Relevant medical documentation is needed in order for agency representatives, such as the agency physician or medical review officer, to render an informed medical and/or management decision relative to the health and safety of the applicant, employee, coworkers, and the public they serve.

One agency requested clarifying § 339.303(b) to address situations where medical documentation from the applicant or employee's private physician or practitioner is contradictory to, and cannot be resolved by, the examining physician or the agency medical review officer. OPM agrees and has amended the section to state that in situations where medical documentation of the private physician or practitioner is

contradictory and cannot be resolved by the examining physician or the agency medical review officer, the agency may, at its option, pursue a third opinion from an appropriate specialist (e.g. independent medical specialist). This enables the hiring agency to make an informed management decision relative to the medical eligibility determination of an applicant or employee.

Section 339.304

Two agencies proposed revising § 339.304 to clarify circumstances where an agency is financially responsible, versus when the applicant or employee is financially responsible, for the cost of medical examinations, testing and related documentation, noting that this issue has caused confusion in the past. OPM agrees that this can be a confusing issue for managers, applicants and employees. OPM has amended the section to clearly state when an agency is responsible, and when an applicant or employee is responsible, for payment of medical examinations, related testing, and documentation.

Section 339.305

An individual proposed revising § 339.305 relative to workers compensation issues. Specifically, the individual stated the section was confusing. The individual also stated he did not understand the purpose of the communication and information interchange with the Office of Workers Compensation (OWCP) and requested to discuss the objectives further. OPM has not accepted this comment or request. This section provides that agencies must forward to OWCP copies of medical documentation and examinations of employees who are receiving or have applied for injury compensation benefits, including continuation of pay. The results of these employee evaluations are significant to the agency and to OWCP in that this information and any related periodic

updates are critical to determining medical limitations that may affect job placement decisions.

The final part 339 is published in its entirety for the convenience of the reader.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

Regulatory Flexibility Act (5 U.S.C. 601, et seq.)

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because it affects only Federal agencies and employees.

E.O. 13132, Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local or tribal governments of more than \$100 million annually. Thus, no written assessment of unfunded mandates is required.

Paperwork Reduction Act

These proposed regulations impose no new reporting or recordkeeping requirements subject to the Paperwork Reduction Act of 1995.

List of Subjects in 5 CFR Part 339

Equal employment opportunity, Government employees, Health, Individuals with disabilities.

U.S. Office of Personnel Management.

Beth F. Colbert,
Director.

Accordingly, OPM is revising 5 CFR part 339 to read as follows:

PART 339—MEDICAL QUALIFICATION DETERMINATIONS

1. Revise part 339 to read as follows:

Subpart A—General

Sec.

339.101 Coverage.

339.102 Purpose and effect.

339.103 Compliance with disability laws.

339.104 Definitions.

Subpart B—Medical Standards, Physical Requirements, and Medical Evaluation

Programs

339.201 Disqualification by OPM.

339.202 Medical standards.

339.203 Physical requirements

339.204 Waiver of standards and requirements and medical review boards.

339.205 Medical evaluation programs.

339.206 Disqualification on the basis of medical history.

Subpart C—Medical Examinations

339.301 Authority to require an examination.

339.302 Authority to offer examinations.

339.303 Medical examination procedures.

339.304 Payment for examination.

339.305 Records and reports.

339.306 Processing medical eligibility determinations.

Authority: 5 U.S.C. 1104(a), 1302(a), 3301, 3302, 3304, 3312, 3318, 3320, 3504, 5112;

39 U.S.C. 1005, Executive Order 10577, Rule II, codified as amended in 5 CFR 2.1(a).

Subpart A—General

§ 339.101 Coverage.

This part applies to –

(a) Applicants for and employees in competitive service positions; and

(b) Applicants for and employees in positions excepted from the competitive service when medical issues arise in connection with an OPM regulation that governs a particular personnel action, such as removal of a preference eligible employee in the excepted service under part 752.

§ 339.102 Purpose and effect.

(a) This part defines the circumstances under which OPM permits medical documentation to be required and examinations and/or evaluations conducted to determine the nature of a medical condition that affects safe and efficient performance.

(b) Personnel decisions based wholly or in part on the review of medical documentation, as defined below, and the results of medical examinations and evaluations must be made in accordance with appropriate sections of this part.

