

SERVED: April 9, 2010

NTSB Order No. EA-5517

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 7<sup>th</sup> day of April, 2010

_____	)	
Petition of	)	
	)	
NEWTON R. DICKSON	)	
	)	
for review of the denial by	)	Docket SM-4892
the Administrator of the	)	
Federal Aviation Administration	)	
of the issuance of an airman	)	
medical certificate.	)	
_____	)	

**OPINION AND ORDER**

Petitioner appeals the oral initial decision issued by Administrative Law Judge William R. Mullins on August 6, 2009.<sup>1</sup> The law judge found that petitioner failed to meet his burden of establishing that the Administrator's denial of his application for a first-class airman medical certificate was error. We deny

<sup>1</sup> A copy of the initial decision, an excerpt from the hearing transcript, is attached.

petitioner's appeal.

The Administrator's March 19, 2009 amended denial of petitioner's application for a medical certificate was predicated on petitioner's medical history of disturbance of consciousness without satisfactory medical explanation; or other seizure disorder, disturbance of consciousness, or neurologic condition. The amended denial letter stated that, under 14 C.F.R. §§ 67.109(a)(2) and (b), 67.209(a)(2) and (b), and 67.309(a)(2) and (b),<sup>2</sup> petitioner was ineligible for airman

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<sup>2</sup> The relevant portions of §§ 67.109, 67.209, and 67.309, that apply to certification for a first-, second-, and third-class medical certificate, respectively, provide as follows:

Neurologic standards for a certificate are:

(a) No established medical history or clinical diagnosis of any of the following:

\* \* \*

(2) A disturbance of consciousness without satisfactory medical explanation of the cause; or

\* \* \*

(b) No other seizure disorder, disturbance of consciousness, or neurologic condition that the Federal Air Surgeon, based on the case history and appropriate, qualified medical judgment relating to the condition involved, finds—

(1) Makes the person unable to safely perform the duties or exercise the privileges of the airman certificate applied for or held; or

(2) May reasonably be expected, for the maximum duration of the airman medical certificate applied for or held, to

medical certification.

Petitioner, then a pilot for Continental Airlines, began initial training on March 21, 2004, to upgrade to second-in-command pilot, or first officer, on the Boeing B-757. Up to that time, he had been first officer on the MD-80 aircraft.

On April 8, 2004, during a layover in London, petitioner had dinner with Sophie Myhill, a friend who resided there. After dinner, Ms. Myhill excused herself to go to the restroom, and suggested that petitioner wait for her on a nearby sofa. It is undisputed that, after standing, petitioner fell and injured himself. When Ms. Myhill returned from the restroom, she observed a crowd of people around petitioner, who was lying on the floor. A restaurant employee called Emergency Medical Services (EMS) to report that a customer had fallen and was "shivering." Exh. R-4 at 4. Because the employee did not speak English well, a second person spoke to EMS, reporting that the customer was bleeding from his nose and mouth and that his eyes were "vacant." Id. at 6. Paramedics arrived at the scene approximately 12 minutes after the telephone call. They wrote in their report, Convulsions/Fitting, Shivering, and also that, "patient had just finished eating when he stood up and collapsed

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(continued)

make the person unable to perform those duties or exercise those privileges.

to the floor and began fitting for approx. 4 minutes." Exh. A-1 at 153, 156. The paramedics noted that petitioner was very confused when the "fitting" stopped. Exh. A-1 at 156.

Petitioner was taken to the University College London Hospital,<sup>3</sup> just several blocks away. He was first seen by Nurse Spicer, approximately 30 minutes after the EMS telephone call. She wrote in her report that petitioner had a witnessed fit lasting 2 minutes, that he was confused postictally,<sup>4</sup> and that he could not identify the U.S. President. Exh. A-1 at 321.

He was next examined by Dr. Kennedy, who wrote in the hospital record that petitioner became less coherent following dinner, that he fell over when he stood, that he was very confused afterwards, that he was foaming at the mouth, and that he had amnesia of the event.<sup>5</sup> These symptoms are consistent with seizure. Exh. A-1 at 323.

Dr. Loy interviewed Ms. Myhill by telephone the following day, when he examined petitioner in the hospital. Dr. Loy's notes reflect that petitioner told him that his last memory was standing up with no preceding symptoms and that his next memory

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<sup>3</sup> Of some significance, this hospital is world-renowned for its expertise in neurology. Tr. at 412, 471, 558.

<sup>4</sup> "Postictal" is a term meaning "following a seizure" or "after a seizure."

<sup>5</sup> We note that Ms. Myhill rode with petitioner in the ambulance, and was present when Nurse Spicer and Dr. Kennedy examined him.

was waking up in the ambulance. Dr. Loy's notes further reflect that Ms. Myhill told him that, upon returning from the restroom, she found petitioner on the ground "convulsing" and very stiff, and that, according to other customers, petitioner's eyes rolled back and he seized for 5 to 10 minutes. Exh. A-1 at 376-77.

Dr. Loy wrote in a subsequent letter, addressed, "To Whom It May Concern," that petitioner was admitted following a 5 to 10 minute episode of generalized seizure, jerking of arms and legs, and rolling back of eyes, without tongue biting or incontinence. Exh. A-1 at 380. Dr. Kennedy also wrote a letter, "To Whom it May Concern," stating that petitioner was admitted to the Emergency Department following an episode of collapse; that he was observed by a friend to be slightly slurring his speech; then was seen to stand up, fall over, and have an episode of unconsciousness; that he was shaking and foaming at the mouth; and that he had amnesia of the event. Exh. A-1 at 381. The April 9, 2004 discharge summary noted that petitioner had a "first witnessed"<sup>6</sup> generalized seizure. Id. at 319.

Petitioner's supervisor, Captain Henry Craig, learned that petitioner had been hospitalized, and he spoke to a nurse at the

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<sup>6</sup> The term "first witnessed" seizure is used to differentiate the first seizure that is witnessed by someone from an "absence" seizure, which was not witnessed, and from subsequent witnessed seizures.

hospital who told him that petitioner had been unconscious. The nurse gave him Ms. Myhill's contact information, and Captain Craig called her. According to Captain Craig, Ms. Myhill told him that she was with petitioner at the restaurant at the time of the seizure and that petitioner was unconscious during the episode. Captain Craig made arrangements for petitioner's return to the United States. Immediately thereafter, petitioner expressed his desire to resume flying, but Captain Craig required that he be evaluated by a doctor because of the period of unconsciousness. When petitioner provided a note from a family physician, Captain Craig indicated that was unacceptable, and instructed petitioner to obtain a release from an aviation medical examiner (AME) before he could resume flight duties. Petitioner later produced a letter from Dr. Stephen Grayson, an AME, releasing him to fly. Exh. A-1 at 168. Although petitioner told Dr. Grayson about hitting his head and falling, he apparently did not tell him that he was unconscious or that he had been diagnosed as having a seizure.

One month after the incident, on May 7, 2004, petitioner returned to flight duties. Paired with Captain Frank Metzner for an additional 757 Initial Operating Experience (IOE) training flight, from Newark to Cleveland, petitioner performed

well.<sup>7</sup> On the second leg of the passenger-carrying flight, from Cleveland to Las Vegas, however, petitioner had difficulty with tasks he performed well on the initial leg. Captain Metzner noticed enroute degradation in his performance, and deterioration in his level of awareness and application of autoflight functions. Petitioner was unable to prepare the arrival and approach without assistance, and did not follow the captain's instructions for loading the visual approach. According to Captain Metzner, he stared at the computer, seemed to ignore the input procedures, and had significant problems with automation that he had not experienced earlier. When petitioner was above a normal glide angle for arrival, Captain Metzner took control of the aircraft, assisted in getting it in a better position for approach, and returned control to petitioner. During approach, petitioner's deviations did not allow a reasonable interception to the glide slope and localizer, and Captain Metzner took over a second time, and then assisted in landing.

