No. 21-1612

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RUSSELL PONTINEN,	)
	)
Plaintiff-Appellant	)
	)
v.	)
	)
UNITED STATES STEEL CORP.,	)
	)
Defendant-Appellee	)

Appeal From the United States District Court
For the Northern District of Indiana, Hammond Division
Case No. 2:18-cv-00232-APR
The Honorable Magistrate Judge Andrew P. Rodovich

BRIEF OF THE PLAINTIFF-APPELLANT, RUSSELL PONTINEN

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Appellate Court No: 21-1612

Short Caption: Russel Pontinen, Plaintiff- Appellant v. United States Steel Corporation

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The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Russel Pontinen

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Attorney's Signature: /s/ Kerry E. Saltzman Date: 4/22/2021

Attorney's Printed Name: Kerry E. Saltzman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ David J. Strubbe Date: July 2, 2021

Attorney's Printed Name: David J. Strubbe

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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JURISDICTIONAL STATEMENT

The United States District Court, Northern District of Indiana, had original jurisdiction of this civil action in that the claims presented, discrimination under the American with Disabilities Act, 42 U.S.C. § 12101, *et seq.,* arose under the Constitution and the laws of the United States, 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

The United States Court of Appeals for the Seventh Circuit has appellate jurisdiction for this proceeding under 28 U.S.C. § 1291. The final judgment which Plaintiff-Appellant appeals was entered by the United States District Court, Northern District of Indiana on March 9, 2021. The March 9, 2021 Order being appealed granted Defendant-Appellee's Motion for Summary Judgment and disposed of Plaintiff-Appellant's claim against Defendant-Appellee. Plaintiff-Appellant timely filed his Notice of Appeal on April 7, 2021.

The Order being appealed is a direct appeal from the decision of Magistrate Judge Andrew Rodovich. The parties consented to proceeding before a United States Magistrate Judge on September 26, 2018. (ECF 9).

STATEMENT OF THE ISSUES

1. Whether Pontinen's medical condition posed a direct threat to the health and safety of others in the workplace pursuant to 42 U.S.C. § 12113(b) such that he does not qualify as an individual with a disability under the ADA.

2. Whether the conclusion that Pontinen's epilepsy was "uncontrolled" at the time he received an offer of employment from U.S. Steel was based on a reasonable medical judgment as required by 29 C.F.R. § 1640.2(r).

3. Whether the District Court's analysis of the four-factor test required by 29 C.F.R. § 1640.2(r) to determine whether Pontinen was a direct threat was flawed because it was based on the false premise that Plaintiff's epilepsy was not actively being controlled.

4. Whether U.S. Steel engaged in the required individualized assessment of Pontinen's medical history before concluding that he posed a direct threat to workplace safety.

STATEMENT OF THE CASE

I. Factual Summary

Pontinen applied for employments at U.S. Steel's Midwest plant as a Utility Person in May 2017. (ECF 43 at 77:3-10). He shortly thereafter received an offer of employment contingent upon a fitness for duty examination, which was conducted at U.S. Steel on May 15, 2017 by Jennifer Ntovas, a family nurse practitioner. (ECF 42-2 at 15:14-18). Prior to the physical, Pontinen completed a nine-page "Health Inventory," on which he disclosed that he had four seizures in his life. (ECF 42-3). These seizures occurred when Pontinen was eight, twenty-two (in 2006), and thirty (June 2014). (ECF 43 at 27:22-28:8; 29:7-12; 30:13-15). [1] Prior the two isolated seizures he had as an adult, Pontinen experienced a warning signal that a seizure may occur, *i.e.,* fuzziness in his left eye, which provided Pontinen between thirty seconds to two minutes to get to a safe space. (*Id.* at 29:16-20; 99:15-22). In June 2014, this warning sign allowed Pontinen enough time to safely descend a ladder and sit in a chair before the seizure began. (*Id.* at 30:16-21).

After the June 2014 seizure, Pontinen began treatment with a neurologist, Dr. George Abu-Aita. (*Id.* at 25:4-12; and ECF 42-1). Dr. Aita initially prescribed Pontinen the anti-seizure medication Trileptal, but because it adversely affected Pontinen's ability to concentrate, Dr. Aita shortly thereafter changed Pontinen's medication to Depakote. (ECF 42-1). Between August 2014 and February 2017, Pontinen took Depakote faithfully, estimates he missed his daily dose only five to ten times, and is adamant that he never intentionally missed a dose of prescribed medication. (ECF 43 at 18:16-18; and 34:15-17).

[1] The fourth "seizure" which Pontinen was referring to on the Health Inventory occurred in August of 2014, but Pontinen's medical records are unclear as to whether this incident was truly a seizure or rather, was a heat-related illness. (ECF 43 at 32:6-11).

In February 2016, because he had been seizure-free for over two years, Pontinen asked Dr. Aita if he could go off the medication. (ECF 43 at 19:13-16). Dr. Aita advised Pontinen to stay on Depakote for one more year, which Pontinen did. (ECF 42-1 at p. 5). After another year passed without a seizure, Pontinen again asked and Dr. Aita agreed to wean Pontinen off of Depakote starting in February 2017. (*Id.* at p. 5-6).

At U.S. Steel's fitness for duty examination in May 2017, Pontinen and Ntovas briefly discussed Pontinen's medical history and treatment with Dr. Aita. (ECF 42-2 at 15:22-16:5). During this conversation, Ntovas handwrote on the Health Inventory that Pontinen "[s]topped Depakote 2 months ago without neurologist's approval." (ECF 42-3 at p. 9). She indicated the same on a physical examination form, and at the conclusion of the physical examination, she "diagnosed" Pontinen with "seizure disorder" and recommended that Pontinen should restart taking Depakote. (ECF 42-4 at p. 11). Prior to Pontinen, Ntovas had never before performed a fitness for duty examination for an individual that had suffered a seizure. (ECF 42-2 at 57:4-9). At the conclusion of the exam, Ntovas told Pontinen that it was likely that work restrictions would be imposed on Pontinen because of his past seizures. (ECF 43 at 73:1-14). Ntovas testified that she had formed an opinion as to the work restrictions she thought needed to be imposed on Pontinen at the conclusion of the physical examination on May 15, 2017. (ECF 42-2 at 38:22-39:2).

After a month passed without hearing from U.S. Steel, Pontinen contacted its HR Department, which informed him that U.S. Steel's medical department was awaiting a medical clearance form. (ECF 42-5). Pontinen picked up the form from U.S. Steel on June 16, 2017 and brought it, along with a job description for the Utility Person position, to Dr. Aita. (ECF 43 at 69:13-14; 70:7-11). Dr. Aita required Pontinen to undergo an Electroencephalogram ("EEG") before he would determine whether work restrictions were necessary for Pontinen's employment

at U.S. Steel. (*Id.* at 69:13-18). Pontinen did so, and the test results came back clean, showing no abnormalities and "no focal, lateralized or epileptiform discharge noted." (ECF 42-8 at p. 2). Dr. Aita accordingly cleared Pontinen for work with no restrictions, and on June 20, 2017, Pontinen delivered to U.S. Steel the EEG results, Dr. Aita's medical records, and the medical referral form indicating that his neurologist was not imposing any restrictions upon his ability to safely perform the duties of a Utility Person. (ECF 42-9).

U.S. Steel, via Ntovas and its Medical Director at the time, Dr. Philippa Norman, disregarded Dr. Aita's clearance and instead, imposed the following restrictions upon Pontinen's employment: (i) avoid jobs higher than five feet; (ii) avoid extensive stairs/ladder/free climbing; (iii) avoid exposure to hazardous machinery; (iv) medical approval required prior to any job change; and (v) no operation of cranes or mobile equipment. (ECF 42-10). Ntovas signed and dated the Restriction Report May 15, 2017, *i.e.,* the same day as the physical examination, but claims she did not check the boxes imposing the five restrictions until after reviewing Pontinen's medical records and EEG results delivered to U.S. Steel on June 20, 2017. (ECF 42-2 at p. 30:10-32-4).

Ntovas and Dr. Norman both agreed that the restrictions imposed on Pontinen, despite clearance from his neurologist, were necessary because Pontinen was no longer on medication. (ECF 42-2 at 53:25-54:5; ECF 41-11 at 22:2-18). Dr. Norman testified she believes that it is "accepted medical practice" that any person who has had a seizure should be on medication. (ECF 42-11 at 38:1-15). In addition, despite having ever spoken to Dr. Aita, Dr. Norman concluded that Pontinen would have ceased taking Depakote with or without Dr. Aita's approval, and that Dr. Aita only agreed to wean Pontinen off of Depakote for the same reason. (*Id.* at 64:10-14).

A few weeks passed before Pontinen heard back from U.S. Steel, but on July 17, 2017, U.S. Steel informed Pontinen that his offer of employment was rescinded "based on the results of [his] pre-placement fitness for duty examination. (ECF 42-12). U.S. Steel ignored Pontinen's follow-up correspondence seeking clarification as to why any medical restrictions were imposed after his neurologist cleared him to work with no restrictions. (*Id.*).

II. Charge of Discrimination and U.S. Steel's Subsequent Investigation

Pontinen filed his Charge of Discrimination against U.S. Steel for violation of the Americans with Disabilities Act, 42 USC § 12101 with the Equal Employment Opportunity Commission on October 26, 2017. Shortly thereafter, U.S. Steel asked its Medical Director at the time, Dr. Mark Gardner, to review Pontinen's file and the decision to rescind his offer of employment. (ECF 42-13 at 13:18-14-17). Dr. Gardner was not employed by U.S. Steel at the time Pontinen applied for employment at U.S. Steel and accordingly was not involved in Pontinen's fitness for duty examination, the imposition of the work restrictions, or the rescission of the offer of employment. (*Id.* at 10-9-11:11; and 14:2-9).

Dr. Gardner sent an email to Dr. Aita's office on January 25, 2018. (ECF 42-14). Within the email, Dr. Gardner stated that "Pontinen is a new hire who will be engaged in safety-sensitive work in the safety-sensitive work environment of a steel mill." (*Id.*). Dr. Gardner than asked Dr. Aita to address whether four of the specific work restrictions U.S. Steel imposed on Pontinen were appropriate. (*Id.*). Dr. Aita and Dr. Gardner spoke the same day, and during the call, Dr. Aita confirmed that he was unwilling to impose medical restrictions on Pontinen's ability to work. (ECF 42-14 at 37:10-16).