(c) Failure to meet medical (which may include psychological) standards and/or physical requirements established under this part means that the applicant or employee is not qualified for the position, unless reasonable accommodation or a waiver is appropriate, in accordance with §§ 339.103 and 339.204. An employee's refusal to be examined or provide medical documentation, as defined below, in accordance with a proper agency order authorized under this part, constitutes a basis for appropriate disciplinary or adverse action. After a tentative job offer of employment conditioned on completion of a medical examination, an applicant's refusal to be examined or provide medical documentation, as defined below, may result in the applicant's removal from further consideration for the position.

§ 339.103 Compliance with disability laws.

(a) The Americans with Disabilities Act (ADA) of 1990, as amended by the Amendments Act of 2008 (collectively the ADA), establishes prohibitions against discrimination and the requirements for reasonable accommodation that apply to the Federal Government through the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791(f). Consequently, actions under this part must comply with the non-discrimination

provisions of the Rehabilitation Act, the non-discrimination provisions of the ADA, and their implementing regulations.

(b) Use of the term “qualified” in this part must comply with the Rehabilitation Act, as amended, and the ADA, as amended. Specifically, a “qualified individual with a disability” means that the individual possess the requisite skill, experience, education, and other job-related requirements of an employment position that the individual holds or seeks, and can perform the essential functions of the position with or without reasonable accommodation.

§ 339.104 Definitions.

For purposes of this part—

Accommodation means reasonable accommodation as described in the ADA.

Arduous or hazardous positions means positions that are dangerous or physically demanding to such a degree that an employee's medical and/or physical condition is necessarily an important consideration in determining ability to perform safely and efficiently.

Medical condition means a health impairment which results from birth, injury or disease, including mental disorder.

Medical documentation or documentation of a medical condition means a copy of a dated, written and signed statement, or a dated copy of actual medical office or hospital records, from a licensed physician or other licensed health practitioner, as these terms are defined below, that contains necessary and relevant information to enable the agency to make an employment decision. To be acceptable, the diagnosis or clinical impression must be justified according to established diagnostic criteria and the conclusions and

recommendations must be consistent with generally accepted professional standards. The determination that the diagnosis meets these criteria is made by or in coordination with a licensed physician or, if appropriate, a practitioner of the same discipline as the one who issued the documentation. An acceptable diagnosis must include the information identified by the agency as necessary and relevant to its employment decision. This information may include, but is not limited to, the following:

(1) The history of the medical condition(s), including references to findings from previous examinations, treatment, and responses to treatment;

(2) Clinical findings from the most recent medical evaluation, including any of the following: findings of physical examination; results of laboratory tests; X-rays; EKGs and/or other special evaluations or diagnostic procedures; and, in the case of psychiatric examination or psychological assessment, the findings of a mental status examination and/or the results of psychological tests, if appropriate;

(3) Diagnosis, including the current clinical status;

(4) Prognosis, including plans for future treatment and an estimate of the expected date of full or partial recovery;

(5) An explanation of the impact of the medical condition(s) on overall health and activities, including the basis for any conclusion as to whether restrictions or accommodations are necessary and, if determined to be necessary, an explanation supporting that determination; and, either of the following:

(6) An explanation of the medical basis for any conclusion that indicates the likelihood that the applicant or employee will suffer sudden incapacitation or subtle

incapacitation by carrying out, with or without accommodation, the tasks or duties of a specific position; or

(7) Narrative explanation of the medical basis for any conclusion that the medical condition has or has not become static or well-stabilized and the likelihood that the applicant or employee may experience sudden incapacitation or subtle incapacitation as a result of the medical condition. In this context, “static or well-stabilized” medical condition means a medical condition which is not likely to change as a consequence of the natural progression of the condition, such as a result of the normal aging process, or in response to the work environment or the work itself.

Medical evaluation program means a program of recurring medical examinations or tests established by written agency policy or directive, to safeguard the health of employees whose work may subject them or others to significant health or safety risks due to occupational or environmental exposure or demands. For example, an agency policy or directive may include medical clearances and medical surveillance to test for occupational exposure to biological, chemical, and/or radiological hazardous agents, occupational diseases, and occupational risk.

Medical restriction is a medical determination that an applicant or employee is limited, or prevented from performing a certain type or duration of work or activity (e.g., standing and/or ability to concentrate) or motion (e.g., bending, lifting, pulling), because of a particular medical condition or physical limitation. The purpose of a medical restriction is to try to prevent aggravation, acceleration, exacerbation, or permanent worsening of the medical condition or physical limitation.

Medical standard is a written description of the minimum medical requirements necessary for an applicant or employee to perform essential job duties as a condition of employment.