Upon arrival in Las Vegas, and before leaving the aircraft to get paperwork, Captain Metzner instructed petitioner to prepare the aircraft for the final leg to Houston. Captain

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<sup>7</sup> Although petitioner had amassed the requisite number of IOE flight training hours, because of the incident and the ensuing delay in returning to the new aircraft, Continental management required him to complete additional IOE flight training.

Metzner retrieved the flight plan, weather notams, and fuel slip, and delivered them to petitioner before going to the ramp office, expecting petitioner to load the computers and prepare for departure, as petitioner had done on the previous two legs. When Captain Metzner returned 45 minutes later, petitioner had accomplished little, and did not appear to be able to complete the tasks without assistance. He stared at the computer and did not enter the take-off data for Houston. He was unable to perform some basic automation procedures, routine cockpit preparation procedures, and normal flows which he had previously performed proficiently. He was unable to load the Flight Management Computer, repeatedly pushing the auto-initialize prompt, even after Captain Metzner told him where to find the correct prompt. Petitioner continued to hit the auto-initiation key, repeating the phrase, "got to load fuel." Tr. at 265. Even with Captain Metzner's direction, he could not find the performance page on the computer. Despite further instruction from Captain Metzner, petitioner could not remember what to do with the "PERF INIT" page.

When Captain Metzner called for the before-start checklist, petitioner reached for the wrong hydraulic pump; the captain moved petitioner's hand to the correct pump. After push off, when petitioner reached for the overhead panel to begin the after-start checklist procedure, "his arm was shaking in a

spastic shaking motion." Tr. at 268. This alarmed the captain, but petitioner assured him that he was just tired and that he always shook like that when he was tired. When he again reached for the wrong switch, the captain coached him through completion of the after-start checklist. According to the captain, petitioner was lethargic and unable to load several sets of data before take-off. Captain Metzner decided to fly the last leg of the passenger-carrying training flight. As a non-flying pilot, petitioner then missed radio calls from ground control and the air route traffic control center, and failed to dial the correct frequency for the air route traffic control center.

During the flight to Houston, petitioner was disengaged and uninvolved; he stared straight ahead with his hands in his lap. Captain Metzner called for a management representative to meet the flight in Houston. During arrival, petitioner was unable to interact with the aircraft systems in order to access ACARS (Aircraft Communications Addressing and Reporting System) or ATIS (Automatic Terminal Information Service) information, could not obtain or load performance information, and could not set the "speed bugs." Captain Metzner was alarmed as to petitioner's inability to perform basic tasks, and decided to operate the aircraft by himself. At landing, petitioner could not perform the flow pattern checklist and had to rely on the after-landing checklist to perform the required duties.

After Captain Metzner taxied to the gate and shut the engines down, Captain Small, an assistant chief pilot for Continental Airlines, entered the cockpit. Petitioner was debriefed in the presence of Captain Small. Petitioner indicated that he did not feel intimidated by Captain Metzner and had no complaints about his training, but could not give an explanation for his inability to perform according to his training.

Captain Small testified that, as to petitioner, "there was just a very removed, detached sense that everything was slow motion, everything was disconnected." Tr. at 367. He described petitioner as someone who was on the outside looking in, not mechanically attached to what was going on in his surroundings. He contacted petitioner's supervisor, telling Captain Craig that petitioner demonstrated very unusual, bizarre behavior, and that Captain Small elected to stop the training in Houston. Captain Craig later met with petitioner, who again failed to provide an explanation. It was determined that he should be evaluated by a doctor. On May 19, 2004, Dr. Grayson issued petitioner a first-class medical certificate. On the application, however, petitioner had certified that he had never in his life been diagnosed with a seizure. Exh. A-1 at 228.

Based on these circumstances, between June 9, 2004, and August 9, 2004, Dr. Michael Berry administered a Fitness for

Duty Medical Evaluation, obtaining the hospital records from London, ordering laboratory tests and conducting a complete physical examination. He spoke with petitioner and with Captain Metzner. Dr. Berry noted that sleep deprivation is a trigger for seizure activity and that, prior to both episodes, petitioner reported that he had experienced sleep deprivation. Dr. Berry consulted with Dr. Pinky Tiwari, a neurologist, who expressed the possibility that the episodes were seizures. Dr. Berry concluded that petitioner suffered a loss of consciousness secondary to seizure, and that he was not qualified for flying duties. He also concluded that further evaluation should rule out frontal lobe seizures (partial complex), and post-concussion syndrome, either of which would disqualify petitioner for flying duties. He recommended a complete neurologic evaluation to include magnetic resonance imaging (MRI) of the brain, 24-hour continuous sleep deprived electroencephalogram (EEG) monitoring, neuropsychological cognitive testing, and cardiovascular evaluation with a 24-hour monitor. He advised petitioner, on August 5, 2004, that he was not fit for flying duties.

At the hearing, petitioner called Dr. Brian Loftus, a Board-certified neurologist, who concluded that petitioner suffered a mild concussion caused by a trip and fall in London, and that he did not suffer a seizure. He testified that the EMS

telephone call describing "shivering" was not sufficient to diagnose a tonic clonic<sup>8</sup> seizure. Tr. at 176-77. He noted that the word "fit" was used only by EMS personnel, and not by the caller. Dr. Loftus also testified that Ms. Myhill's testimony, that when petitioner was on the ground and shivering and she held his hand and it was relaxed, was strong evidence that he did not suffer a seizure because, during tonic clonic movements, all of the muscles contract and then extend and contract, including wrists, hands, and fingers. He opined that petitioner's hand could not have been relaxed during a seizure, and that the likelihood that petitioner suffered a generalized

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<sup>8</sup> According to the Epilepsy Foundation, seizures happen when the electrical system of the brain malfunctions. Instead of discharging electrical energy in a controlled manner, the brain cells keep firing. The result may be a surge of energy through the brain, causing unconsciousness and contractions of the muscles. If only part of the brain is affected, it may cloud awareness, block normal communication, and produce a variety of undirected, uncontrolled, unorganized movements. The Epilepsy Foundation describes seizures as being divided into generalized seizures (atonic, tonic-clonic, myoclonic), partial seizures (simple and complex), nonepileptic seizures and status epilepticus. A generalized seizure affects both cerebral hemispheres of the brain and produces loss of consciousness, and is sub-categorized into several major types, including tonic clonic. A generalized tonic clonic seizure (previously known as a grand mal seizure) begins with stiffening of the limbs (the tonic phase), followed by jerking of the limbs and face (the clonic phase). In partial seizures, the electrical disturbance is limited to a specific area of one cerebral hemisphere. Partial seizures are subdivided into simple partial seizures (in which consciousness is retained), and complex partial seizures (in which consciousness is impaired or lost). See [epilepsyfoundation.org](http://epilepsyfoundation.org).

tonic clonic seizure is 1.7 out of 100. He relied on studies regarding tongue biting in the diagnosis of seizures, and on oral lacerations and incontinence during convulsive seizures, stating that there is a 25 percent chance that petitioner would have bitten his tongue, that there is a 26 percent chance that he would have had oral lacerations, and that between 20 and 57 percent of patients experience urinary incontinence during a generalized seizure. He estimated that two-thirds of patients experience some period of sleep after a generalized tonic-clonic seizure. Finally, he said that 90 percent of patients who experienced a tonic clonic seizure on a hard surface would sustain bruises. Multiplying the percentages of the simultaneous presence of tongue-biting, incontinence, period of sleep, and bruising, Dr. Loftus calculated a 1.7 percent possibility that petitioner experienced a generalized tonic clonic seizure.

