

# Proposed Rules

Federal Register

Vol. 72, No. 247

Thursday, December 27, 2007

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR PART 339

RIN 3206-AL14

#### Medical Qualification Determinations

**AGENCY:** Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Personnel Management (OPM) is proposing a revision of its regulations regarding medical qualification determinations. The proposed revisions add four authorities, separate and move two definitions, add three definitions, clarify coverage and applicability, update to reflect current references and language, and address the need for medical testing/examination or medical documentation of an employee whose job has no physical standards or physical requirements.

**DATES:** We will consider comments received on or before February 25, 2008.

**ADDRESSES:** Send, deliver, or fax comments to Mark Doboga, Deputy Associate Director, Center for Talent and Capacity Policy, Strategic Human Resources Policy, U.S. Office of Personnel Management, Room 6551, 1900 E Street, NW., Washington, DC 20415-9700; e-mail [employ@opm.gov](mailto:employ@opm.gov); FAX: (202) 606-2329. Comments may also be sent through the Federal eRulemaking Portal at <http://www.regulations.gov>. All submissions received through the Portal must include the agency name and docket number or Regulation Identifier Number (RIN) for this rulemaking.

**FOR FURTHER INFORMATION CONTACT:** J. C. Phillip Spottswood, J.D., M.P.H., by telephone at (202) 606-1389, by TTY at (202) 418-3134; by fax at (202) 606-0864; or by e-mail at [phil.spottswood@opm.gov](mailto:phil.spottswood@opm.gov).

**SUPPLEMENTARY INFORMATION:** The Office of Personnel Management (OPM) is issuing proposed revised regulations on medical qualification determinations.

Details of the proposed revisions are discussed under the applicable subpart.

OPM has replaced the verb “shall” with “must” in this part for added clarity and readability. OPM intends that any provisions in this part using the verb “must” has the same meaning and effect as previous provisions in this part using “shall.”

The proposed revised regulations add 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.

#### Subpart A

Subpart A covers General information. The proposed subpart A adds wording to clarify applicability of this regulation to excepted service positions; updates references to the Rehabilitation Act of 1973, as amended, and to portions of the Americans with Disabilities Act of 1992 that are applicable to the Federal government through the Rehabilitation Act; adds examples to the definition in § 339.104 for “medical evaluation program,” separates and moves definitions for “subtle incapacitation” and “sudden incapacitation;” and adds definitions for “medical restriction,” “physical fitness standard,” and “physical fitness test.”

#### Subpart B

Subpart B governs Medical Standards, Physical Requirements, and Medical Evaluation Programs. The title of proposed subpart B is changed to clarify application of this part to physical requirements and medical evaluation programs. The proposed subpart B incorporates physical fitness standards into § 339.203, and adds language to clarify application of this part to arbitrary disqualification; adds “medical surveillance” to policies agencies may establish to safeguard employee health; provides an example of an immunization program and changes “incumbents” to “employees” to clarify § 339.205.

#### Subpart C

Subpart C governs Medical Examinations. The proposed subpart C incorporates minor corrections in

references, spelling and punctuation; adds wording to clarify examinations the agency may require and examples of “benefits” in § 339.304; and adds wording to clarify applicability of this regulation to excepted service positions when requesting a medical disqualification or a pass over of a preference eligible in § 339.306.

For the convenience of the reader, the proposed part 339 is published in its entirety.

#### 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 employees.

#### List of Subjects in 5 CFR Part 339

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

U.S. Office of Personnel Management.

**Linda M. Springer,**

*Director.*

Accordingly, OPM proposes to revise 5 CFR part 339 to read as follows:

#### PART 339—MEDICAL QUALIFICATION DETERMINATIONS

##### Subpart A—General

Sec.  
339.101 Coverage.  
339.102 Purpose and effect.  
339.103 Compliance with disability laws and regulations.  
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 and/or physical fitness requirements.  
339.204 Waiver of standards and requirements.  
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 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 all applicants for and employees in competitive service positions; and to applicants for and employees in positions excepted from the competitive service, by statute or executive order, when medical issues arise in connection with an OPM regulation that governs a particular personnel decision.

#### § 339.102 Purpose and effect.

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

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

(c) Failure to meet a properly established medical standard or physical requirement under this part means that the individual is not qualified for the position unless a waiver or reasonable accommodation is suitable, as described in §§ 339.103 and 339.204. An employee's refusal to be examined and provide medical documentation in accordance with a proper agency order authorized under this part constitutes a basis for appropriate disciplinary or adverse action.