Medical surveillance is the on-going systematic collection and analysis of health data to improve and protect the health and safety of employees in the workplace, and to monitor for health trends both in individual workers and in population of workers. Medical surveillance can include the tracking of occupational injuries, illnesses, hazards, and exposures, as well as laboratory and examination-based medical data, in order to identify findings that could provide an early warning of, or indicate the risk for, an occupational disease. Medical surveillance also is part of compliance with those Federal and state regulations that require medical monitoring when employees use or are exposed to certain hazardous materials.

Physical requirement is a written description of job-related physical abilities that are essential for performance of the duties of a specific position.

Physician means a licensed Doctor of Medicine or Doctor of Osteopathy, or a physician who is serving on active duty in the uniformed services and is designated by the uniformed service to conduct examinations under this part.

Practitioner means a person providing health services who is not a medical doctor, but who is certified by a national organization, licensed by a State, and/or registered as a health professional to provide the health service in question.

Subtle incapacitation means gradual, initially imperceptible impairment of physical or mental function, whether reversible or not, which is likely to result in safety,

performance and/or conduct issues that may undermine the agency's commitment to maintaining a safe working environment for all employees and others.

Sudden incapacitation means abrupt onset of loss of control of physical or mental function(s), whether reversible or not, which is likely to result in safety, performance or conduct issues that may undermine the agency's commitment to maintaining a safe working environment for all employees and others.

Subpart B—Medical Standards, Physical Requirements, and Medical Evaluation Programs

§ 339.201 Disqualification by OPM.

OPM must review and decide upon an agency's request to pass over a candidate, who is a preference eligible, on medical grounds pursuant to § 339.306. OPM may deny an applicant employment by reason of physical or mental unfitness for the position for which he or she has applied. An OPM decision under this section or § 339.306 is separate and distinct from a determination of disability pursuant to statutory provisions for disability retirement under the Civil Service Retirement System and the Federal Employees' Retirement System.

§ 339.202 Medical standards.

OPM may establish and/or approve medical standards for a Governmentwide occupation (i.e., an occupation common to more than one agency) or approve revisions to its established medical standards. An individual agency may establish medical standards for positions that predominate in that agency (i.e., where the agency has 50 percent or more of the positions in a particular occupation). Such standards must be justified on the basis that the duties of the positions are arduous or hazardous, or require a certain level of

health status for successful performance when the nature of the positions involves a high degree of responsibility toward the public or sensitive national security concerns. The rationale for establishing the standard must be documented and supported by a study(ies) or evaluation(s) establishing the medical standard is job-related to the occupation(s). Medical standards established by agencies must be approved by OPM prior to implementation. Standards established by OPM or an agency must be:

- (a) Established by written directive and uniformly applied, and
- (b) Directly related to the actual performance and requirements necessary for the performance of the duties of the position.

§ 339.203 Physical requirements.

(a) An agency may establish physical requirements for individual positions without OPM approval when such requirements are considered essential for performance of the duties of a specific position. Physical requirements must be clearly supported by the actual duties of the position, documented in the position description, and supported by a study(ies) or evaluation(s) establishing physical requirement(s) is job-related to the occupation(s).

(b) An applicant or employee may not be disqualified arbitrarily on the basis of physical requirements or other criteria that do not relate specifically to performance of the duties of a specific position.

§ 339.204 Waiver of standards and requirements and medical review boards.

(a) An agency must waive a medical standard or physical requirement established under this part when an applicant or employee, unable to meet that standard or requirement, presents sufficient evidence that the applicant or employee, with or without

reasonable accommodation, can perform the essential duties of the position without endangering the health and safety of the applicant or employee or others. Additional information obtained by the agency may be considered in determining whether a waiver is appropriate. An agency may establish timeframes, in writing, for submission of initial or additional information for consideration, with allowance for reasonable extensions.

(b) Agencies may, but are not required to, establish medical review boards to help the agency provide a case-by-case, fact-based, individualized assessment whenever an individual is found to not meet agency medical standards or physical requirements. An agency may also use a medical review board as a forum for a higher level of review within the agency when medical questions or issues arise. If established, the Board is expected to recommend administrative actions that are consistent with applicable law, as well as applicable and current medical practice standards of care, through the combined expertise of its members.

(c) The use and composition of a medical review board will be determined by the agency. Upon request, an agency will provide to OPM information regarding the composition and use of medical review boards. OPM may issue guidance from time to time as to best practices with respect to the composition and use of such boards.