Regarding petitioner's behavior during the IOE training flights, Dr. Loftus opined that petitioner was simply "acting like a teenager." Tr. at 188.

Ms. Myhill testified at the hearing that she never told anyone that petitioner experienced a seizure, and that she never said he was foaming at the mouth. She also testified that she did not notice petitioner slurring his speech at any time during dinner, and that she did not tell Dr. Loy that she found

petitioner on the ground convulsing. She also stated that she did not tell Dr. Loy that she found petitioner to be very stiff, that his eyes were rolled back, or that he had been foaming at the mouth.

The Administrator called Dr. John Hastings, who has been Board-certified in neurology and aerospace medicine since 1972, and who has been a neurological consultant for the Federal Air Surgeon, the Air Line Pilots Association, and the Allied Pilots Association. Dr. Hastings opined that petitioner experienced a seizure in London. He testified about the differences between seizures and concussions, and stated that, generally, if there is a period of amnesia after the concussion until the person comes to (anterograde amnesia), there should also be a period of amnesia that occurs before the injury (retrograde amnesia). He concluded that petitioner's recall of the events, from standing up from the table to the fall, was inconsistent with a concussion because it was absent retrograde amnesia. He was present when petitioner testified, and noted a "rather exquisite recollection of events right up until ... the time of the event itself." Tr. at 475.

Dr. Hastings further explained that the notation in the records that petitioner's eyes rolled back is evidence of a seizure as opposed to concussion. He also testified regarding a letter from Dr. Grayson and a statement therein. Dr. Grayson

stated that after petitioner's fall he physically protested attempts to move him from his spot. Dr. Hastings testified that this was consistent with a person coming out of a generalized tonic clonic seizure being confused, disoriented, and combative, and that the person will frequently fight, resist, or otherwise interfere with attempts to hold him down or stabilize him.

Dr. Hastings observed that the EMS call was made after the event occurred, that 3 or 4 minutes later petitioner was still in bad shape, and that petitioner's deficient score on the Glasgow Coma Scale,<sup>9</sup> 14 at about 12 minutes after the EMS call and still 14 at about 26 minutes after the call, was significant in his evaluation. Dr. Hastings also noted Nurse Spicer's

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<sup>9</sup> The Glasgow Coma Scale, or GCS, is a 15-point test that helps assess severity of a brain injury by checking the ability to follow directions, to blink the eyes, or to move extremities. The coherence of speech also is a factor. Patients with scores of 3 to 8 are usually said to be in a coma. The total score is the sum of the scores in three categories. For "Eye Opening Response," 4 points are assigned for spontaneous eye opening with blinking; 3 points for opening to verbal command, speech, or shout; 2 points for opening to pain not applied to the face; and 0 points for no eye opening response. For "Verbal Response," 5 points are assigned for oriented verbal response; 4 points for confused conversation, but able to answer questions; 3 points for inappropriate responses if the words are discernible; 2 points for incomprehensible speech; and 1 point for no verbal response. For "Motor Response," 6 points are assigned for obeying commands for movement; 5 points for purposeful movement to painful stimulus; 4 points if the patient withdraws from pain; 3 points for abnormal (spastic) flexion; 2 points for extensor (rigid) response; and 1 point for no motor response. Petitioner's score of 14 reflected top scores for the eye opening and motor responses, and a 1 point deduction for confusion in the verbal response category.

observation, 24 minutes after the EMS call, that petitioner looked confused and vague, and explained that the length of time of confusion helped to determine the cause of a disturbance of consciousness and that a person who had a seizure may be confused for such a period of time.

As to the circumstances of the IOE flights, Dr. Hastings opined that they did not implicate fatigue or incompatibility of the flight crew, but rather a medical issue. Further, "[o]n the heels of the event in London ... this could be a series of complex partial seizures," or that this "certainly would be at the forefront of your diagnostic possibilities." Tr. at 494. He concluded that petitioner was not qualified to hold an airman medical certificate.

The Administrator also called Dr. Willard Hauser, a clinical neurophysiologist, a professor of neurology and epidemiology at Columbia University, a consultant to the Mayo Clinic, and Board-certified in neurology since 1971. Dr. Hauser referenced the hospital records stating that petitioner became less coherent at dinner. He opined that this incoherence suggested that something happened before the seizure, and that the detailed description in the records regarding shaking and eyes rolled back was consistent with a generalized tonic clonic seizure. He agreed that petitioner suffered a seizure, stating that the information contained in the ambulance record was a

description of a seizure and that the hospital records reflected "a reasonable and rather comprehensive story for a generalized seizure." Tr. at 409, 418. As for the IOE flights, Dr. Hauser concluded that petitioner experienced a disturbance of consciousness, most likely caused by a prolonged partial seizure.

Dr. James DeVoll is the manager of FAA's Medical Appeals Branch, and is Board-certified in aerospace medicine. He testified that the FAA consulted Dr. Ronald Lesser, professor of neurology and neurosurgery at Johns Hopkins Hospital, an expert in epilepsy, and the former chair of the Epilepsy Center of the Department of Neurology at Johns Hopkins. Tr. at 606, Exh. A-1 at 49. Just as Dr. Hauser did, Dr. Lesser noted that the record suggests that petitioner's episode in London may have begun before he hit his head. Exh. A-1 at 49. Assuming that petitioner seized for 5 to 10 minutes, Dr. Lesser opined that the episode was much more likely attributable to a seizure than to a syncopal<sup>10</sup> event, but that the information available to him did not allow a definite determination of the cause of the 2004 London episode. Id. at 49-50. He also opined that a partial complex seizure was a reasonable possibility to explain petitioner's behavior during the IOE flights and that petitioner

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<sup>10</sup> Syncopal is the adjective form of the word for fainting.

might be vulnerable to future seizure episodes. Id. at 50. After the consultation with Dr. Lesser and a review of petitioner's medical file, Dr. DeVoll found no satisfactory medical explanation for any disturbance of consciousness.

The law judge concluded that petitioner failed to meet his burden of establishing that he is entitled to hold a medical certificate. The law judge made an explicit credibility determination in favor of Captain Metzner and against petitioner; he made implicit credibility determinations against Ms. Myhill and in favor of the medical witnesses when he found that the ambulance and hospital records were accurate. Initial Decision at 696-97.

Petitioner argues on appeal, generally, that he has established that he did not experience a seizure or unexplained loss of consciousness either in London or during the IOE flights and that he has shown himself to be qualified for a medical certificate. He specifically argues, first, that the law judge's findings of fact are not supported by a preponderance of reliable, probative, and substantial evidence, regarding his findings as to what prompted the EMS call from the restaurant; regarding his findings as to the EMS personnel's procedures in reporting the incident to which they responded; or as to his findings regarding the circumstances of the IOE flights.

Petitioner next argues that the law judge's conclusions

were not made in accordance with law, precedent, and policy. Although not entirely clear, petitioner's argument seems to be that the Board failed to follow its precedent in Petition of Drennan, NTSB Order No. EA-3478 (1992).<sup>11</sup>

Finally,<sup>12</sup> petitioner argues that prejudicial errors have occurred in that the law judge did not include in his decision findings and conclusions on all material issues of fact, of law, and of witness credibility. He specifically argues that the law judge did not thoroughly discuss "his reasons for accepting or rejecting each piece of evidence and for believing or crediting each expert witness concerning the logic, objectivity, persuasiveness, and the depth of the medical opinions." Appeal Br. at 45. Petitioner addresses the fact that two of the Administrator's expert medical witnesses advanced two different theories regarding the likelihood of a seizure during the IOE flights.