#### § 339.103 Compliance with disability laws and regulations.

Actions under this part must be consistent with the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act (ADA) of 1992, as it applies to the Federal government through the Rehabilitation Act. In addition, 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. Particularly relevant to medical qualification determinations are 29 CFR 1630.2(o) (requiring reasonable accommodation of individuals with disabilities); 29 CFR

1630.10 (prohibiting use of employment criteria that screen out individuals with disabilities unless shown to be related to the job in question); and 29 CFR 1630.13 (prohibiting pre-employment examination or inquiry related to the existence or nature of a disability and pre-employment medical examination or inquiry of employees, except under specified circumstances). In addition, use of the term "qualified" in this part must be interpreted consistently with 29 CFR 1630.2(m), which provides that a "qualified individual with a disability" means an individual with a disability "who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others."

#### § 339.104 Definitions.

For purposes of this part—

*Accommodation* means *reasonable accommodation* as described in 29 CFR 1630.2(o).

*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 psychiatric disease.

*Medical documentation or documentation of a medical condition* means a statement from a licensed physician or other appropriate practitioner who provides information the agency considers necessary to enable it 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 not be inconsistent 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 statement. An acceptable diagnosis must include the following information, or parts identified by the agency as necessary and relevant:

- (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 which have been obtained: Findings of physical examination; results of laboratory tests;

X-rays; EKG's and other special evaluations or diagnostic procedures; and, in the case of psychiatric examination or psychological assessment, the findings of a mental status examination and 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 that restrictions or accommodations are or are not warranted, and if warranted, an explanation of their therapeutic or risk avoiding value;

(6) An explanation of the medical basis for any conclusion that indicates the likelihood that the individual is or is not expected to suffer sudden or subtle incapacitation by carrying out, with or without accommodation, the tasks or duties of a specific position; and

(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 individual may experience sudden 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, specifically 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 (e.g., age adjusted periodic 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 but is not limited to 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 an operative event that limits, modifies, or prevents an individual from performing certain physical requirements (e.g., lifting, pushing, and standing) because of a particular medical condition(s) or physical limitation(s). The purpose of a medical restriction is to ensure that the

medical condition(s) is not aggravated, accelerated, exacerbated, or made permanently worse.

*Medical standard* is a written description of the medical requirements for a particular occupation based on a determination that a certain level of fitness or health status is required for successful performance.

*Physical fitness standard(s)* is a documented and validated evaluation of identified essential common duties of similar positions, job task simulation scenarios, and results of testing.

*Physical fitness test(s)* is a measure of the minimum level of physical fitness (e.g., running or lifting) consistent with validated physical fitness standards that must be met in order to perform the essential duties of the position (e.g. law enforcement or wildland firefighter duties that regularly involve dangerous and stressful situations and physical hazards).

*Physical requirement* is a written description of job-related physical abilities which are normally considered essential for successful performance in 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 service(s) who is not a medical doctor, but who is certified by a National organization and licensed by a State 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 performance or conduct deficiencies.

*Sudden incapacitation* means abrupt onset of loss of control of physical or mental function(s).

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

#### **§ 339.201 Disqualification by OPM.**

Under subpart C of part 731 of this chapter, OPM may deny an applicant examination, deny an eligible appointment, and/or instruct an agency to remove an appointee by reason of physical or mental unfitness for the position for which he or she has applied, or to which he or she has been appointed. An OPM decision under this section is separate and distinct from a determination of disability pursuant to statutory provisions for CSRS and FERS disability retirement.

#### **§ 339.202 Medical standards.**

OPM may establish 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 qualification standards. An agency may establish medical standards for position(s) that predominate in that agency (i.e., where the agency has 50 percent or more of the position(s) in a particular occupation). Such standards must be justified on the basis that the duties of the position(s) are arduous or hazardous, or require a certain level of health status or physical fitness because, for reasons including the nature of the position(s) involves a high degree of responsibility toward the public or sensitive national security concerns. The rationale for establishing the standard must be documented. Standards established by OPM or an agency must be:

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

#### **§ 339.203 Physical requirements and physical fitness standards.**

Agencies are authorized to establish physical requirements for individual positions without OPM approval when such requirements are considered essential for successful job performance. This includes development and implementation of validated physical fitness standards including but not limited to aerobic capacity. The requirements or standards must be clearly supported by the actual duties of the position, documented in the position description and by job analysis. Applicants and employees cannot be disqualified arbitrarily on the basis of physical requirements, fitness tests, or other criteria that do not relate specifically to job performance.