§ 339.205 Medical evaluation programs.

Agencies may establish periodic medical examinations, medical surveillance, or immunization programs by written policies or directives to safeguard the health of employees whose work may expose them or others to significant health or safety risks due to occupational or environmental exposure or demands. This may include the requirement to undergo vaccination with products approved by the Food and Drug

Administration (e.g., for national security reasons or in order to fulfill the duties of a position designated as national security sensitive). The need for a medical evaluation program must be clearly supported by the nature of the work. The specific positions covered must be identified and the applicants or employees notified in writing of the reasons for including the positions in the program.

§ 339.206 Disqualification on the basis of medical history.

An employee or applicant may not be disqualified for any position solely on the basis of medical history. For positions subject to medical standards and/or physical requirements, and for positions under medical evaluation programs, a history of a particular medical condition may result in medical disqualification only if the condition at issue is itself disqualifying, recurrence of the condition is based on reasonable medical judgment, and the duties of the position are such that a recurrence of the condition would pose a significant risk of substantial harm to the health and safety of the applicant or employee or others that cannot be eliminated or reduced by reasonable accommodation or any other agency efforts to mitigate risk.

Subpart C—Medical Examinations

§ 339.301 Authority to require an examination.

(a) A routine pre-employment medical examination is appropriate only for a position with specific medical standards and/or physical requirements, or that is covered by a medical evaluation program established under this part.

(b) Subject to § 339.103, an agency may require an applicant or employee who has applied for or occupies a position that has medical standards and/or physical

requirements, or is covered by a medical evaluation program established under this part, to report for a medical examination:

(1) Subsequent to a tentative offer of employment or reemployment (including return to work from medically based absence on the basis of a medical condition);

(2) On a regularly recurring, periodic basis after appointment in accordance with § 339.205; or

(3) Whenever the agency has a reasonable belief, based on objective evidence, that there is a question about an employee's continued capacity to meet the medical standards or physical requirements of a position.

(c) An agency may require an employee who has applied for or is receiving continuation of pay or compensation as a result of an injury or disease covered under the provisions of the Federal Employees' Compensation Act to report for an examination to determine medical limitations that may affect job placement decisions.

(d) An agency may require an employee who is released from his or her competitive level in a reduction in force under part 351 of this chapter to undergo a relevant medical evaluation if the position to which the employee has assignment rights has medical standards and/or physical requirements, that are different from those required in the employee's current position.

(e)(1) An agency may order a psychiatric examination (including a psychological assessment) only when:

(i) The result of a current general medical examination that the agency has the authority to order under this section indicates no physical explanation for behavior or actions that may affect the safe and efficient performance of the applicant or employee,

the safety of others, and/or the vulnerability of business operation and information systems to potential threats, or

(ii) A psychiatric examination or psychological assessment is part of the medical standards for a position having medical standards or required under a medical evaluation program established under this part.

(2) A psychiatric examination or psychological assessment authorized under paragraphs (e)(1) of this section must be conducted in accordance with accepted professional standards by a licensed physician certified in psychiatry by the American Board of Psychiatry and Neurology or the American Osteopathic Board of Psychiatry and Neurology, or by a licensed psychologist or clinical neuropsychologist, and may only be used to make inquiry into a person's mental fitness as it directly relates to successfully performing the duties of the position without significant risk to the applicant or employee or others, and/or to the vulnerability of business operation and information systems to potential threats.

§ 339.302 Authority to offer examinations.

An agency may, at its option, offer a medical examination (including a psychiatric examination or psychological assessment) in situations where the agency needs additional medical documentation to make an informed management decision. This may include situations where an employee requests, for medical reasons, a change in duty status, assignment, working conditions, or any other different treatment (including reasonable accommodation or return to work on the basis of full or partial recovery from a medical condition) or where the employee has a performance or conduct problem that may require agency action. Reasons for offering an examination must be documented. When an offer

of an examination has been made by an agency and the offer has been accepted by the applicant or employee, the examination must be carried out in accordance with the authorities cited in §339.103. The results of the examination must also be used in accordance with the authorities cited in §339.103.

§ 339.303 Medical examination procedures.

(a) When an agency requires or offers a medical or psychiatric examination or psychological assessment under this subpart, it must inform the applicant or employee in writing of its reasons for doing so, the consequences of failure to cooperate, and the right to submit medical information from his or her private physician or practitioner. A single written notification is sufficient to cover a series of regularly recurring or periodic examinations ordered under this subpart. An agency may establish timeframes, in writing, for submission of medical documentation, with allowances for reasonable extensions.