The Administrator contests each of petitioner's arguments in his reply brief, and urges us to deny petitioner's appeal.

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<sup>11</sup> Although his argument is couched in terms of "law, precedent, and policy," he concludes the argument saying that the law judge's findings are "unsupported by any reliable, probative, or substantial evidence in the record." Petitioner's Appeal Br. at 39, 45.

<sup>12</sup> We also note that petitioner seeks oral argument. We find that the parties have fully briefed the issues in this case and that oral argument on these issues is not necessary. See 49 C.F.R. § 821.48. We therefore deny this motion.

We have closely examined the record of proceedings below, and we conclude that petitioner has not established that he did not have a disturbance of consciousness without satisfactory medical explanation in London in 2004. The medical records provide ample indication that a seizure occurred. Although petitioner's witness, Ms. Myhill, now contradicts the statements attributed to her, both explicitly and implicitly, in those medical records, we note that the law judge made an implicit credibility finding against her, and specifically indicated that he placed confidence in the accuracy of the information in the records. Ms. Myhill's current statements, not in the context of providing accurate information for the purposes of medical diagnosis and treatment, do not diminish the validity conferred on statements made in the context of those medical purposes. Statements made to a physician or health care professional can normally be relied upon in view of the strong motivation to be truthful. See, e.g., Administrator v. Harrington, 3 NTSB 2364 (1980); Administrator v. Jensen, 3 NTSB 3085 (1980). The law judge made an implicit credibility determination regarding the hearing testimony of Ms. Myhill, which contradicted other evidence attributed to her, and we will not reverse it.

The Administrator presented evidence from two medical doctors, one emergency room/triage nurse, and two paramedics, all of whom collected information to assist them in diagnosing

and/or treating a person in distress. The Administrator also presented testimony and other evidence from five more medical doctors, most of whom have extensive neurologic credentials, who relied on that information in determining the qualifications of an individual to engage in passenger-carrying flights for a major airline. We conclude that the records indicate that petitioner has a medical history or clinical diagnosis of disturbance of consciousness without satisfactory medical explanation of the cause; or that he has a seizure disorder, disturbance of consciousness, or neurologic condition that the Federal Air Surgeon found makes him unable to safely perform the duties or exercise the privileges of an airman certificate, or may reasonably be expected, for the duration of the certificate, to make him unable to perform those duties or exercise those privileges.

As for petitioner's contention that two of the expert witnesses presented by the Administrator expounded two different theories regarding petitioner's loss of consciousness, we find that this argument is without merit. Either of the theories disqualify petitioner from holding an unrestricted medical certificate. Although there is certainly room for disagreement on whether petitioner suffered a partial complex seizure or a simple complex seizure, or whether the IOE incident constituted a seizure or seizures at all, petitioner has only raised

questions about the theories; he has not established that he did not suffer one or the other, or that the incident was something other than a seizure. His statement that, "there is a lack of any concern [he] may be at a greater risk for seizures in the future than the general population," has no basis in fact. See Appeal Br. at 35-36.

Petitioner also argues, however, that the law judge "did not make a definitive finding whether he credited the testimony of" Dr. Hauser and Dr. Hastings. Id. at 38-39. While we agree with petitioner that there was not a specific credibility determination regarding their testimony, the record seems clear to us, based on the law judge's factual findings and oral initial decision, that he did credit those witnesses. In any event, the record is clear regarding the law judge's determination that at least one unexplained disturbance of consciousness occurred. Such a finding disqualifies petitioner from holding an airman medical certificate.

As noted by petitioner in his appeal brief, the burden of proof is on the petitioner to establish his medical qualifications. Petition of Peet, NTSB Order No. EA-4854 (2000); Petition of Witter, NTSB Order No. EA-4500 (1996). In this case, however, petitioner did not establish that he did not experience a seizure or unexplained loss of consciousness during

the London incident or during the IOE training flights.<sup>13</sup>

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<sup>13</sup> We comment on one other aspect of petitioner's brief. He posits that the facts of his case are "extremely analogous to the Board's holding in Petition of Drennan, NTSB Order No. EA-3478 (1992)." Appeal Br. at 39. We disagree.

In Drennan, the petitioner experienced a disturbance of consciousness while she was on a mountain hike. The record reflects that, before the incident, she had been under considerable stress and did not get much sleep during that time, and that she did not get any sleep at all the night preceding the incident. She also had nothing to eat for 24 hours prior to the beginning of the hike, experienced the onset of her menstrual period earlier that day, and consumed a wine cooler before the hike began. The hike was up a steep slope, and she and her boyfriend proceeded at a rapid pace and were arguing when she experienced the disturbance of consciousness, about one mile into the hike. The boyfriend informed the attending paramedics that she suffered a seizure. The hospital records noted no disorientation, but did reflect that she had a history of seizures "off and on" for the previous 10 years. A nurse's entry stated that the petitioner vomited a large amount of undigested food enroute to the hospital and that she last had a seizure a year earlier. Physician entries later noted that she had a 15-year history of seizures.

She was examined less than 3 weeks later by a neurologist, whose assessment was that a seizure, "if it did occur" (Drennan at 2), was a symptomatic-type seizure following sleep and food deprivation, fatigue, onset of menses, alcohol ingestion and hyperventilation. The doctor suggested that such a phenomenon is not uncommon in young adults who push their bodies to the limit. About 5 months later, the petitioner's record was reviewed by a neurologist for the FAA, who questioned whether the petitioner actually had a seizure in view of the conditions leading up to the event, and opined that she fainted. After submitting an application for medical certification, the petitioner was evaluated by at least four more doctors, who generally returned "normal" findings, and more than one opined that she had not experienced a seizure; one noted that, if a seizure had occurred, it would have been "on the basis of exhaustion and perhaps even hypoglycemia." (Id. at 3.)

Ultimately, it became apparent that any history of seizures may have come from the petitioner's unfamiliarity with that term.

Having thoroughly examined the briefs of the parties, the transcript of the hearing, and the evidence submitted therein, we find that petitioner has failed to meet his burden of proof to establish his qualifications for a medical certificate.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Petitioner's appeal is denied;
2. The law judge's decision is affirmed; and
3. The denial of petitioner's application for a medical certificate under 14 C.F.R. §§ 67.109(a)(2) and (b), 67.209(a)(2) and (b), and 67.309(a)(2) and (b) is affirmed.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, Member of the Board, concurred in the above opinion and order.

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(continued)

She was a German national for whom English was a second language, who equated the term "seizure" with dizziness, and related that she sometimes felt weak and tired at the onset of her menstrual period, especially if she were travelling and eating improperly. A letter from the petitioner's parents indicated that they were unaware of any seizure in her past.

The Administrator's only expert witness based his opinion regarding seizure primarily on the hospital report regarding the incident. These records were shown to have significant discrepancies and inaccuracies, such as the previously-mentioned misunderstanding regarding the word "seizure," and the notation of vomiting a large amount of undigested food even though the petitioner had not eaten in the 24 hours before the incident.

In the end, the Board agreed that, even if there was a seizure, there was a satisfactory medical explanation for it. Therefore, based on our review of the Drennan case, we believe that it is markedly different from the one before us.

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
OFFICE OF ADMINISTRATIVE LAW JUDGES

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In the matter of: \*  
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NEWTON R DICKSON, \*  
\*  
for review of the denial by the \*  
Administrator of the Federal \* Docket No. SM-4892  
Aviation Administration of the \* JUDGE MULLINS  
issuance of an airman medical \*  
certificate. \*  
\*  
\* \* \* \* \*

U.S. Tax Court  
U.S. Courthouse  
516 Rusk Avenue  
Houston, Texas 77002

Thursday  
August 6, 2009

The above-entitled matter came on for hearing,  
pursuant to notice at 9:00 a.m.