Dr. Gardner, however, discredited Dr. Aita's medical clearance because he believes Dr. Aita is only "an advocate for the patient" and "has no responsibility whatsoever for the

environment of safety in that steel mill for the co-workers." (*Id.* at 40:22-41:21). Dr. Gardner not only discredited Dr. Aita's medical opinion, but all neurologists, because they "do what the patient asks," and he believes that if the patient does not want work restrictions, the neurologists will not impose restrictions. (*Id.* at 41:22-42:9). Despite not being a neurologist or having ever examined Pontinen, Dr. Gardner believed he was in a better position than Pontinen's treating neurologist to assess the safety risks of Pontinen's employment. (*Id.* at 53:2-23).

III. U.S. Steel's Motion for Summary Judgment

Pontinen filed a one-count Complaint against U.S. Steel on June 15, 2018. (ECF 1). During the discovery process, U.S. Steel deposed only the Plaintiff, Pontinen.[2] Pontinen deposed Jennifer Ntovas, Dr. Philipa Norman, and Dr. Mark Gardner.[3]

U.S. Steel thereafter moved for summary judgment on the Pontinen's claim on the basis that he was not a qualified individual under the ADA because he posed a "direct threat" to the health or safety of himself and others "due to his medical non-compliance and uncontrolled active seizure disorder. (ECF 25, at p. 4). In determining whether an individual would pose a direct threat, the factors to consider include: 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood that the potential harm will occur; and 4) the imminence of the potential harm. 29 C.F.R.§ 1630.2(r). The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. *Id*.

[2] Pontinen's deposition transcript is included in the Record on Appeal at ECF 43.
[3] These deposition transcripts are, respectively, ECF 42-2, 42-11, and 42-14.

U.S. Steel argued that each of the four factors in evaluating the direct threat defense weighed in its favor and thus justified the rescission of Pontinen's employment offer. (ECF 25, at p. 7). First, U.S. Steel argued that the duration of the risk Pontinen would pose if employed "is indefinite and would exist as long as Pontinen held the Utility Person job" because "there is no cure for seizures." (*Id.*). Second, U.S. Steel posited that Pontinen posed a substantial risk of causing severe harm because of his "decision to stop the anti-seizure medication." (*Id.*). According to U.S. Steel, "Pontinen's failure to take anti-seizure medication created an unacceptable risk that he would suddenly become incapacitated while performing a task that can cause a significant risk of injury or death to himself or others." (*Id.* at p. 8). Third, U.S. Steel argued that the likelihood that Pontinen's employment would cause harm was great. (*Id.*). U.S. Steel believed that "Pontinen should have been on anti-seizure medication in May, 2017 because he had an 'active seizure disorder,'" and that "because of his decision not refuse prescribed anti-seizure medication, he was at a higher risk of having a seizure than he would have been had he remaining compliant in taking the medication." (*Id.* and 8-9). Fourth, U.S. Steel claimed the imminence of potential harm would have been significant because Pontinen "intentionally refuses to take anti-seizure medication prescribed by his neurologist" and instead "unilaterally took himself off of prescribed anti-seizure medication." (*Id.* at 9).

Pontinen refuted U.S. Steel's conclusion that he could not safely perform the essential functions of the Utility Person position based on the specific nature of his prior seizures, his years-long and on-going treatment with Dr. Aita, and his recent EEG results showing no abnormalities. In his Statement of Disputed Facts (ECF 42) and Response to U.S. Steel's Motion for Summary Judgment (ECF 41), Pontinen argued that each of the four factors under the "direct threat" analysis

favor a finding that he was qualified or, at a minimum, there are "genuine disputes of material facts with respect to each of the four factors under the direct threat analysis."

Pontinen first argued that the duration of the potential risk he posed was "fleeting" because of the brief nature of the seizures he had in the past and the infrequently with which he has suffered a seizure. (ECF 41, at p. 5, 6). Pontinen contended that U.S. Steel incorrectly analyzed this factor by looking to the indefinite nature of "seizure disorder" in general, as opposed to the duration of the epileptic episodes. (*Id.*). Second, Pontinen described the prior two seizures he suffered as an adult to demonstrate that the severity of the potential harm was minimal. (*Id.* at 6, 7). In each case, Pontinen felt an identical warning signal which provided him with between 90 seconds to two minutes to ensure he was not in a dangerous situation were a seizure to occur. (*Id.*). Pontinen cited to his neurologist's record to further support the veracity of his testimony regarding the warning signal he experienced. (*Id.* at 6). Third, Pontinen argued that the likelihood of potential harm was minimal. (*Id.* at 7, 8). Pontinen suffered only three confirmed seizures over thirty-two years, neither of which resulted in injury to himself or anyone else. (*Id.* at 8). Pontinen weaned off the anti-seizure medication with Dr. Aita's approval and assistance after living seizure free for three years. (*Id.*). For the same reason, Pontinen explained there was no evidence that supported the conclusion that he was at an imminent risk to suffer an unexpected seizure. (*Id.* at 9).

Pontinen also argued that U.S. Steel was not entitled to summary judgment because it did not engage in an "expressly individualized assessment" of his medical history when it concluded that he posed a "direct threat." (*Id.* at 10). In support of this argument, Pontinen cited to how and when the medical restrictions were imposed by U.S. Steel to demonstrate that he was categorically disqualified because of his prior seizures. Ntovas concluded that Pontinen stopped taking his medication without neurologist approval and should have remained on the medication before she

had access to or reviewed Pontinen's medical records and EEG test results. (*Id.*). She also told Pontinen that there "might be a couple of restrictions imposed" before affording Pontinen the opportunity to have his neurologist analyze whether restrictions were appropriate or necessary. (*Id.*). Ntovas admitted, however, that when she reached these conclusions had not yet "discuss[ed] the specifics of Pontinen's seizures with him or the critical fact that each was accompanied with a warning sign." (*Id.*). Pontinen also cited to the fact that the form which imposed the medical restrictions is dated May 15, 2017 (the date of the physical exam), which was more than a month before he provided Dr. Aita's medical records and EEG results to U.S. Steel, and that this discrepancy in the dates at least created an issue of fact as to when U.S. Steel imposed the medical restrictions which led to the rescission of the offer. (*Id.*).

Pontinen also argued that the comments made by U.S. Steel medical personnel support his contention that he was not afforded a truly individualized assessment as required by the ADA. In addition to Ntovas' conclusion that Pontinen needed to be medicated, Dr. Norman opined that any person with a seizure disorder required medication. (*Id.* at 10). She also formed the opinion, without having ever spoken to Pontinen or Dr. Aita, that Dr. Aita only agreed to wean Pontinen off Depakote because Pontinen was going to do so himself regardless. (*Id.*). Finally, Dr. Gardner did not work for U.S. Steel in May and June 2017 and thus, his opinions are not relevant to the analysis of whether Pontinen was afforded an individualized assessment. (*Id.* at 10). Nonetheless, Dr. Gardener's testimony that Dr. Aita's opinion lacked credibility simply because he is an "advocate for the patient" supports Pontinen's position that U.S. Steel categorically disqualified him. (*Id.* at 11).

IV. The Court's March 9th Opinion and Order

The Court granted summary judgment in favor of U.S. Steel on the basis that Pontinen was not a qualified individual under the ADA because "his uncontrolled epileptic condition would have posed a direct threat to the health and safety of himself and others while working at USS." (ECF 45, at p. 15).[4] In reaching this conclusion, the Court found that all four factors analyzed under the "direct threat" framework favored U.S. Steel.

With respect to the duration of the risk factor, the Court opted to analyze the "epileptic condition in general" and not "the duration of the seizure itself." (ECF 45, at 6). The Court did so based upon its conclusion that Pontinen's seizures were not under control, stating:

> Dr. Aita's notes from the February 22, 2017 appointment show that Dr. Aita did not approve of Pontinen's "decision" to stop taking the medication. The notes stated that at "the last visit he told [Dr. Atia that] he d[id] not want to be on any medication. [Dr. Aita] told him that he should be, but [] he [wa]s still asking [Dr. Aita] [] to stop [] the medication because he did not have any seizure[s]." Dr. Aita "told him that he [wa]s at a higher risk of having seizures at any time." But since going off Depakote was "[Pontinen's] decision," Dr. Aita instructed Pontinen on how to properly wean himself off the medication. Pontinen is twisting Dr. Aita's willingness to instruct him on how to wean himself off Depakote as approving of his decision to discontinue the anti-seizure medication.

(*Id.* at 9). Thus, the Court concluded "Pontinen's seizures were not controlled at the time he applied for the Utility Person position" and therefore, "the duration of the risk factor weighs in favor of USS." (*Id.*).

Next, the Court agreed with U.S. Steel that the nature and severity of the potential risk weighed in favor of finding that Pontinen posed a direct threat. (*Id.* at 9-11). Though the Court "acknowledge[d] that Pontinen's testimony and Dr. Aita's notes state he experienced warning signals" prior to two seizures, the Court concluded that "a jury could not reasonably find that the

[4] Because the Court granted summary judgment based U.S. Steel's "direct threat" defense, it did not address U.S. Steel's second argument, *i.e,* that Pontinen's history of seizures was not the "but for" cause of the rescission.

nature and severity f the risk would be substantially lessened based on the warning signals Pontinen experienced, mainly because of their inconsistency." (*Id.* at 12). In addition, the Court concluded that this factor tipped in favor of U.S. Steel because Pontinen's "condition was not under control" and thus "presented a greater risk of seizures." (*Id.*).