(1) Refusal or failure to report for a medical examination ordered by the agency may be a basis for a determination that the applicant or employee is not qualified for the position. In addition, an employee may be subject to adverse action.

(2) Refusal or failure on the part of an applicant or the employee to authorize release of any results from an agency ordered or offered medical examination issued in accordance with §§ 339.301 or 339.302, or the results of any previous medical treatments or evaluations relative to the identified medical issue, to authorized agency representatives, including the agency physician or medical review officer and/or independent medical specialists, may be a basis for disqualification for the position by the hiring agency. In addition, an employee may be subject to adverse action.

(b) The agency designates the examining physician or other appropriate practitioner, but must offer the applicant or employee an opportunity to submit medical documentation from his or her private physician or practitioner for consideration in the medical examination process. The agency must review and consider all such documentation supplied by the private physician or practitioner. The applicant or employee must authorize release of this documentation to all authorized agency representatives. In situations where the medical documentation of the applicant or employee's private physician or practitioner is contradictory and cannot be resolved by the examining physician or the agency physician or medical review officer, the agency may, at its option, pursue another opinion from an appropriate specialist at agency expense. An applicant or employee also may, at his or her option, pursue another opinion from an appropriate specialist at his or her expense in the event of conflicting or contradictory medical documentation.

§ 339.304 Payment for examination.

(a) An agency must pay for all medical and/or psychological and/or psychiatric examinations required or offered by the agency under this subpart, whether conducted by the agency's physician or medical review officer, an independent medical evaluation specialist (e.g., occupational audiologist) identified by the agency, or a licensed physician or practitioner chosen by the applicant or employee. This includes special evaluations or diagnostic procedures required by an agency.

(b) Following conclusion of the initial medical, psychological, and/or psychiatric examination, the agency physician or medical review officer will render a final medical determination. In certain final medical ineligibility determinations, the agency physician

or medical review officer may reference supplemental medical examination, testing or documentation, which the applicant or employee may submit to the agency for consideration and further review relative to potential medical eligibility. Under these circumstances, the applicant or employee is responsible for payment of this further examination, testing and documentation.

(c) An applicant or employee must pay to obtain all relevant medical documentation from his or her private licensed physician or required practitioners in instances where no medical examination is required or offered by the agency, but where the agency requests the applicant or employee to provide medical documentation relative to an identified medical or physical condition in question or where the agency needs medical documentation to render an informed management decision.

(d) An applicant or employee must pay for a medical examination conducted by his or her private licensed physician or practitioner where the purpose of the examination is to secure a change sought by an applicant (e.g., new employment) or by an employee (e.g., a request for change in duty status, reasonable accommodation, and/or job modification).

§ 339.305 Records and reports.

(a) Agencies will receive and maintain all medical documentation and records of examinations obtained under this part in accordance with part 293, subpart E, of this chapter.

(b) The report of an examination conducted under this subpart must be made available to the applicant or employee under the provisions of part 297 of this chapter.

(c) Agencies must forward to the Office of Workers' Compensation Programs (OWCP), Employment Standards Administration, Department of Labor, a copy of all medical documentation and reports of examinations of employees who are receiving or have applied for injury compensation benefits under 5 U.S.C. chapter 81, including continuation of pay. The agency must also report to OWCP the failure of such employees to report for examinations that the agency orders under this subpart. When the employee has applied for disability retirement, this information and any medical documentation or reports of examination must be forwarded to OPM.

§ 339.306 Processing medical eligibility determinations.

(a) In accordance with the provisions of this part, agencies are authorized to medically disqualify a nonpreference eligible. A nonpreference eligible so disqualified has a right to a higher level review of the determination within the agency.

(b) OPM must approve the sufficiency of the agency's reasons to:

(1) Medically disqualify or pass over a preference eligible in order to select a nonpreference eligible for:

(i) A competitive service position under part 332 of this chapter; or

(ii) An excepted service position in the executive branch subject to title 5, U.S.

Code;

(2) Medically disqualify or pass over a 30 percent or more compensably disabled veteran for a position in the U.S. Postal Service in favor of a nonpreference eligible;

(3) Medically disqualify a 30 percent or more compensably disabled veteran for assignment to another position in a reduction in force under § 351.702(d) of this chapter;

or

(4) Medically disqualify a 30 percent or more disabled veteran for noncompetitive appointment, for example, under § 316.302(b)(4) of this chapter.

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