BEFORE: WILLIAM R. MULLINS  
Administrative Law Judge

## APPEARANCES:

On behalf of the Petitioner:

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ORAL INITIAL DECISION

ADMINISTRATIVE LAW JUDGE MULLINS: This has been a proceeding before the National Transportation Safety Board held here in Houston, Texas. Today is the 6th day of August 2009. We began the hearing on the 4th of August and we have tried the matter now for three days. This is the conclusion of the third day. The matter was on for hearing on the Petition of Newton R. Dickson for review of the denial by the Administrator of the Federal Aviation Administration of the issuance of an airman medical certificate. Throughout these proceedings I will refer to Mr. Dickson as the Petitioner, which he is. And hopefully I will continue to say Petitioner. Most of our cases the airman is a respondent, and I did note that all of his exhibits are marked "R" in sequence which is part of that mindset I guess we all have in working these cases.

In any event, Mr. Newton Dickson is the Petitioner and his petition serves as the document that we have proceeded on here today which has been answered by the Administrator of the Federal Aviation Administration. The matter has been heard before me, William R. Mullins. I'm the administrative law judge for the National Transportation Safety Board and is provided by the Board's rules I will issue a bench decision at this time.

The matter came on for hearing pursuant to notice and

1 was given to the parties and was called for trial here in Houston,  
2 as I said, on the 4th day of August 2009. The Petitioner was  
3 present throughout these proceedings and represented by his  
4 counsel, Mr. Greg Winton of Rockville, Maryland. The Administrator  
5 was present throughout these proceedings and was represented by  
6 his counsel Ms. Autumn Killingham of the Chief Counsel's office in  
7 Washington, DC. The parties were afforded a full opportunity to  
8 offer evidence, to call, examine and cross-examine witnesses; and  
9 in addition the parties were afforded an opportunity to make  
10 argument in support of their respective positions.

11 DISCUSSION

12 Basically this matter is on based on two incidents. One  
13 was April 8th of 2004, when at the conclusion of a flight which  
14 was part of an initial operating experience flight by this  
15 Petitioner, on that evening on arrival in London there was an  
16 incident at a restaurant which resulted in the Petitioner being  
17 transported to a London hospital. As a result of that the  
18 Administrator has taken the position that there was a seizure  
19 related to the incident in the restaurant. And then a month later  
20 on May 8th of 2004, while on another leg on an initial operating  
21 experience leg -- actually that day there were two legs. There  
22 was one from Cleveland, Ohio to Las Vegas and then from Las Vegas  
23 back to Houston. And I think the primary complaint is on the leg  
24 from Las Vegas to Houston. There was, according to the  
25 Administrator's witnesses, a disturbance of consciousness. And

1 based on those two incidents the Administrator has denied the  
2 respondent his medical, an application for medical based on  
3 provisions of FAR 67.109 (a)(2), 209(a)(2) and 309(a)(2) of that  
4 FAR 67. I'll briefly go through witnesses and exhibits. Actually  
5 it won't be brief, but I'll try to identify them. The Petitioner  
6 had a number of exhibits and none of them in sequence, and I'll  
7 try to identify them as they were identified and admitted. But  
8 the first exhibit that was identified in the evidence was Exhibit  
9 R-49 which was the picture of the cockpit of an MD 80 and 757 and  
10 checklists that accompany those particular aircraft.

11           The next was respondent's [Petitioner's] Exhibit 8 which  
12 is a report or document from the London Ambulance Service, LAS,  
13 which would reflect convulsions and fitting. The next was  
14 respondent's [Petitioner's] Exhibit 10 which was the emergency  
15 call out of the ambulance service, and it also reflects  
16 convulsions. The next was R-11 which were clinical notes from the  
17 hospital. The next was R-12 which is the patient record from the  
18 hospital. Next was R-13 which are hospital notes of Dr. Kennedy.  
19 Next was R-14 which is an inpatient history sheet. Next was R-15  
20 which was a discharge with some information on it. Next was R-17  
21 which was a letter from University -- I guess that's University of  
22 Central London Hospital, Dr. Kennedy. Next was R-19, admission  
23 information. Next was R-20, discharge summary. Next was R-21,  
24 letter from the University of Central London Hospital. R-34 was a  
25 letter to Petitioner from the management of the London hospital.

1 R-22 is a statement of Dr. Grayson. And R-31 is a fitness for duty  
2 evaluation, medical evaluation. And I believe that was  
3 Dr. Berry's report. Respondent's Exhibit 33 next admitted was a  
4 letter from Dr. Berry.

5           Let me say in general that almost all of the exhibits of  
6 the Petitioner are contained in the Administrator's Exhibit A-1  
7 which is the blue ribbon medical record file of this Petitioner.  
8 The next, R-48, was the letter of denial by Dr. Tilton, the  
9 Federal Air Surgeon. Next was Respondent's Exhibit 4 which is a  
10 transcript of the EMS call and Respondent's Exhibit 5 was the tape  
11 or CD of that call. Next was R-39 which is Dr. Loftus' CV. Next  
12 was R-51 which was Ms. Myhill's schematic of the restaurant floor  
13 plan. Next was R-28 which is affidavit of Captain Metzner prepared  
14 for some lawsuit that was ongoing. Next was R-41 which is a note  
15 from the director of the Employee Assistance Program, EAP. And  
16 that would be Continental Airlines. The next was Respondent's  
17 [Petitioner's] Exhibit 52 which was a form used by Continental  
18 Airlines. I think it's captioned Accuload, and it was the form  
19 that was involved in the flight from Las Vegas to Houston on that  
20 date in question and it relates to weight and balance information  
21 and also has a comment down there about the zero weight -- zero  
22 fuel weight of a minus 1,000 pounds. Respondent's [Petitioner's]  
23 Exhibits 53, 4, 5, 6 and 7 were documents introduced by Dr. Loftus  
24 here today as a rebuttal witness. R-53 is a chart prepared by  
25 Dr. Loftus. 54, 5, 6 and 7 are articles. 54 is an article on

1 Value of Tongue Biting in Diagnosis of Seizure. 55 is Diagnostic  
2 Value of Incontinence in Seizure Diagnosis. R-56 is patient with  
3 epilepsy article, and 57 is an article on prolonged postictal  
4 confusion. Those are Respondent's exhibits.

5           The Administrator had 13 exhibits. The first was the  
6 medical file that I made reference to which is some three-hundred-  
7 and-some, 400 pages long. The second was the airman file which was  
8 admitted as A-2. A-3 is Respondent's [Petitioner's] reply to  
9 interrogatories this particular one was admitted as A-3. A-4 was  
10 Mr. Dickson's answer to -- I'm not sure what it was an answer to.  
11 But it is captioned Answer of Newton Dickson. A-5 was a letter to  
12 Captain Metzner from the Petitioner. A-6 was the resume of Captain  
13 Metzner. A-7 was Captain Metzner's notes that were made on the  
14 back of some document for Continental Airlines. A-8 and A-9 were  
15 notes to the legal department from Captain Metzner. I think A-9  
16 was kind of a general description and A-8 was a specific  
17 description of what had gone on on the flight on May 8th. A-10 was  
18 the curriculum vitae, CV of Dr. Hauser. A-11 was an article that  
19 was written by Dr. Hauser. A 12 was the CV of Dr. Hastings, and A-  
20 13 was the CV of Dr. DeVoll.

21           The first witness called by the Petitioner was  
22 Mr. Dickson. Mr. Dickson testified he's 47 years old, has been  
23 flying since he was 19. He has an airline transport pilot  
24 certificate and has a type rating in the 757/767. And I did ask  
25 him about why he didn't have type ratings in the other aircraft

1 that he had flown for Continental and over this period of time,  
2 and his testimony was that it was Continental's policy that first  
3 officers didn't have type ratings and had something to do with  
4 trying to keep them employed, I guess.

