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NTSB Order No. EA-4041

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 8th day of December, 1993

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DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11973
v.)	
)	
STEVEN D. SWYDERSKI,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Joyce Capps issued at the conclusion of an evidentiary hearing held in this matter on January 6, 1992.¹ In that decision, the law judge affirmed an order of the Administrator revoking respondent's first class airman medical certificate and his commercial pilot certificate based on his

¹ Attached is an excerpt from the hearing transcript containing the oral initial decision.

false statements on four applications for airman medical certification, in violation of 14 C.F.R. 67.20(a)(1).²

Respondent argues on appeal that the Administrator failed to prove two of the elements of intentional falsification, specifically materiality and knowledge.³ He also asserts essentially that the law judge prejudged the case before hearing the evidence. As discussed below, we find no merit to respondent's appeal, and we affirm the initial decision.

It is undisputed that on four applications for airman medical certification (submitted in 1984, 1985, 1987, and 1988), respondent checked "no" in response to question 21v on that form, which asks whether the applicant has ever had a "record of traffic convictions," when in fact respondent's Florida driving record reflected ten such convictions between 1983 and 1986. (Exhibits A-1 and A-3.) Three of those traffic convictions (in 1983, 1984, and 1986) were for driving while intoxicated (DWI). Nor, despite respondent's assertions to the contrary in his appeal brief, can there be any real dispute as to the materiality of the information sought in question 21v. Administrator v.

² Section 67.20(a)(1) provides as follows:

§ 67.20 Applications, certificates, logbooks, reports, and records: Falsification, reproduction, or alteration.

(a) No person may make or cause to be made --

(1) Any fraudulent or intentionally false statement on any application for a medical certificate under this part.

³ The elements of intentional falsification are 1) a false statement, 2) in reference to a material fact, 3) made with knowledge of its falsity. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976).

Krings, NTSB Order No. EA-3908 at 5 (1993) (materiality is established by virtue of the fact that the information was specifically sought in a form used by the Administrator to determine an applicant's qualifications to hold an airman medical certificate).⁴

Thus, the elements of falsity and materiality are established in this case, and the only remaining factual issue is whether respondent had actual knowledge that he was making false statements on his medical applications. Respondent argues that the Administrator presented no direct evidence, and insufficient circumstantial evidence, to establish that respondent had actual knowledge of the falsity. However, we have already held that a falsely-answered medical application itself constitutes sufficient circumstantial proof of a respondent's intent to falsify. Administrator v. Juliao, NTSB Order No. EA-3087 (1990) (if law judge rejects respondent's explanation of false answers, medical application with incorrect answers constitutes circumstantial proof of intent to falsify).

⁴ In addition, there was testimony in this case on the issue of materiality from the FAA's Regional Flight Surgeon which established that DWI convictions can indicate drug or alcohol problems, and multiple traffic convictions in general might indicate psychological trouble of some sort. (Tr. 91.) The Regional Flight Surgeon testified that if respondent had truthfully disclosed his record of traffic convictions his application would most certainly have been deferred by the aviation medical examiner to the FAA for further evaluation. (Tr. 92, 101, 105.)

We note also that at several points during the hearing both respondent and his trial attorney conceded the materiality of the information sought in question 21v. (Tr. 9, 88, 113, 132, 173.)

Respondent is not being represented in this appeal by the attorney who appeared at the hearing.

At the hearing, respondent attempted to justify his incorrect answers by claiming that he did not pay close attention to the medical history section of the form, but simply checked "no" to everything because he felt he was in generally good health. (Tr. 123-4, 145, 161, 152-3.) However, respondent also testified, in apparent contradiction to his position that he did not read the question, that he thought the form was vague and misleading and he did not understand what question 21v was asking of him. (Tr. 127, 133, 157.) The law judge rejected as incredible respondent's claim that he did not read the form, stating "I don't buy the story from . . . [r]espondent that he didn't read it or anything like that." (Tr. 186.) She also implicitly rejected his alternate position that he did not understand the question, noting that respondent was an "intelligent individual" with many years of experience in the aviation industry, and that, in her judgment, there was nothing complicated or vague about the form. (Tr. 180, 184-5.) Since such credibility judgments are in the exclusive province of the law judge unless they are made in an arbitrary or capricious manner or inconsistent with the overwhelming weight of the evidence⁵ (factors not present here), we will not disturb them.

Respondent also argues that a finding of actual knowledge is precluded in this case due to United States v Manapat, 928 F.2d 1097 (11th Cir. 1991), which held, in a 2 to 1 decision, that the

⁵ Administrator v. Smith, 5 NTSB 1563 (1986); Administrator v. Blossom, NTSB Order No. EA-3081 at 4 (1990).

question here at issue (question 21v) was so fundamentally ambiguous as to preclude a conviction under 18 U.S.C. § 1001 as a matter of law. However, we have already expressed our disagreement with the majority's conclusion in that case, and indicated that in our view the questions relating to traffic convictions and other convictions are not confusing in any respect that would likely cause persons of ordinary intelligence to entertain any genuine doubt as to their meaning.

Administrator v. Barghelame and Sue, NTSB Order No. EA-3430 (1991). We further stated that we do not consider the holding in Manapat to be controlling in our certificate proceedings, and we will continue to rely on our law judge's determinations as to whether a particular respondent's false answer in response to those questions was deliberate or intended to deceive. Id.⁶

In sum, it is clear from the record that the law judge's conclusion that the Administrator proved all of the elements of intentional falsification is supported by sufficient evidence in the record. (Tr. 188.)

As for respondent's final argument, that the law judge prejudged his case prior to hearing the evidence, we see no evidence of such prejudgment in this record. Even though, as

⁶ In upholding a certificate revocation based in part on a charge of intentional falsification, the Ninth Circuit has recently recognized (as the Manapat majority itself pointed out) that Manapat speaks only to criminal prosecutions, and does not preclude certificate actions, such as this one, based on an applicant's false statements on an application for medical certification. Sue v. NTSB, No. 93-70456, slip op. at 5 (9th Cir. Sept. 20, 1993).

respondent points out, the law judge made reference to the fact that she has adjudicated numerous other cases of this nature, we are satisfied that respondent received a fair hearing and that the law judge's decision in this case was properly based on the evidence in this case.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The revocation of respondent's airman medical certificate and pilot certificate shall commence 30 days after the service of this opinion and order.⁷

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

⁷ For the purpose of this opinion and order, respondent must physically surrender his certificates to an appropriate representative of the FAA pursuant to FAR § 61.19(f).