Third, the Court found that there was a substantial likelihood of harm to occur to Pontinen or others if he worked at U.S. Steel as a Utility Person. (*Id.* at 14). In so finding, the Court once again relied on its conclusion that "Pontinen's epilepsy was uncontrolled at the time of the offer and during the exam, and he gave no indication that it would be controlled in the future." (*Id.*). The Court rejected Pontinen's argument that he was not dependent on anti-seizure medication and instead concluded that "Dr. Aita's notes indicated what it took for Pontinen's condition to be 'controlled,' taking Depakote." (*Id.*). The Court recognized that "Pontinen was not injured during any previous episode and he never experienced a seizure on the job," but nonetheless found that "the likelihood of harm resulting from a seizure while performing the hazardous functions of Utility Person still existed." (*Id.*). For the same reasons, the Court also concluded that "the potential harm was imminent." (*Id.*). Thus, the Court held:

> "After analyzing the direct threat framework and Pontinen's inability to establish any material dispute of relevant facts, the court finds that his uncontrolled epileptic condition would have posed a direct threat to the health and safety of himself and others while working at USS." (*Id.* at 15).

The Court also rejected Pontinen's argument that U.S. Steel did not engage in an expressly individualized assessment of his history of seizures. (*Id.* at 15-18). In response to Pontinen's argument that Ntovas' conclusions at the physical examination on May 15, 2017 were premature, the Court stated that her conclusions were "irrelevant, not only because no final decision actually was made at that time, but also because Pontinen's statements alone warranted a finding that his uncontrolled seizure condition posed a direct threat to the health and safety of himself and others

if he were to [be] employed as [a] Utility Person at USS." (*Id.* at 16-17). Furthermore, the Court concluded that U.S. Steel was not required to follow Dr. Aita's recommendations because U.S. Steel's "medical personnel conducted a day-long assessment with multiple tests and still did not make any decisions as to Pontinen's restrictions until information from Dr. Aita was received. Nonetheless, as discussed above, Pontinen's own statements warranted a direct threat finding." (*Id.* at 18).

SUMMARY OF ARGUMENT

Pontinen appeals the District Court's March 9th Order and Opinion granting summary judgment in favor of U.S. Steel on his claim that U.S. Steel unlawfully discriminated against him in violation of the ADA when it withdrew its offer of employment because of Pontinen's history of seizures. The District Court concluded that Pontinen's claim failed, as a matter of law, because his condition posed a direct threat to the health and safety of others employed by U.S. Steel.

The District Court erred in granting summary judgment in favor of U.S. Steel because its analysis of the "direct threat" defense was flawed and contrary to existing law. The District Court's ruling was premised on its factual determination that Pontinen's seizure disorder was "uncontrolled" because approximately four months earlier, Pontinen's neurologist agreed to wean him off of the anti-seizure medication Depakote.

This factual conclusion is refuted by the record. Pontinen's testimony and his neurologist's records instead reflect that Pontinen had been under the treatment of Dr. Aita for approximately three years, during which time he had been seizure-free and followed the treatment plans Dr. Aita recommended. Pontinen asked to be weaned off the anti-seizure medication in February 2016, but upon the advice of Dr. Aita, he agreed to continue taking it for another year. At his next annual appointment in February 2017, Pontinen again asked, and this time Dr. Aita agreed, to wean

Pontinen off of Depakote. Though Dr. Aita may have been reluctant at first to do so, his agreement to reduce the daily dosage from 1500 mg to 1000 mg to 500 mg at monthly intervals was expressly conditioned on Pontinen remaining seizure-free each month with the reduced dosage. After being weaned off the medication, the EEG performed on June 20, 2017 came back clean and showed no abnormalities. As such, the evidence presented by Pontinen shows that his seizures were under control.

To conclude otherwise, the District Court resolved disputed issues of fact and construed them in the light most favorable to the movant, U.S. Steel. For example, the Court concluded that Pontinen was "unmotivated" to treat his condition, despite his on-going treatment with Dr. Aita. The Court also concluded that Dr. Aita only agreed to wean Pontinen off of Depakote because Pontinen was going to do so with or without his doctor's approval, whereas Dr. Aita's records contain no such indication. These conclusions simply are not supported by the record, and, at a minimum, are disputed facts that must be resolved by a jury.

Because the District Court concluded that Pontinen's seizure disorder was uncontrolled, its analysis of the four factors under the "direct threat" test was inherently tainted. The Court's discussion of each factor was expressly premised on its factual finding that Pontinen's seizure disorder was uncontrolled. If a reasonable jury were to conclude that Pontinen's condition was actively being treated by his neurologist, and thus under control, it is likely that the trier of fact would reach different conclusions as to whether each factor weighed in favor or against a finding of a "direct threat." Accordingly, U.S. Steel is not entitled to a finding as a matter of law that it carried its burden in proving that Pontinen's employment would have directly threatened the safety of its workplace.

The District Court also erred in concluding that U.S. Steel's withdrawal of Pontinen's offer of employment was based on an expressly individualized assessment of Pontinen's medical condition based on reasonable medical judgment and objective evidence. Rather, Pontinen provided the Court with evidence and key admissions that demonstrate U.S. Steel's conclusion that he constituted a direct threat was based on preconceived notions about epileptic seizures. As such, U.S. Steel's assessment of Pontinen's medical condition did not comply with the requirements of the ADA, which thus precludes summary judgment in its favor.

ARGUMENT

I. Standard of Review

This Court reviews a District Court's grant of summary judgment de novo, "granting no deference to the district court." *McCottrell v. White*, 933 F.3d 651, 656 n.3 (7th Cir. 2019); *Ellis v. CCA of Tenn. LLC*, 650 F.3d 640, 646 (7th Cir. 2011) ("Our review is de novo: we accord no deference to a district court's determination that the requirements of Rule 56(a) have been met."). "Any doubt as to the existence of a genuine issue for trial is resolved against the moving party." *Ponsetti v. GE Pension Plan*, 614 F.3d 684, 691 (7th Cir. 2010) (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986)).

Summary judgment is only proper where the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ P. 56 (c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). In determining whether a genuine issue of material fact exists, the record must be reviewed in the light most favorable to the non-moving party and with all reasonable inferences made in the non-moving party's favor. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). In addition,

the trial court must determine whether the evidence presented by the party opposed to the summary judgment is such that a reasonable jury might find in favor of that party after a trial. *Anderson*, 477 U.S. at 248.

To defeat summary judgment, the non-movant must only present "more than a scintilla" of evidence showing a genuine issue of material fact. *Zuppardi v. Wal-Mart Stores, Inc*., 770 F.3d 644, 650 (7th Cir. 2014) (quoting *Roger Whitmore's Auto Servs., Inc. v. Lake Cnty*., Ill., 424 F.3d 659, 669 (7th Cir. 2005)).

II. The ADA and the "Direct Threat" Defense

The ADA prohibits discrimination against a qualified individual with a disability on the basis of that disability. *Basith v. Cook County*, 241 F.3d 919, 926-27 (7th Cir. 2001). A qualified individual is one "who with or without a reasonable accommodation, could perform the essential functions of the employment position." *Id*. at 927. In order to prevail on a disparate treatment claim under the ADA, an individual must prove that (1) he was disabled; (2) he was qualified to perform essential functions with or without reasonable accommodation; and (3) the disability was the "but for" cause of the adverse employment action. 42 U.S.C. § 12112(a); *Mlsna v. Union Pacific Railroad Company*, 975 F.3d 629, 633 (7th Cir. 2020).

The ADA provides a defense to a discrimination claim if the employee's disability poses "a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). A "direct threat" is defined as creating "a significant risk to the health or safety of others that cannot be eliminated by a reasonable accommodation." *Id*. In order to determine whether an employee's disability poses a "direct threat" to himself or others in the workplace, four factors must be analyzed: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3)

the likelihood that potential harm will occur; and (4) the imminence of potential harm." *Stragapede v. City of Evanston, Ill.*, 865 F.3d 861, 866 (7th Cir. 2017).

An employer who refuses to hire an individual because the individual's medical condition poses a direct threat bears the burden of proving that its conclusion is based on sound medical support. *Branham v. Snow*, 392 F.3d 896, 906–07 (7th Cir. 2004). It is not enough for an employer to have a good faith belief that an employee presents a direct safety risk. *See Bragdon v. Abbott*, 524 U.S. 624, 649 (1998). Rather, the employer's conclusion must be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence" and upon an expressly "individualized assessment of the individual's present ability to safely perform the essential functions of the job," reached after considering, among other things, the imminence of the risk and the severity of the harm portended. 29 C.F.R. § 1630.2 (r).

III. U.S. Steel was not Entitled to Summary Judgment because Pontinen Did Not Pose a "Direct Threat" to the Health and Safety to himself and others.

In granting U.S. Steel's Motion for Summary Judgment, the Court ultimately concluded, "[a]fter analyzing the direct threat framework and Pontinen's inability to establish any material dispute of relevant facts, the court finds that his uncontrolled epileptic condition would have posed a direct threat to the health and safety of himself and others while working at USS." (ECF 45 at 15). The Court erred in reaching this conclusion because: ***first,*** the record reflects that Pontinen's seizure disorder was being controlled, and the Court's conclusion otherwise was based on improperly construing disputed issues of material fact in favor of U.S. Steel; and ***second***, the Court's wrongful assumption that Pontinen's medical condition was "uncontrolled" thereafter tainted its analysis of the "direct threat" factors.

A. The record demonstrates that Pontinen's seizure disorder was being controlled.

The District Court's determination that U.S. Steel was justified in rescinding Pontinen's offer of employment because he posed a direct threat to the safety of the workplace was not based on reliable medical support. The decision was, instead, based on the misconception that his seizure disorder was not under control because he was not actively taking medication in May 2017 when he was offered employment at U.S. Steel. The record shows that from the beginning of the application process, U.S. Steel and its medical personnel conflated the fact that Pontinen was not actively medicated with his condition being "uncontrolled" and that he had disregarded his neurologist's treatment plan.

Ntovas, the Nurse Practitioner who imposed the medical restrictions on Pontinen, wrote on both the Health Inventory form (ECF 42-4) and the Physical Examination form (ECF 42-5) that Pontinen "Stopped Depakote 2 months ago without neurologist's approval." Ntovas was not privy to any information or medical records at that time that could have led her to such a conclusion. Ntovas testified that she could not recall a conversation with Pontinen which would have led to her to the conclusion that he ceased taking Depakote without his neurologist's approval. (ECF 42-2, at 17:12-18-5). Pontinen, on the other hand, testified that he only went off of Depakote with his doctor's approval, but that Ntovas "tried saying that I got off of [Depakote] myself, like I just took myself off of it." (ECF 43 at 79:2-12). Thus, U.S. Steel's conclusion that Pontinen went off medication "without neurologist's approval" was based on Ntovas' incorrect initial presumption.