5           Anyway, he testified he has 17 to 18,000 hours of flight  
6 time and he has not flown since the flight on May 8th of 2004, and  
7 he's currently employed by the Transportation Security Agency. He  
8 did testify and he talked about his 757 type rating. And he talked  
9 about that the type rating was all done in a simulator and then he  
10 was required to have 25 hours of initial operating experience, IOE,  
11 according to the Continental Airlines procedure manual. And he  
12 was in the process of getting that and had almost -- as I  
13 understood it, had almost all of that time when he flew to London  
14 on April 8th. He testified he met Ms. Sophie Myhill in London who  
15 was an old friend. Her testimony was they had been acquainted for  
16 13 years and they went to a Thai Noodle Bar restaurant. He said  
17 he was very tired. He testified that something happened. He  
18 collapsed and that Ms. Myhill came to him and asked what happened.

19           They said he -- or he testified he didn't bite his  
20 tongue, he was not convulsing and he said the ambulance personnel,  
21 technicians, paramedics jerked him up when they arrived at the  
22 scene and there was one of them in the front driving, one in the  
23 back with he and Ms. Myhill. He was asked about the prime  
24 minister, who was the prime minister. He said he didn't know.  
25 When he was asked who was the President, he said Bush, Bush 2.

1 And testified that on arrival at the hospital he felt he was good  
2 as new and jumped out of the ambulance. He did identify R-8 which  
3 is the London Ambulance Service which shows the note that there  
4 was convulsions, fitting and shivering. He identified R-10 which  
5 was the emergency call out from the London Ambulance Service which  
6 also indicated foaming -- I believe, foaming at the mouth.

7 But, anyway, there was fitting or four minutes of  
8 fitting. He identified Respondent's [Petitioner's] R-11 which was  
9 a clinical note of Nurse Spicer, T. Spicer. And this one said  
10 that witness said he fitted for two minutes. Then her comment on  
11 that same form was he looked confused and vague. He identified  
12 Exhibit R-12 and there was a possibility of a fit. R-13, clinical  
13 notes of Dr. Kennedy. And Dr. Kennedy's notes reflected that he  
14 had fallen over, had fit, shaky, foaming at the mouth, very  
15 confused, amnesia. He identified R-14 which was the inpatient  
16 history which also reflected shaking, foaming at the mouth and all  
17 with a question mark before them. I think Dr. Hauser said that  
18 was possible and/or questionable. Either way.

19 Anyway the notes in that patient history all had a  
20 question mark before it. Some of the others did as well. R-15  
21 was the discharge which the diagnosis was generalized seizure. R-  
22 17 was the hospital letter which I have previously identified. R-  
23 19 was the admission information. R-20 -- and these are all  
24 things he testified about and I'm just going through them. R-20  
25 is the discharge summary that talked about an epileptic fit. I

1 think Dr. Hauser said it wasn't epilepsy if it was the first  
2 seizure. You had to have more than one for it to be epilepsy.

3 In any event. R-21 was a letter from the hospital  
4 saying Ms. Myhill was at your side immediately after fall and her  
5 account would be more accurate. R-34 is letter to Petitioner from  
6 the hospital. And he testified -- Petitioner testified that  
7 subsequent to these events he had sued both Captain Metzner and  
8 Dr. Berry. His initial comment was they had been withdrawn, but  
9 apparently there was some settlement. And as I understood it,  
10 part of the settlement in those lawsuits was that Captain Metzner  
11 provided an affidavit which I think is R-28 and that Dr. Berry  
12 agreed that he would not testify as an expert in these proceedings  
13 based on this settlement.

14 Mr. Dickson did testify that Dr. Berry was trying  
15 to -- he didn't say extort, but he said Dr. Berry had told him  
16 that he wanted money to make this problem go away and he said that  
17 R-33, which was a letter from Dr. Berry to Dr. Silberman, was in  
18 retaliation for not giving him the money. That letter did apprise  
19 Dr. Silberman of his fitness for -- fitness evaluation that had  
20 been requested, I think, by Captain Craig and it would indicate he,  
21 Petitioner wasn't fit because of this seizure activity although at  
22 that time he had a current medical, first class medical which was  
23 never revoked. There was some comment about that and I don't  
24 think that had any bearing on these proceedings this week. On  
25 cross-examination he testified only that Ms. Myhill was the only

1 person with him and he had testified that on this initial  
2 operating experience leg into Las Vegas from Cleveland that the  
3 autopilot had malfunctioned.

4           On cross-examination it was pointed out apparently he  
5 made a statement or something to the effect that he had put the  
6 information in wrong in the autopilot, not that it had  
7 malfunctioned. He also testified that Dr. Craig had advised him  
8 to see Dr. Berry and Dr. Tiwari for this fitness evaluation. He  
9 testified about the events of the flight back from Las Vegas to  
10 Houston and indicated that he had become so upset with Captain  
11 Metzner that he just thought it was okay to turn a cold shoulder  
12 on him. Second witness called by the Petitioner was Dr. Loftus,  
13 and Dr. Loftus said that he believed that the incident in the  
14 restaurant was caused by a fall that resulted in a concussion that  
15 rendered the Petitioner unconscious and that there was -- he  
16 didn't agree with any of the findings in the hospital records that  
17 there was seizure activity involved and he believed that it was  
18 simply a concussion.

19           The third witness was Sophie Myhill, and Ms. Myhill  
20 testified that -- and she identified this -- and she drew the  
21 schematic of the restaurant. She testified going to the  
22 restaurant with the respondent that evening. She testified at the  
23 end of the meal that she had gotten up and gone to the restroom  
24 and was gone one to two minutes and on her return respondent was  
25 laying in the floor, that Ms. Kayenne was down holding his hand

1 and Ms. Kayenne moved and Ms. Myhill got down there. She said  
2 after she returned from the restroom that it was about three  
3 minutes before the ambulance arrived. She said she was holding  
4 his hand and he was staring straight ahead and his eyes were  
5 vacant. She said she saw no convulsions, no eyes rolled back and  
6 no foaming at the mouth. The last witness called by the respondent  
7 was Mr. Reiko Walker who also works for the Transportation  
8 Security Agency. He is a pilot with 132 hours. And he says -- he  
9 testifies he works alongside Petitioner every day, eight hours a  
10 day at least five days a week and sees him on the weekends and had  
11 been doing so for at least two years and had never seen any kind  
12 of seizure activity or abnormality in Mr. Dickson's health  
13 presentation.

14           The Administrator then -- and then Petitioner rested.  
15 The Administrator called first Captain Metzner who has an ATP with  
16 some 21,000 hours of flight time and his resume is in at A-6. Very  
17 high-time pilot who apparently has reached age 60 and no longer  
18 flies for Continental Airlines. He said he was working for  
19 Dominicana I believe was the name of the airline as a chief pilot  
20 or check airman for them down in the Dominican Republic. He  
21 identified Exhibit A-7 which is the flight assignment thing that  
22 has the times on the IOE reflected on it and he also identified A-  
23 5 as a letter he received at his home. And it had at the top of  
24 it Newton Dickson's home address and the second page on the lower  
25 part was signed "Newton" and typed in below that was Newton

1 Dickson. He saw the Accuload thing, but he wasn't -- he couldn't  
2 identify that was part of the flight. He hasn't seen that since  
3 then, but it was later identified on rebuttal by the Petitioner.  
4 Then R-28 was the affidavit of Captain Metzner that was submitted  
5 as part of the settlement agreement in the lawsuit.