#### **§ 339.204 Waiver of standards and requirements.**

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 requirements presents sufficient evidence that he or she, with or without reasonable accommodation, can perform the essential duties of the position without endangering the health and safety of him or herself or others. Additional information obtained by the agency may be considered in determining whether a waiver is appropriate.

#### **§ 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 subject them or others to significant health or safety risks due to occupational or environmental exposure or demands. This may include but is not limited to the requirement to undergo mandatory Food and Drug Administration approved vaccines (e.g., for national security reasons or in order to safely carry out an agency program). 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.**

A candidate may not be disqualified for any position solely on the basis of medical history. For positions with medical standards or physical requirements, or positions under medical evaluation programs, a history of a particular medical condition(s) may result in medical disqualification only if the condition(s) at issue is itself disqualifying, recurrence is a reasonable probability, and the duties of the position are such that a recurrence would pose a reasonable probability of substantial harm to the individual or others.

### **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, physical requirements, or validated physical fitness standards, or is covered by a medical evaluation program established under this part.

(b) Subject to § 339.103, an agency may require an individual who has applied for or occupies a position which has medical standards, physical requirements, physical fitness standards, or is covered by a medical evaluation program established under this part, to report for a medical examination:

(1) Prior to appointment or selection (including reemployment on the basis of full or partial recovery from a medical condition(s));

(2) On a regularly recurring, periodic basis after appointment; or

(3) 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.

(c) An agency may require an employee who has applied for or is receiving continuation of pay or compensation as a result of an on-the-job injury or disease to report for an examination under 5 U.S.C. 8123 to determine medical limitations that may affect 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 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 individual or the safety of others, or

(ii) A psychiatric examination or psychological assessment is specifically called for in a position having medical standards or under a medical evaluation program established under this part.

(2) A psychiatric examination or psychological assessment authorized under paragraphs (e)(1)(i) or (ii) of this section must be conducted in accordance with accepted professional standards, by a licensed physician or practitioner authorized to conduct such examinations, 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 undue hazard to the individual or others.

#### **§ 339.302 Authority to offer examinations.**

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

must be carried out and used in accordance with 29 CFR 1630.

#### **§ 339.303 Examination procedures.**

(a) When an agency orders 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 personal physician or practitioner. A refusal or failure to report for a medical examination ordered by the agency may be a basis for the agency to determine that the employee is not qualified for the position. A single notification is sufficient to cover a series of regularly recurring or periodic examinations ordered under this subpart.

(b) The agency designates the examining physician or other appropriate practitioner, but must offer the individual an opportunity to submit medical documentation from his or her personal physician or practitioner. The agency must review and consider all such documentation supplied by the individual's personal physician or practitioner.

#### **§ 339.304 Payment for examination.**

Agencies must pay for all examinations ordered or offered under this subpart, whether conducted by the agency's physician or the applicant's or employee's own physician or practitioner. This includes special evaluations or diagnostic procedures required by an agency. Applicants and employees must pay for a medical examination conducted by his or her own physician or practitioner where the purpose of the examination is to secure a change sought by an employee (e.g., a request for change in duty status, reasonable accommodation, and 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 individuals who are receiving or have applied for injury

compensation benefits under 5 U.S.C. 81, including continuation of pay. The agency must also report to the OWCP the failure of such individuals to report for examinations that the agency orders under this subpart. When the individual 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:

(A) competitive service positions under part 332 of this chapter; and

(B) excepted service positions in the executive branch subject to title 5, U.S.C. by statute or executive order;

(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.

[FR Doc. E7-25108 Filed 12-26-07; 8:45 am]

BILLING CODE 6325-39-P

## **SMALL BUSINESS ADMINISTRATION**

### **13 CFR Parts 121, 125, 127, and 134**

**RIN 3245-AF40**

#### **Women-Owned Small Business Federal Contract Assistance Procedures**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Small Business Administration (SBA) proposes to amend its regulations governing small business contracting procedures. This proposed rule would add a new part that would implement procedures to increase procurement opportunities for