This is important, of course, because there is a significant distinction between not being medicated and not being in control of a medical condition. The record in this case demonstrates that while Pontinen was not prescribed anti-seizure medicine in May 2017, his condition was nevertheless under control. At that time, Pontinen had been under the care of his neurologist, Dr. Aita, for approximately three years, with whom he began treatment in June 2014 following a

seizure. (ECF 42-1).[5] Pontinen had annual check-ups with Dr. Aita and Dr. Aita's medical notes corroborate Pontinen's testimony that he never intentionally missed a dose of prescribed medication. (ECF 43, at 34:15-17). Dr. Aita's records from Pontinen's check-up visit on February 25, 2015 indicate that Pontinen may have missed his daily dose "once in a blue moon" but a blood sample taken during this visit confirmed the Depakote level in Pontinen's system was normal. (*Id.* at p. 1, 3). The EEG performed on June 20, 2017 confirmed that Pontinen was not suffering from any abnormalities. (ECF 42-8). Perhaps most importantly, under the care of Dr. Aita, Pontinen had been seizure-free for three years. Thus, the assumption that his condition was not well-controlled is belied by the medical records.

The District Court's conclusion to the contrary was based on its interpretation of Dr. Aita's medical records, which improperly resolved disputed facts in a light most favorable to U.S. Steel. Though the Court recognized that there was a factual dispute "as to whether Dr. Aita approved Pontinen's decision to stop taking Depakote," and that "Pontinen testified that he never would have gone off the medication without Dr. Aita's approval" it nonetheless concluded that "there is no factual dispute [that] Dr. Aita's notes from the February 22, 2017 appointment show that Dr. Aita did not approve of Pontinen's 'decision' to stop taking the medication." (ECF 45 at p. 8).

In reaching this conclusion, the Court relied on comments in Dr. Aita's notes reflecting that going off of Depakote was Pontinen's "decision" and that Pontinen "insisted on being off of the medication." (ECF 45, at p. 8, 9). While it is true that Dr. Aita did note that it was Pontinen's desire to be off of the medication, the Court's conclusion that Dr. Aita "did not approve of Pontinen's 'decision' to stop taking the medication" is not found in his notes and is instead based

[5] Dr. Aita's Progress Notes begin with a visit on August 26, 2014, but the notes refer to this visit as a "followup in regard to his seizures" and that Pontinen was "prescribed Trilepal after his last visit." (ECF 42-1 at p. 1).

on an interpretation of those notes. Notably absent from Dr. Aita's notes is any indication Pontinen threatened to go off the medication regardless of whether Dr. Aita agreed to wean him off of it. Thus, the Court's conclusion that Pontinen "insisting" on going off of the medication necessarily meant he was willing to disregard his neurologist's treatment plan simply is not supported by the record. In fact, if that were true, Pontinen would have ceased taking Depakote in February 2016 when he first "insisted" on going off the medication but was told not to.

Likewise, the Court's belief that Dr. Aita's "willingness to instruct [Pontinen] on how to wean himself off Depakote" was based only on Pontinen's insistence on doing so wrongfully prescribes a negative inference to Dr. Aita's motivation, or that Dr. Aita had no choice but to cave to his patient's demands. But Dr. Aita's notes refute this notion expressly provide that Dr. Aita was willing to reduce the dosage of Depakote from 1000 mg to 500 mg, and then 500 mg to no medication, only "if no seizures" occurred in each respective month. (ECF 42-1 at p. 6). Furthermore, the Court's conclusion that Pontinen was the sole decision-maker in being weaned off Depakote is inconsistent with the fact Dr. Aita cleared to work at U.S. Steel without medical restrictions. (ECF 42-9).

The Court's refusal to lend any credibility to Pontinen's testimony that he would not have ceased taking Depakote without Dr. Aita's approval, and construe it in the light most favorable to him, was inappropriate at the summary judgment stage. No portion of the Court's Opinion and Order more clearly highlights this error as when it stated, "Pontinen was unmotivated to control his epilepsy and that was apparent by his statements to Ntovas and the testimony in this case." (ECF 45 at p. 16). This conclusion is problematic for a few reasons. First, it is unclear to what "statements to Ntovas" the Court is referring. Ntovas testified she did not recall discussing Pontinen's past seizures with him or the reason he was no longer on medication. In addition, the

record does not support the Court's conclusion that Pontinen was "unmotivated" to control his seizures. He had been under the treatment of a neurologist since 2014, had faithfully taken anti-seizure medication for three years, and voluntarily underwent an EEG to demonstrate to U.S. Steel that he did not present a risk. Equating Pontinen's desire to medication-free to being reckless with his health is unfair and delves into the sort of credibility assessment reserved for the ultimate trier of fact.

Moreover, the Court's finding that the facts of this case are analogous to *Darnell v. Thermafiber*, 417 F.3d 657 (7th Cir. 2005) is unsupported. In *Darnell*, the evidence that plaintiff was purposefully not keeping his diabetes in control was apparent. For example, in his pre-employment physical, Darnell "related a history of poor compliance and failure to seek medical attention; he admitted 'his blood sugar levels were too high, he hadn't checked in with a doctor in a number of months . . . [and] last anyone seen, it was not good.'" *Id.* at 660. Darnell's poor compliance was also confirmed in a urine glucose test. *Id*.

Pontinen's conduct and attitude towards his seizures stands in stark contrast to Darnell's. Unlike Darnell, Pontinen maintained regular, annual check-ups with his neurologist, faithfully took his prescribed medication (for a year longer than he initially desired), and the most recent medical test performed – the EEG on June 20, 2017 – confirmed that his epilepsy was under control when he applied for the Utility Person position.

At a minimum, (i) Pontinen's testimony that he would not have ceased taking Depakote without Dr. Aita's approval, (ii) Pontinen's compliance with Dr. Aita's recommended treatment plan and faithful adherence to daily medication from June 2014 to February 2017, (iii) Dr. Aita's agreement to wean Pontinen off of Depakote over a two month span only if he remained seizure-free, (iv) the June 20, 2017 EEG results, and (v) Dr. Aita's clearance for Pontinen to work at U.S.

Steel without restrictions sufficiently created a genuine issue of material fact as to whether Pontinen's seizure disorder was under control. *See e.g., Stragapede v. City of Evanston*, 865 F.3d at 861 (7th Cir. 2017).

In *Stragapede,* this Court upheld a jury verdict which found that plaintiff was discharged in violation of the ADA and that plaintiff's continued employment would not have posed a direct threat to the health or safety of other individuals in the workplace. 865 F.3d at 866-67. The Court noted that though the medical and objective evidence presented to the jury regarding plaintiff's medical condition was mixed, "[i]t's the jury's job to weigh conflicting evidence, make credibility determinations, and evaluate the trial record based on its collective common sense." In affirming that it was reasonable to conclude that plaintiff could perform his job without significant risk to health or safety, the Court explained:

> The jury was free to discount this evidence or to treat it as insufficient to support an inference that Stragapede posed an actual threat to his own safety or the safety of others. Stragapede testified in general terms that he followed safety protocols. He also testified that intersection incident occurred only because he was reaching to grab a clipboard that had bounced off the seat and fallen. He noted, moreover that the light was green and no pedestrians were present. Reasonable jurors could accept this explanation and reject the City's argument that the incident supports an inference that Stragapede was a safety threat. The jury also might reasonably have concluded that the two directional mishaps were not a safety issue at all. Lastly, as we've noted, the jury was free to discount [the neurologist's] opinions, which relied entirely on the City's characterization of Stragapede's performance.

Here, as in *Stragapede*, a jury should have been allowed to determine whether there was sufficient evidence to support that District Court's conclusion that Pontinen's seizure disorder was "uncontrolled." As set forth above, the record on summary judgment is rife with conflicting evidence and differing opinions between Pontinen's neurologist and U.S. Steel's medical personnel. Certainly, a reasonable jury would be entitled to conclude that Dr. Aita's last word regarding Pontinen – *i.e.,* that four months after the decision to wean him off Depakote, and

because his EEG came back clean, he did not require work restrictions – was deserving of belief. Similarly, a jury may find Nurse Practitioner Ntovas lacks credibility or that she failed to rely on a reasonable medical judgment when she imposed restrictions upon Pontinen which disqualified him from employment at U.S. Steel. But in any event, these are issues of disputed material facts that must be decided by a jury, not by the District Court's interpretation of Dr. Aita's medical notes.

B. The Court's "direct threat" analysis was tainted because its consideration of each factor was premised on its conclusion that Pontinen's seizure disorder was not under control.

The District Court's conclusion that U.S. Steel met its burden in proving that Pontinen's employment would have caused a direct threat was inherently flawed because it analyzed each factor based on its conclusion that Pontinen's seizure disorder was uncontrolled. Thus, the District Court's finding was erroneous and must be reversed.

First, the Court's decision to consider the duration of the risk based on the condition of epilepsy in general, as opposed to the duration of the seizure itself, was expressly conditioned on Pontinen's condition being uncontrolled. (ECF 45 at p. 7); citing *School Bd. of Nassau County, Fla. v. Arline,* 480 U.S. 273, 288 (1987) ("Generally speaking, if the risk is not controlled or controllable, the duration is indefinite and thus would weigh more heavily in favor of a finding of direct threat"). It is likely that a jury could conclude that Pontinen's seizure disorder was controlled, in which case the duration analysis would be measured by the length of seizure itself, as opposed to the duration of the condition. *See EEOC v. Rexnord Indust. LLC*, 966 F.Supp.2d 829, 837 (E.D. Wis. 2013). If so, the jury would then also likely conclude that the duration of the risk favor clearly favors Pontinen. *See EEOC v. Kinney Shoe Corp*., 917 F.Supp. 419, 429 (W.D.

Va. 1996) (finding no direct threat because the plaintiff's seizures only lasted "a few minutes or less").