6 In the affidavit Captain Metzner said he never saw the  
7 Petitioner unconscious on the flight from Houston -- from Las  
8 Vegas to Houston on May 8th, 2004. I may have confused those. I  
9 think A-7 may be the sheet he made his notes on which was  
10 identified and then on cross-examination he identified A-2 which  
11 is a training record for the initial operating experience and  
12 there was nothing entered on that about the leg from Las Vegas to  
13 Houston.

14 MR. WINTON: Your Honor, is that R 2 maybe? R-1 and R-2  
15 were offered and received as the training records.

16 ADMINISTRATIVE LAW JUDGE MULLINS: R-1 was?

17 MR. WINTON: R-1 and R-2.

18 ADMINISTRATIVE LAW JUDGE MULLINS: Okay. That's R-2.  
19 Okay.

20 MR. WINTON: R-1 as well is in the record.

21 ADMINISTRATIVE LAW JUDGE MULLINS: Thank you for that  
22 correction. Then he did talk about this R-52, the Accuload thing,  
23 and finally figured out -- in his handwritten notes there was a  
24 comment about ZFW minus 1,000 and he didn't know what that was.  
25 Then when he saw the Accuload document he remembered that. It had

1 something to do with backing out this 1,000 pounds of fuel in  
2 their computer which Petitioner was unable to do when the captain  
3 returned to the cockpit after their layover in Las Vegas. He  
4 testified -- he also admitted A-8 and A-9. As I said, A-8 is a  
5 very detailed explanation by Captain Metzner of the events that  
6 occurred on that flight. And he reemphasized or he testified it  
7 was in that document that he kept asking Petitioner if he was all  
8 right. Was he feeling all right. He was concerned that his  
9 performance had deteriorated to a point where he thought he was  
10 having some kind of medical problem that was not letting him  
11 continue or that might impact their continuing that flight. He  
12 said that Petitioner assured him he was okay.

13 I won't go into -- I think A-9 pretty well covers all of  
14 the problems that they were having on that flight, and he  
15 testified about this, about the inability of the  
16 respondent -- Petitioner, excuse me, to do some fairly basic tasks  
17 that he felt like he would have obtained the ability to do those  
18 tasks by getting his type rating in that particular aircraft.  
19 Then as they were arriving into Houston he said Petitioner was  
20 unable to do tasks that were common to any airplane like setting  
21 the speed bugs on the speed indicator and also obtaining the  
22 Automatic Terminal Information Services (ATIS) information.

23 Second witness called by the Administrator was Gary  
24 Small who now is chief pilot for Continental Airlines. He was  
25 assistant chief pilot on the date of this flight from Las Vegas to

1 Houston and was called on the telephone from the cockpit by  
2 Captain Metzner and was asked to meet the aircraft because he  
3 felt -- it was Captain Metzner's testimony that he just felt this  
4 was a situation he'd never seen before and he felt like a  
5 management pilot should be involved in the debrief when they  
6 arrived because captain Metzner said he just couldn't imagine what  
7 was going on with the Petitioner. Captain Small testified when he  
8 got to the aircraft he went in the cockpit and they closed the  
9 door. And he described -- he talked about his inability to be  
10 medically accurate, but he said that respondent was lethargic,  
11 detached, not in the moment.

12           When he quizzed him Petitioner said he was tired. He  
13 hadn't gotten any sleep. Captain Small said that fatigue was  
14 something that pilots dealt with every day and that he believed  
15 this was a medical problem, not fatigue.

16           On cross-examination there was quite a bit about why  
17 didn't he have him drug tested and everything, but Captain Small  
18 said he didn't think there was a drug issue involved and he didn't  
19 smell any alcohol. The third witness called by the Administrator  
20 was Captain Craig who was assistant chief pilot in Newark who was  
21 the supervising pilot, I guess, for Petitioner. Apparently -- he  
22 said he had flown with Petitioner many times and he knew him to be  
23 an excellent pilot and employee. I found that sort of an  
24 interesting comment. I suspect we all have in our knowledge of  
25 pilots we know some people who are just excellent pilots, but

1 they're pain-in-the-butt employees for whoever they're flying for.  
2 But his comment was that Mr. Dickson was not only an excellent  
3 pilot but he was an excellent employee.

4           Then he went on about talking about his knowledge of  
5 Captain Metzner, and he said that not only was Captain Metzner one  
6 of the best pilots he had ever been around, and Captain Craig's  
7 background was military. I think he was Army. Retired from the  
8 Army and then 19 years -- he's now retired, but he spent 19 years  
9 with Continental Airlines. And he said he thought Captain Metzner  
10 was probably the best pilot he had known in all those years, which  
11 was quite an endorsement of Captain Metzner. And I didn't mention  
12 but Captain Small who is now the chief pilot of Continental  
13 Airlines was a former Navy pilot and had been with Continental  
14 Airlines since 1978. Any event, Captain Craig described the  
15 information he received about Mr. Dickson as -- he said his  
16 conduct was unusual and bizarre.

17           The fourth witness called by the Administrator was  
18 Dr. Willard Allen Hauser who is professor of neurology at Columbia  
19 University. He's board certified in neurology and epidemiology.  
20 A consultant to Mayo Clinic. Sometimes I think that perhaps the  
21 Administrator thinks the longer the CV is, the more credibility  
22 you're supposed to give a witness. Dr. Hauser's CV was 53 pages  
23 long and 43 pages of that were his publications. He obviously is  
24 very academically astute. And he had reviewed all of the records  
25 in this matter and his opinion was the incident in London was a

1 tonic-clonic seizure and that the event that occurred on the  
2 flight from Las Vegas to Houston was a continuation or was another  
3 extended seizure. That's probably not a good word that I've used,  
4 but I'm not a medical person. That was his opinion. The next  
5 witness called by the Administrator was Dr. Hastings.

6 Dr. Hastings -- John Hastings is a board certified  
7 neurologist and also board certified in aerospace medicine. He's  
8 a senior consultant to the Federal Air Surgeon and is from Tulsa.  
9 I have had many cases over the years with Dr. Hastings including  
10 the Angela Drennan case. He testified in that case up in Alaska  
11 many years ago which was mentioned by counsel for Petitioner in  
12 closing. In any event his expert opinion was that the history was  
13 a valid history that's contained in these records, the hospital  
14 records, the ambulance records; and based on that history he  
15 believes he had a seizure. And that on the IOE flight -- that was  
16 April 8th. Then on the May 8th flight from Las Vegas to Houston  
17 he believed there was a disturbance of consciousness that rendered  
18 the Petitioner to act the way he acted. The last witness called  
19 by the Administrator was Dr. DeVoll who is board certified in  
20 aerospace medicine. He's, I guess, deputy FAA Air Surgeon. Works  
21 in Dr. Tilton's office in Washington, DC. And he also -- his  
22 opinion was based on this medical record that Petitioner was not  
23 qualified for an airman medical certificate. The Petitioner had  
24 two witnesses in rebuttal. The first was Dr. Loftus who came back  
25 this morning and he identified, as I said earlier, his chart he

1 prepared which was R-53 and then four articles involving diagnosis  
2 of seizure which is 54, 55 and 56 and 57. He said the hallmark of  
3 seizure is the movement of the arms and legs or fitting. I think  
4 he also used that term fitting. He said it rarely extended beyond  
5 two minutes. He also and I didn't mention but I think Dr. Hauser  
6 mentioned that the Central London Hospital was famous worldwide  
7 for its neurology department, and Dr. Loftus confirmed that today.  
8 And he also reconfirmed what he said yesterday about instead of a  
9 loss of consciousness or disturbance of consciousness on this  
10 flight he felt like the airman Petitioner was simply acting like a  
11 teenager.