The Court's analysis of the second factor, *i.e.,* the nature and severity of the risk of harm, also hinged on whether it believed Pontinen's condition was under control. (ECF 45 at p. 12)("Rather, when measuring the nature and severity of the risk of harm posed by Pontinen's epilepsy, the relevant inquiry is whether Pontinen's condition was under control at the time he applied for the position and underwent the fitness examination.") Because the Court concluded "his condition was not under control," it also concluded that Pontinen presented a greater risk of seizures. (*Id.*). Utilizing an analysis that does not automatically conclude that Pontinen's condition was uncontrolled, a jury could reasonably give more credence to Pontinen's testimony that his prior seizures were preceded by a consistent warning signal, and thus determine the nature and severity of the risk was minimal.

The Court's finding in favor of U.S. Steel with respect to the third and fourth factors - the likelihood that potential harm will occur and the imminence of potential harm – was also tainted by the false premise that Pontinen's epilepsy was uncontrolled at the time of the offer and during the exam. (*Id.* at 14). Therefore, the Court found there was a substantial likelihood of harm to occur if Pontinen worked at U.S. Steel as a Utility Person and that the potential harm was also imminent. (*Id.*). As with the first two factors, a reasonable jury could reach a different conclusion if its analysis does not start from the misconception that Pontinen's medical condition was not under control.

IV. The Evidence Demonstrates that U.S. Steel Did Not Afford Pontinen the Requisite Individualized Assessment of his Medical History.

The District Court recognized that U.S. Steel's conclusion that Pontinen's medical condition would have posed a direct threat to the safety of the workplace had to be based upon an expressly "individualized assessment of the individual's present ability to safely perform the essential functions of the job," 29 C.F.R. § 1630.2 (r). The Court, however, summarily rejected Pontinen's argument that he was categorically disqualified based on preconceived notions of "seizures," by concluding that "Pontinen's statements alone warranted a finding that his uncontrolled seizure condition posed a direct threat to the safety of himself and others." (ECF 45 at 16-17). In addition, the Court stated U.S. Steel was justified in disregarding Dr. Aita's medical clearance because U.S. Steel conducted its own day-long assessment with multiple tests. (*Id.* at 18).

These conclusions are not supported by the record. The Court's opinion does not cite to or explain which "statements" Pontinen made to justify an immediate finding of a direct threat. To the contrary, Ntovas made critical admissions which demonstrate no such comments exist. First, Ntovas admitted that she discussed neither the specific nature of Pontinen's prior seizures with him nor the fact they were preceded by a warning signal. Second, Ntovas testified that she did not recall discussing the circumstances which led to Pontinen being weaned off of Depakote. Simply put, there is nothing in the record – and the District Court cited to no evidence – which could possibly lead a reasonable jury to conclude that "Pontinen's statements alone" carried U.S. Steel's burden of demonstrating its direct threat defense. *See e.g., Branham,* 392 F.3d at 906-07 (The employer bears the burden of proving that its refusal to hire an individual because the individual's medical condition posed a direct threat was based on sound medical support.)

Similarly, the District Court's reliance on the "multiple tests" conducted by U.S. Steel on May 15, 2017 to undercut the significance of Ntovas' premature imposition of work restrictions is unavailing. The tests conducted by U.S. Steel on May 15, 2017 included "an audiogram, a vision test, lab work, blood work, a physical exam, blood pressure, pulse, respirations, and pulmonary function studies." (ECF 26, at p. 8, FN 9). None of these tests pertained to Pontinen's seizure disorder. The Court's citation to those tests supports, not refutes, Pontinen's argument that U.S. Steel did not engage in an individualized assessment of his medical condition.

The District Court's March 9th Order also failed to address Ntovas' admission that she would have imposed the exact same medical restrictions upon Pontinen's employment *even if* he had continued taking Depakote. This admission further demonstrates that U.S. Steel's conclusion that Pontinen posed a direct threat was not truly based on an individual assessment specific to Pontinen but rather was based on the generalized conclusion that any individual who has suffered a seizure is not capable of working (i) without being medicated and (ii) unless significant work restrictions are imposed upon him or her. This is the very type of categorical discrimination warned of in *EEOC v. Kinney Shoe Corp.,* 917 F.Supp.419, 429 (W.D. Va. 1996) (failing to conduct an individualized assessment "would be validating the position that persons susceptible to debilitating epileptic seizures are, as a matter of law, unqualified to hold any job since such seizures will cause some disruption in most, if not all, work environments.")

Instead of addressing Ntovas' admission, the Court focused on two other facts U.S. Steel purportedly relied on as part of its imposition of the work restrictions. First, the Court cited to temporary work restrictions which Dr. Aita put in place following Pontinen's seizure in 2014 (*i.e.*, no operating the forklift, no working on the elevated catwalk, no working from heights, and avoid heavy machinery). (ECF 45 at p. 17). While the Court acknowledged that Pontinen testified the

restrictions were in place for only two weeks, the Court was critical of Dr. Aita's reliability because "there was no mention that such restrictions were lifted" in his medical records. (*Id.*). Importantly, though, Pontinen's testimony that the restrictions were temporary is unrefuted, and he need not affirmatively prove the restrictions were lifted when it is U.S. Steel's burden to carry the direct threat defense.

Similarly, the Court held that U.S. Steel's refusal to accept Dr. Aita's work clearance was justified, in part, because he did not consider the Department of Transportation's Federal Motor Carrier Safety Administration's (DOT) Medical Handbook. (*Id.* at 17-18). Yet, the undisputed evidence establishes that Dr. Aita was not asked to consider those regulations. Instead, he completed the Medical Referral Form U.S. Steel provided to Pontinen and required Pontinen to undergo an updated EEG. In other words, Pontinen and his neurologist went ***above and beyond*** what U.S. Steel requested of Pontinen.

U.S. Steel should not be permitted to discredit a treating physician's findings on the basis that he did not consider non-binding regulations which he was not asked to consider, otherwise the entire process of asking Pontinen to obtain medical clearance was a sham from the start – as there was nothing that Dr. Aita could have said in the medical clearance form to convince U.S. Steel that Pontinen could safely work without restrictions.

Finally, the District Court's consideration of Dr. Gardner's opinion that "Pontinen was at an elevated risk of having seizures in the future because he had a history of seizures, he recently discontinued medication, and he already had experiences more than two unprovoked seizures" in its decision was an error. (ECF 45 at p. 14). Dr. Gardner was not employed by U.S. Steel in May or June 2017, played absolutely no role in the imposition of medical restrictions, and did not render these opinions until months after the employment offer of employment was rescinded. Dr.

Gardner's *post hoc* opinions were thus, by their very nature, not part of the requisite individualized assessment U.S. Steel was supposed to have conducted for Pontinen.

Thus, the District Court erred in finding that U.S. Steel afforded Pontinen an individualized assessment as required by the ADA, and accordingly, erred in granting summary judgment in favor of U.S. Steel.

CONCLUSION

For all the reason set forth herein, Plaintiff-Appellant Russell Pontinen respectfully requests that this Court reverse the District Court's March 9, 2021 Judgment Order (ECF 46) granting Defendant-Appellee's Motion for Judgment.

Respectfully submitted,

By: /s/ *Kerry E. Saltzman*
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CERTIFICATE OF COMPLIANCE WITH
FRAP RULE 32 (a)(7), FRAP RULE 32(g) and CR 32(C)

The undersigned, counsel of record for the Plaintiff-Appellant, Russell Pontinen, furnishes the following in compliance with F.R.A.P Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P Rule 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 8,619 words.

/s/ *Kerry E. Saltzman*
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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ *Kerry E. Saltzman*
One of the Attorneys for
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CIRCUIT RULE 30(D) CERTIFICATION

The undersigned hereby certifies that all of the materials required by Circuit Rule 30(a) and (b) are included in the following pages or in the separately bound Appendix submitted herewith.

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Plaintiff-Appellant Russell Pontinen

No. 21-1612

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RUSSELL PONTINEN,	)
	)
Plaintiff-Appellant	)
	)
v.	)
	)
UNITED STATES STEEL CORP.,	)
	)
Defendant-Appellee	)

APPENDIX

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CIRCUIT RULE 30 APPENDIX
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

RUSSELL PONTINEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:18-cv-232
	)	
UNITED STATES STEEL CORP.,	)	
	)	
Defendant.	)	

OPINION AND ORDER

This matter is before the court on the Motion for Summary Judgment [DE 24] filed by the defendant, United States Steel Corp., on September 30, 2020. For the following reasons, the motion is **GRANTED**.

Background

The plaintiff, Russel Pontinen, initiated this matter on June 15, 2018 against the defendant, United States Steel Corp. (USS), under the Americans with Disabilities Act of 2008 (ADA), 42 U.S.C. § 12101. He has alleged that USS discriminated against him by rescinding an offer of employment because he "experienced a few isolated seizures in his life."

Pontinen applied for USS' position of "Utility Person" in May of 2017. The essential functions of the job included the ability work a significant portion of any particular shift: a) at a height greater than five feet; b) operating hazardous machinery; c) performing excessive ladder and stair climbing; and d) operating mobile equipment. USS stated that a Utility Person was typically assigned to operating a crane, which could weigh one hundred (100) tons and move objects weighing more than fifty (50) tons.

On May 8, 2017, Pontinen received an offer for employment as Utility Person contingent upon a "satisfactory pre-placement fitness for duty examination." In preparation for the exam,

Pontinen filled out a health inventory form in which he indicated "yes" as to whether he has (or had) convulsions, epilepsy, seizures, or fits. Pontinen claimed that he began experiencing seizures when he was eight (8) years old. Between 2006 and 2014, he experienced three more seizures. It was not until 2014 that Pontinen began receiving medical treatment. His treating neurologist, Dr. George Abu-Aita, prescribed a trial sample of Trileptal which eventually caused him to feel "fuzzy" and unable to concentrate. On August 26, 2014, Dr. Aita prescribed Depakote instead of Trileptal.

On May 15, 2017, family practitioner, Jennifer Ntovas (Ntovas), performed the fitness for duty examination of Pontinen on behalf of USS. During the exam, Pontinen disclosed that he had been diagnosed with epilepsy in the past. Ntovas requested that he provide an updated report and examination from Dr. Aita because he was Pontinen's treating neurologist. The form provided to Dr. Aita stated that its purpose was "a preemployment fitness for duty examination." On June 19, 2017, Dr. Aita reexamined Pontinen which included conducting an EEG test. The EEG test results came back normal, and Dr. Aita cleared Pontinen to work with no restrictions. On July 17, 2017, USS informed Pontinen that his offer of employment was rescinded based on the results of the fitness for duty examination.

As stated above, Pontinen filed his complaint against USS alleging one violation of the ADA based on his epileptic condition. USS has moved for summary judgment on the claim, arguing that Pontinen was not a "qualified individual" who could perform the essential functions of the Utility Person job with or without a reasonable accommodation. USS also argues that Pontinen's uncontrolled seizure disorder was not the "but for" cause of its decision to rescind Pontinen's conditional job offer. Pontinen filed a response in opposition on January 31, 2021. USS filed a reply on February 12, 2021.

Discussion

Pursuant to **Federal Rule of Civil Procedure 56(a)**, summary judgment is proper only if it is demonstrated that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322–23 (1986); ***Garofalo v. Vill. of Hazel Crest***, 754 F.3d 428, 430 (7th Cir. 2014); ***Kidwell v. Eisenhauer***, 679 F.3d 957, 964 (7th Cir. 2012); ***Stephens v. Erickson***, 569 F.3d 779, 786 (7th Cir. 2009). A fact is material if it is outcome determinative under applicable law. The burden is upon the moving party to establish that no material facts are in genuine dispute, and any doubt as to the existence of a genuine issue must be resolved against the moving party. ***Adickes v. S.H. Kress & Co.***, 398 U.S. 144, 160 (1970); ***Stephens***, 569 F.3d at 786.

When the movant has met its burden, the opposing party cannot rely solely on the allegations in the pleadings but must "point to evidence that can be put in admissible form at trial, and that, if believed by the fact-finder, could support judgment in [her] favor." ***Marr v. Bank of America, N.A.***, 662 F.3d 963, 966 (7th Cir. 2011); *see also* ***Steen v. Myers***, 486 F.3d 1017, 1022 (7th Cir. 2007) (quoting ***Hammel v. Eau Galle Cheese Factory***, 407 F.3d 852, 859 (7th Cir. 2005) (summary judgment is "the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events.")). The non-moving party cannot rely on conclusory allegations. ***Smith v. Shawnee Library System***, 60 F.3d 317, 320 (7th Cir. 1995). Failure to prove an essential element of the alleged activity will render other facts immaterial. ***Celotex***, 477 U.S. at 323; ***Filippo v. Lee Publications, Inc.***, 485 F. Supp. 2d 969, 972 (N.D. Ind. 2007) (the non-moving party "must do more than raise some metaphysical doubt as to the material facts; she must come forward with specific facts showing a genuine issue for trial").

In viewing the facts presented on a motion for summary judgment, a court must construe all facts in a light most favorable to the non-moving party and draw all legitimate inferences in favor of that party. ***Anderson v. Liberty Lobby, Inc.,*** 477 U.S. 242, 248 (1986); ***McDowell v. Vill. of Lansing***, 763 F.3d 762, 764-65 (7th Cir. 2014). The trial court must determine whether the evidence presented by the party opposed to the summary judgment is such that a reasonable jury might find in favor of that party after a trial. ***Anderson***, 477 U.S. at 248; ***Cung Hnin v. Toa, LLC***, 751 F.3d 499, 504 (7th Cir. 2014); ***Wheeler v. Lawson***, 539 F.3d 629, 634 (7th Cir. 2008).

In order to prevail on a disparate treatment claim under the ADA, an individual must prove that (1) he was disabled; (2) he was qualified to perform essential functions with or without reasonable accommodation; and (3) the disability was the "but for" cause of the adverse employment action. **42 U.S.C. § 12112(a)**; ***Mlsna v. Union Pacific Railroad Company***, 975 F.3d 629, 633 (7th Cir. 2020). To survive USS' motion for summary judgment, Pontinen must identify a genuine issue of material fact as to at least one of the three elements. ***Tonyan v. Dunham's Athleisure Corp.***, 966 F.3d 681, 687 (7th Cir. 2020) (citing ***Majors v. Gen. Elec. Co.***, 714 F.3d 527, 533 (7th Cir. 2013)).

In the instant motion, there is no dispute that Pontinen was disabled. However, USS argues that Pontinen was not a "qualified individual" who could perform the essential functions of the Utility Person position with or without reasonable accommodation. **42 U.S.C. § 12113(a)** states that "it may be a defense to a charge of discrimination under [the ADA] that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." The term "qualification standards" "may include a requirement

that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." **§ 12113(b)**.

In order to determine whether an employee's disability poses a "direct threat" to himself or others in the workplace, four factors must be analyzed: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of potential harm." ***Stragapede v. City of Evanston, Ill.***, 865 F.3d 861, 866 (7th Cir. 2017); **29 C.F.R. § 1630.2**. An employer's belief, even if in good faith, that a significant risk exists based on an employee's condition is not sufficient to relieve it from liability. 865 F.3d at 867 (citing ***Bragdon v. Abbott***, 524 U.S. 624, 649 (1998)). The defense must be "based solely on 'medical or other objective evidence.'" ***Stragapede***, 865 F.3d at 867 (quoting ***Bragdon***, 524 U.S. at 649). However, the Seventh Circuit has recognized testimonial evidence as "sufficient to support [] a direct threat finding under the ADA." ***Darnell v. Thermafiber, Inc.***, 417 F.3d 657, 660 (7th Cir. 2005); *see* ***Bekker v. Humana Health Plan, Inc.***, 229 F.3d 662, 671 (7th Cir. 2000) (finding that patients and employees reports of smelling alcohol on the doctor while she was working was sufficient to support a finding that the doctor posed a risk of harm to herself and others).

USS argues that Pontinen's seizure condition posed a direct threat to the health and safety of himself and others in the workplace if he were hired as Utility Person. In response, Pontenin maintains that federal courts applying the "direct threat" framework routinely have found triable issues of fact when analyzing the direct threat associated with isolated seizures.

USS claims that employees working in Utility positions are exposed to numerous safety risks and are required to work in a heavy industrial environment with varying conditions. As stated above, a Utility Person must have the ability work a significant portion of any particular

shift: a) at a height greater than five feet; b) operating hazardous machinery; c) performing excessive ladder and stair climbing; and d) operating mobile equipment. As to the first factor, the duration of the risk, USS argues that there is no dispute in the medical profession that seizures are unpredictable, the symptoms can vary, the duration of the risk of seizures is indefinite, and the risk would last as long as he was an employee at USS. In fact, USS claims that Pontinen admitted that the symptoms from his last seizure varied from the symptoms he experienced with other seizures.

Pontinen, in analyzing the duration of the risk, states that the duration of the potential risk was not indefinite, but rather "fleeting" because of the brief nature and infrequency of his seizures. In coming to that conclusion, Pontinen relies on two non-binding decisions. One being ***Lovejoy-Wilson v. NOCO Motor Fuel, Inc.,*** 263 F.3d 208 (2nd Cir. 2001). There, the Second Circuit very briefly analyzed whether the plaintiff's seizures posed a direct threat of harm to himself and others and ultimately rejected the employer's argument that the plaintiff was not a qualified individual because the employer failed to provide any evidence that the plaintiff posed a significant risk of harm. ***Lovejoy-Wilson***, 263 F.3d at 220. The court only mentioned in passing that the plaintiff's seizures lasted "a few minutes or less." 263 F.3d at 220.

The parties seem to have different interpretations as to whether the "duration of the risk" means the duration of the seizure itself or the duration of the epileptic condition in general. Courts have not adopted a uniform approach to this question. Some courts have analyzed the actual duration of each episode caused by the medical condition, such as a seizure. *See* ***EEOC v. Kinney Shoe Corp.,*** 917 F.Supp. 419, 429 (W.D. Va. 1996) (finding no direct threat because the plaintiff's seizures only lasted "a few minutes or less"); ***Olsen v. Capital Region Medical Center***, 2012 WL 1232271, at *7 (W.D. Mo. April 12,2012) (stating that the "plaintiff's seizures

lasted long enough to cause her to lose consciousness for a period of several minutes" when analyzing the duration of risk factor and eventually finding the plaintiff was not a qualified individual under the ADA). However, more courts have looked to the condition as a whole, and this court agrees. *See* **E.E.O.C. v. Rexnord Industries, LLC**, 966 F.Supp.2d 829, 837 (E.D. Wis. Aug. 20, 2013) (citing ***School Bd. Of Nassau County, Fla. V. Airline***, 480 U.S. 273, 288 (1987) ("Generally speaking, if the risk is not controlled or controllable, the duration is indefinite and thus would weigh more heavily in favor of a finding of direct threat"). The Supreme Court and the Seventh Circuit have measured the duration of the risk by ascertaining whether the medical condition can be controlled and whether the individual is actively engaged in controlling it. *See* ***Airline***, 480 U.S. at 288 (analyzing the duration of the risk by "how long the carrier is infectious"); ***Darnell***, 417 F.3d at 661 (classifying the plaintiff's uncontrolled diabetes as a direct threat); ***Bekker***, 229 F.3d at 668 (finding that a doctor who suffered from alcoholism was not qualified under the ADA even if the employer offered treatment as a reasonable accommodation); ***Branham v. Snow***, 392 F.3d 896, 907 (7th Cir. 2004) (finding that the employee's diabetes did not present a significant risk as he "test[ed] his blood sugar several times a day, ha[d] exceptional control over his blood glucose levels and ha[d] 'full awareness of all his reactions,' allowing him to respond promptly to low blood sugar levels").

There is no dispute that Pontinen was not taking medication at the time he applied for the Utility Person position and at the time of his fitness exam. In 2014, when Dr. Aita began treating Pontinen, he noted "history of seizure disorder [] [wa]s not well controlled." As a result, Dr. Aita prescribed Depakote to control Pontinen's condition. A few months later, on October 29, 2014, Dr. Aita noted that the "seizures [] seem[ed] to be well controlled by Depakote" and warned Pontinen to "not miss [his] medication." On February 25, 2015, Dr. Aita again noted

"history of generalized seizures [] seem[ed] to be well controlled so far with [] Depokote," and warned Pontinen "not to miss his medication." On February 24, 2016, Dr. Aita noted that Pontinen wanted to stop taking Depokote. Dr. Aita stated that "[Pontinen] [wa]s considering being off of the Depakote totally [*sic*]," and told Pontinen, "since he had three seizures in his life and he ha[d] a sister with seizures he [wa]s at higher risk of having seizures in the future." Dr. Aita "d[id] not recommend [that Pontinen] be[] off medication …" and warned him again to "not miss taking [his] medication." On February 22, 2017, Dr. Aita noted, that Pontinen still insisted on being off the medication but that he "told [Pontinen] that he should be" on medication, but "since it [wa]s [Pontinen's] decision to get off the medication [he] w[ould] reduce the Depakote to 500mg every night for a month and if no seizure[s] [occurred,] then stop it." About three months later, Pontinen applied for the position at USS.

Pontonin's own neurologist stated that Pontenin's epilepsy was not controlled when he began treating him in 2014 but was under control when Pontinen began taking Depakote as prescribed. There is a dispute on both sides as to whether Dr. Aita approved Pontien's decision to stop taking Depakote. Pontinen testified that he never would have gone off the medication without Dr. Aita's approval. He also argues that Dr. Aita's records reflect that he did receive approval. Therefore, Pontinen claims that there is a genuine dispute as to whether Dr. Aita approved of him stopping medication.

Medical records from Dr. Aita verify that there is no factual dispute. Dr. Aita's notes from the February 22, 2017 appointment show that Dr. Aita did not approve of Pontinen's "decision" to stop taking the medication. The notes stated that at "the last visit he told [Dr. Atia that] he d[id] not want to be on any medication. [Dr. Aita] told him that he should be, but [] he [wa]s still asking [Dr. Aita] [] to stop [] the medication because he did not have any seizure[s]."

Dr. Aita "told him that he [wa]s at a higher risk of having seizures at any time." But since going off Depakote was "[Pontinen's] decision," Dr. Aita instructed Pointinen on how to properly wean himself off the medication. Pontinen is twisting Dr. Aita's willingness to instruct him on how to wean himself off Depakote as approving of his decision to discontinue the anti-seizure medication. As a result, Pontinen's seizures were not controlled at the time he applied for the Utility Person position at USS or during the fitness exam. Therefore, the duration of the risk factor weighs in favor of USS.

The next factor weighed in determining whether a disabled individual poses a direct threat to himself and others, thereby classifying him as "unqualified" under the ADA, is the nature and severity of the medical condition. USS argues that the nature and severity of Pontinen's epilepsy was substantial. USS claims that Pontinen's decision to stop anti-seizure medication only increased the risk of harm to himself and others. USS states that its employees must be vigilant when working at the Plant because of the hazardous nature of the job. Specifically, the Utility Person has the duties of operating industrial equipment, using torches, shovels, and other tools, using pneumatic equipment and power tools, working with hot and heavy materials and hazardous chemicals, and assisting in inspecting and performing maintenance on equipment. USS claims that if Pointenin suffered a seizure while working at USS, the risks would be "catastrophic." He could burn himself or cause others to be burned, fall, be struck by equipment, or suffer a fatality. Additionally, he could suffer a seizure while operating heavy machinery which could result in devastating injuries to himself or others.

However, Pontinen claims, based on his own testimony and Dr. Aita's medical records, that there are triable issues of fact existing with respect to the nature and severity of the potential harm his condition posed. Pontinen points to the fact that before two of his seizures, in 2006 and

2014, he experienced a "warning signal" of fuzziness in his eye about 30 seconds to two minutes prior to having the seizure. Pontinen claims that the signal gave him enough time to descend from a ladder and prevent an injury. Therefore, if he got the signal while performing the essential functions of Utility Person at USS, he would have enough time to stop what he was doing and get to a place of safety. Pontinen also claims that the warning signal factored into Dr. Aita taking him off of medication. Pontinen relies on ***Rexnord*** to support this proposition.

In ***Rexnord***, the plaintiff began experiencing blackouts at age 13. 966 F.Supp.2d at 833. While working for the defendant, the plaintiff experienced at least two blackouts within a three-month period. 966 F.Supp.2d at 833-34. When the plaintiff went to the doctor, the doctor diagnosed her with "possible" seizure disorder. 966 F.Supp.2d at 834. When she underwent a fitness for duty exam, another doctor opined that she had an active seizure disorder which was being treated, but it did create a direct safety risk to herself and others. 966 F.Supp.2d at 834. The doctor did not recommend that the plaintiff return to work until the condition was completely stabilized. 966 F.Supp.2d at 834. Shortly thereafter, the defendant terminated the plaintiff. ***Rexnord***, 966 F.Supp.2d at 834. In evaluating the nature and severity of the harm posed by the plaintiff's seizures, the court noted the doctor's testimony that "anytime an individual loses consciousness especially if they [*sic*] have no warning of that event, that loss of consciousness can put them [*sic*] in a risky situation." 966 F.Supp.2d at 838. However, the court also noted that the plaintiff testified that she would "feel the blackouts coming on" and would either tell her supervisor or go to the bathroom. 966 F.Supp.2d at 838-39. The court found that the defendant's reliance on the doctor's testimony that losing consciousness would place the plaintiff in a risky situation and the plaintiff's testimony that she experienced warning signs before the blackouts would occur created a genuine issue of material fact. 966 F.Supp.2d at 839.

As an initial matter, Pontinen's argument that the warning signal he experienced factored into Dr. Aita's decision to wean him off Depakote is incorrect. As discussed above, Pontenin is twisting the words of Dr. Aita's medical records. Dr. Aita clearly stated that since it was Pontinen's decision to stop taking medication, Dr. Aita would instruct him on properly weaning off the medication. Dr. Aita simply noted that Pontinen reported experiencing warning signals. Next, the difference between the warning signals experienced by the plaintiff in ***Rexnord*** and those experienced by Pontinen was the number of times the warning signals were experienced. The plaintiff in ***Rexnord*** experienced two blackouts within three months, and both times she had the same warning signals. Though it is unclear, it can be assumed that the plaintiff in that case experienced the same warning signals many more times than Pontinen just based on the greater number of blackouts that she reportedly had since age 13. Pontinen has had four seizures in his life. There is mention that perhaps his most recent seizure was not a seizure, but nonetheless out of the four seizures, he experienced warning signals only before two of them. This does not seem to be consistent enough to definitely say that Pontinen will feel "fuzziness in his eye" prior to having a seizure, therefore the severity of the risk posed by having a seizure while carrying out the essential functions of a Utility Person would be minimal. This court is not bound by the analysis of the court in ***Rexnord***, though it does acknowledge that Pontinen's testimony and Dr. Aita's notes state that he experienced warning signals. However, a jury could not reasonably find that the nature and severity of the risk would be substantially lessened based on the warning signals Pontinen experienced, mainly because of their inconsistency.

Lastly, USS argues that the severity and nature of Pontinen's epilepsy was substantiated by the fact that his condition was not controlled by medication. In their pleadings, the parties dispute whether Pontinen missed his medication regularly when he was taking it. However, the

court does not see that fact as relevant. Rather, when measuring the nature and severity of the risk of harm posed by Pontinenin's epilepsy, the relevant inquiry is whether Pontinen's condition was under control at the time he applied for the position and underwent the fitness examination. Pontinen was not on medication at the time he applied for the position or during the fitness exam and gave no inclination that he would be resuming the medication any time in the future. Therefore, his condition was not under control, and it presented a greater risk of seizures, as pointed out by his own treating neurologist. As stated above, the court acknowledges the fact that the Pontinen has had warning signals prior to some of his seizures, however the inconsistency of the warning signs and the uncontrolled nature of his condition tips this factor more in favor of USS.

The third factor to be considered is the likelihood that the potential harm will occur. USS argues that the potential was great because Pontinen's first three seizures occurred while he was not medicated. Additionally, during his last three seizures he lost consciousness. USS also claims that Pontinen's decision to stop taking anti-seizure medication only heightened the risk that he would have more seizures than he would have had if he continued medication. Pontinen states that courts have looked at the type of injury experienced and whether the condition is controlled in analyzing the likelihood of potential harm. He further claims that the fact he was not injured during either of his seizures in 2006 and 2014, and the small amount of seizures he experienced throughout his life, support a finding that harm was not likely to occur.

USS relies on ***Darnell*** to support its position. In ***Darnell***, the plaintiff was a type-1 diabetic who was insulin dependent. 417 F.3d at 659. He was hired as a temporary employee for the defendant-company for ten months. 417 F.3d at 659. A year later, the plaintiff applied for a permanent position. 417 F.3d at 659. The company offered the plaintiff the job contingent upon

him passing a fitness exam. 417 F.3d at 659. The company manufactured mineral wool insulation, and the essential functions of the plaintiff's position included climbing tall ladders, operating dangerous machinery, and lifting 80-pound pieces of fiber board. 417 F.3d at 658, 661. During his fitness exam, the plaintiff stated that he did not have any "debilitating episodes" caused by his diabetes while working, that he had not seen a doctor in months, but that his last glucose test results were not good. 417 F.3d at 659. His poor glucose levels were confirmed by a test. 417 F.3d at 659. He also explained that his levels were "good enough" and that he had no interest in regulating his diabetes. 417 F.3d at 660. As a result, the doctor reported to the company that the plaintiff was not capable of performing the essential functions of the job, and the company rescinded its offer. 417 F.3d at 660. The plaintiff filed a discrimination claim against the company, and the district court granted summary judgment in favor of the defendant. ***Darnell***, 417 F.3d at 659. On appeal, the Seventh Circuit disagreed with the plaintiff's argument that his failure to regulate his diabetes was not likely to cause substantial injury because "blood sugar levels can fluctuate dramatically when diabetes go[] unregulated" causing "unconsciousness, confusion and impaired judgment." 417 F.3d at 661. Further, were the plaintiff to "experience such symptoms [while working], the injury to himself or others could be great." 417 F.3d at 662. To the plaintiff's argument that there was no proof that a harmful episode would occur, the Seventh Circuit stated "where the plaintiff's medical condition is uncontrolled, of an unlimited duration, and capable of causing serious harm, injury may be considered likely to occur." 417 F.3d at 662. Additionally, "an employee with a health related condition who has experienced no on-the-job episodes can still pose a direct threat to workplace safety." 417 F.3d at 662.

Pontinen argues that USS' reliance on ***Darnell*** is not supported by the evidence here.

The court finds just the opposite. Pontinen's epilepsy was uncontrolled at the time of the offer and during the fitness exam, and he gave no indication that it would be controlled in the future. Pontinen's argument that he was "not dependent" on anti-seizure medication, unlike the plaintiff in ***Darnell***, is not supported by medical evidence. Once again, Dr. Aita's notes indicated what it took for Pontienen's condition to be "controlled," taking Depakote. Pontinen testified that he lost consciousness during some of his seizures. Even though Pontinen was not injured during any previous episode and he never experienced a seizure on the job, the likelihood of harm resulting from a seizure while performing the hazardous functions of Utility Person still existed. Additionally, Dr. Mark K. Gardner, USS' acting Medical Director, testified that Pontinen was at an elevated risk of having seizures in the future because he had a history of seizures, he recently discontinued medication, and he already had experienced more than two unprovoked seizures. As the Seventh Circuit stressed, "where the plaintiff's medical condition is uncontrolled, of an unlimited duration, and capable of causing serious harm, injury may be considered likely to occur." Therefore, the court finds that there was a substantial likelihood of harm to occur to Pontinen or others if he worked at USS as a Utility Person while his epilepsy remained uncontrolled.

The last factor to be weighed in the direct threat framework is the imminence of potential harm caused by Pontinen's condition. Pontinen argues that the record does not support a finding that the potential harm was imminent by stating he only had two seizures in his adult life, neither resulted in injury, and prior to each he experienced a warning signal. For the same reasons that there was a substantial likelihood that harm would occur, the potential harm also was imminent. Seizures are unpredictable and can cause different symptoms each time. This is validated by Pontinen's testimony that he felt different symptoms during his fourth seizure than during the

others. Dr. Aita stated that Pontinen's risk of experiencing seizures was higher if he was not on medication. Being exposed to a higher risk of experiencing seizures with unpredictable outcomes points to a finding of a direct threat of safety. After analyzing the direct threat framework and Pontinen's inability to establish any material dispute of relevant facts, the court finds that his uncontrolled epileptic condition would have posed a direct threat to the health and safety of himself and others while working at USS.

In relation to determining whether Pontinen's condition posed a direct threat of safety, he argues that USS did not engage in an expressly individualized assessment of his history of seizures. Pontinen claims that when applying the direct threat analysis to an individual with a history of isolated seizures, there must be a distinction between a categorical assessment of the effects of the seizures and an individual assessment of the specific nature of the seizures suffered by an individual. Pontinen relies on a Western District of Virginia case to support his position. There the court held that:

> "the degree of disruption caused by the employee's disability must be substantial in order to render an employee unqualified. Otherwise, … the court would be validating the position that persons susceptible to debilitating epileptic seizures are, as a matter of law, unqualified to hold any job since such seizures will cause some disruption in most, if not all, work environments. In short, whether the seizures in this particular case were disruptive enough to render [the plaintiff] unqualified must be determined by reference to the frequency and effects of seizures."

Kinney, 917 F.Supp. at 428. While the court is not bound by this finding, it is important to note that the ultimate finding of the ***Kinney*** court, that summary judgment should not be granted in the employer's favor, was that the frequency and effect of the plaintiff's seizure remained disputed. 917 F.Supp. at 428. There is no dispute here. Pontinen testified that he has had four seizures in his life, that during three of them he became unconscious, and that the symptoms

varied somewhat with all four. Additionally, the sought-after position in ***Kinney*** was a sales' manager. 917 F.Supp. 422-23. While there were physical requirements of that type of job, the hazardous nature of the Utility Person position at USS does not come close in comparison.

Pontinen also maintains that the testimony of all medical personnel involved in conducting his fitness examination and reviewing the results demonstrates that Pontinen was categorically disqualified because of his prior seizures. Specifically, he claims that the Ntovas' conclusion, that he should have been on medication and that he stopped it without approval, was premature because she had not reviewed all of his medical records or had not spoken with Dr. Aita. While Ntovas may have reached that conclusion, she made no recommendation to human resources at that point. Rather, she instructed Pontinen to be reexamined by Dr. Aita, provide medical records, and present a medical referral form to Dr. Aita to be completed and returned to USS. Even so, Pontinen's own statements to Ntovas were sufficient to support a finding of a direct threat under the ADA. See ***Thermafiber***, 417 F.3d at 660 (finding the plaintiff's statement to the physician that he does control his diabetes nor has any intention to was sufficient in finding a direct threat even though the physician had not consulted the plaintiff's medical chart because "additional testing was unnecessary because the results could not have refuted the fact that [the plaintiff] was unmotivated to control his diabetes"]. Pontinen was unmotivated to control his epilepsy and that was apparent by his statements to Ntovas and the testimony in this case. Dr. Aita did not approve of discontinuing the medication, and the only time Dr. Aita stated Pontinen's condition was controlled was when he was taking Depakote. What Ntovas was thinking and what she wrote in her notes during the exam was irrelevant, not only because no final decision actually was made at that time, but also because Pontinen's statements alone warranted a finding that his uncontrolled seizure condition posed a direct threat to the health and

safety of himself and others if he were to by employed as Utility Person at USS.

Lastly, there is some debate as to whether the work restrictions that Dr. Aita put in place were reliable. Following Pontinen's August 2014 seizure, Dr. Aita put work restrictions in place which included no operating the forklift, no working on the elevated catwalk, no working from heights, and avoid heavy machinery. Pontinen testified that those work restrictions were only temporary and in place for two weeks. However, Dr. Aita's medical records do not verify that, and there was no mention that such restrictions ever were lifted. When Pontinen was instructed by Ntovas to take the medical referral form to Dr. Aita following the fitness exam, Pontinen testified that Dr. Aita said that he would clear Pontinen for work at USS if Pontinen underwent an EEG and test results came back clear. The EEG results showed no abnormalities. Dr. Aita noted that Pontinen was off anti-seizure medication and signed the referral form clearing Pontinen for work with no restrictions at USS, stating that Pontinen did not pose a safety risk to himself or others.

Pontinen argues that Dr. Aita's decision to clear him to work at USS with no restrictions makes him a qualified individual under the ADA. USS claims that Dr. Aita's decision was not reliable because Dr. Aita had not conducted a thorough assessment of Pontinen and the Utility Person position before he came to that conclusion, his opinion of no restrictions was inconsistent with and contradicted by his previous records, and his opinion did not consider the Department of Transportation's Federal Motor Carrier Safety Administration's (DOT) Medical Handbook regulations and all of the essential job functions of the Utility Person position.[1] Pontinen testified

[1] The DOT guidelines state that a person is physically qualified to drive a motor vehicle if he "has no established medical history of clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a commercial motor vehicle." 49 C.F.R. 391.41(b)(8).

that he gave Dr. Aita a list of the Utility Person position's essential functions. Pontinen does not dispute that Dr. Aita did not consider DOT guidelines, but rather argues that the Medical Referral form did not instruct Dr. Aita to do so.

There is no requirement that an employer accept a treating physician's findings, as long as "an individualized assessment" of each of the employee's "actual condition[s], rather than a determination based on general information about how an uncorrected impairment usually affects individuals." ***Branham v. Snow***, 392 F.3d 896, 903 (7th Cir. 2004); *see* ***Homeyer v. Stanley Tulchin Assocs., Inc***., 91 F.3d 959, 962 (7th Cir. 1996) ("some impairments may be disabling for particular individuals but not for others …"). If USS was required to follow Dr. Aita's findings, the requirement for an individual assessment of Pontinen's epilepsy would be meaningless. However, USS medical personnel conducted a day-long assessment with multiple tests and still did not make any decisions as to Pontinen's restrictions until information from Dr. Aita was received. Nonetheless, as discussed above, Pontinen's own statements warranted a direct threat finding. *See* ***Darnell***, 417 F.3d at 660-61.

USS also argues that Pontinen's uncontrolled seizure condition was not the "but for" cause of its decision to rescind Pontinen's conditional offer of employment. However, since Pontinen's condition posed a direct threat of health and safety to himself and others employed by USS, the court does not find it necessary to address the "but for" argument. Thus, Pontinen discrimination claim fails as a matter of law.

Based on the foregoing reasons, the Motion for Summary Judgment [DE 24] is **GRANTED**. This matter is **DISMISSED**.

ENTERED this 8th day of March, 2021.

/s/ Andrew P. Rodovich
United States Magistrate Judge

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the
Northern District of Indiana

RUSSELL PONTINEN,

Plaintiff,

v. Civil Action No. 2:18-cv-00232

UNITED STATES STEEL CORPORATION,

Defendant

JUDGMENT IN A CIVIL ACTION

The court has ordered that (*check one):*

___ the plaintiff _____ recover from the defendant _____ the amount of dollars $_____, which includes prejudgment interest at the rate of _____% plus post-judgment interest at the rate of _____% along with costs.

___ the plaintiff recover nothing, the action is dismissed on the merits, and the defendant recover costs from the plaintiff _____.

_X_ Other: Judgment ENTERED in favor of Defendant United States Steel Corporation and against Plaintiff Russell Pontinen. This matter is DIMISSED.

This action was (*check one):*

___ tried to a jury with Judge _____ presiding, and the jury has rendered a verdict.

___ tried by Judge _____ without a jury and the above decision was reached.

_X_ decided by Magistrate Judge Andrew P. Rodovich on a Motion for Summary Judgment by Defendant.

DATE: March 9, 2021

ROBERT N. TRGOVICH, CLERK OF COURT

By: s/ L. Higgins-Conrad
Signature of Deputy Clerk