12           Then the second witness in rebuttal was Mr. Dickson. He  
13 went on again about his problem with Captain Metzner and how  
14 difficult it was to work with Mr. Metzner. Then he identified  
15 that R-52, which was the Accuload thing. He did comment -- I  
16 remember he said they were two and a half hours on the ground in  
17 Las Vegas. That's not what the documents would indicate. That's  
18 not what Captain Metzner testified to. Although I think it was an  
19 hour and 40 minutes or an hour and 45 minutes between the time  
20 they arrived and the time they left. I don't think that was  
21 important for my decision. But I just made a note of that in  
22 passing. Okay. That's the testimony that I received. Let me  
23 briefly make some general comments. First of all, I'll tell you  
24 right now that I cannot sustain the Petitioner's petition in this  
25 matter and it will be overruled. But in general and if you step

1 back and look at this thing, counsel for Petitioner started out  
2 talking about the time line. So I've had that in mind as I worked  
3 through this case and tried to see where all this is coming from.  
4 But there was an interesting time lapse perhaps between the  
5 incident and the time the ambulance was called. I guess it could  
6 go either way. If somebody falls in a restaurant, the restaurant  
7 is not going to call an ambulance. There's not going to be  
8 somebody say, oh, somebody fell. Let's call an ambulance. There  
9 has to be some sort of conduct that prompts the call. And if it's  
10 an immediate call, which the suggestion is, then it has to be  
11 something bad is happening. It's not just somebody laying on the  
12 floor staring vacantly ahead holding some lady's hand. I think it  
13 would have to be something that is much more serious than that and  
14 probably would be as reflected in the hospital records some sort  
15 of fit that's going on, some sort of foaming at the mouth, some  
16 sort of behavior that is so contrary to someone just laying on the  
17 floor that that probably prompted this call which would support  
18 these hospital documents. The other thing in the time line is that  
19 Ms. Myhill testified she went to the bathroom for two minutes and  
20 came back and the ambulance arrived three minutes later and that  
21 when she came back from the bathroom Petitioner was laying on the  
22 floor. Well, that's five minutes. It was a lot longer than five  
23 minutes between the call that went to the ambulance service and  
24 the arrival of the ambulance. And I suspect -- and Ms. Myhill was  
25 an attractive young lady. In my experience, limited as it might

1 be, but attractive young ladies spend more than one to two minutes  
2 on restroom break when they're on a date or out with some young  
3 gentleman. So I think there was -- I suspect there was quite a bit  
4 more time that elapsed.

5           But on the arrival -- and the other thing that hasn't  
6 been particularly addressed is and I kept -- the question you have  
7 to have as you look at this is where did this information come  
8 from, the foaming at the mouth, the convulsion, the fitting that  
9 was prevalent all through these hospital records, but no one  
10 mentioned it. But, you know, it talked about customers said  
11 referring to these things. Well, the emergency medical team people  
12 that go out, the ambulance people are trained and they take  
13 statements and they interview people and in my experience they're  
14 doing all this while they're trying to get somebody loaded and  
15 delivered to the hospital. They probably spend even more time  
16 doing that where apparently when they got there whatever had  
17 happened was over and he is just laying on the floor on his side  
18 staring vacantly.

19           In any event I think those circumstances of this  
20 particular case give credence to the hospital records and the  
21 continued comments about convulsion, fitting, foaming at the mouth  
22 that's prevalent all the way through here. I think that does give  
23 credence to those comments. Another interesting comment I thought  
24 was there apparently was some indication at least in part of the  
25 record of some incoherence on the part of this Petitioner prior to

1 his falling on the floor, and that would be consistent with the  
2 suggestion -- and I think it came from Ms. Myhill, that he sat on  
3 the couch while she had gone to the restroom. Why else would he  
4 need to be on the couch unless there is something happening to him  
5 or something going on? There was certainly no indication the  
6 restaurant people wanted them out of their seat or away from that  
7 table.

8           That was another aspect of the case that I thought was  
9 interesting and again would contribute to something that's going  
10 on with this Petitioner, medically that's going on with him rather  
11 than just lack of sleep. And let me go back to that. Captain  
12 Small said fatigue and lack of sleep is something pilots deal with  
13 every day. As I stated I find, based on those general comments,  
14 that that gives credence, and I find the reports of fitting,  
15 convulsion, foaming at the mouth established by the history  
16 reflected in the ambulance and hospital records and which would  
17 support the medical opinions of Dr. Hauser and Dr. Hastings of a  
18 seizure. Now, let me talk a little bit about the IOE flight.

19           There was some talk about -- first of all, let me say  
20 that I have -- I've been hearing cases before the Safety Board for  
21 20 years and I've never had three as distinguished airmen as  
22 Captain Metzner, Captain Small and Captain Craig in one hearing.  
23 Captain Small is a chief pilot for one of the major air carriers  
24 in the United States, Continental Airlines. Captain Craig had been  
25 assistant chief pilot for that same airline. And Captain Craig

1 identified Captain Metzner as probably the best pilot he had ever  
2 known in all of his years of aviating. One of them, and I'm not  
3 sure which one, talked about cockpit resource management. I would  
4 share with you just a little bit about my background. About eight  
5 years ago, seven years ago, at least some period of time two or  
6 three years before these events I had a hearing here in Houston  
7 involving two Continental Airline pilots who landed an MD 80 at  
8 Houston Intercontinental with 80 passengers on board gear up. And  
9 there was absolutely nothing wrong with that airplane. And that  
10 event probably has impacted all of the airlines across the United  
11 States but it certainly impacted crew resource management training  
12 at Continental Airlines.

13           So I know that about the time this was going on crew  
14 resource management was probably at the forefront of everybody  
15 that flew for Continental's mindset about how to act and how to  
16 interact in the cockpit. So I find Captain Metzner's comments  
17 about trying to determine what's going on with this Petitioner  
18 being particularly relevant given, you know, those circumstances.  
19 Any event, particularly his comments about the inability of the  
20 Petitioner to do basic airman functions, not necessarily related  
21 to the flight management system but the same requirements that are  
22 expected of any airman, setting of the air speed bugs, getting the  
23 ATIS information. That's just something that is done routinely in  
24 every cockpit on every flight in every airplane in every airline  
25 in the United States. And based on Captain Craig's statement that

1 he had flown, that he knew this Petitioner had several thousand  
2 hours of flight time, he was a good pilot and a good employee,  
3 that just was not consistent with what was going on with the  
4 Petitioner that day.

5 I was not particularly impressed by Dr. Loftus'  
6 characterization of acting like a teenager. I would state on the  
7 record that in my experience I think I'd rather fly with someone  
8 with a seizure disorder than I would somebody setting up there  
9 acting like a teenager because I have some teenage grandchildren  
10 and I've raised some teenagers over the years so I know a little  
11 bit about what that means. And that's inconsistent with the kind  
12 of pilot that Captain Craig said this Petitioner was over the  
13 years of his flight time with Continental Airlines. Finally, and  
14 I'm reluctant to say this, but to a certain extent the events of  
15 the initial operating experience relate to credibility of Captain  
16 Metzner and to the Petitioner.

17 And I was particularly struck by the fact that  
18 Petitioner just vehemently denied the authorship of Exhibit A-5,  
19 and it's real clear under the evidence of this case that he's the  
20 only one that would have known the information that was contained  
21 in that letter. And you only have to look through this file to  
22 find several signatures of respondent, and that signature on that  
23 letter is exactly the same as all of these documents contained in  
24 these files. Based on that I just find that that has impacted any  
25 credibility assessment I could give to Petitioner's comments about

1 that IOE flight, and therefore I believe Captain -- and I would  
2 assess Captain Metzner's evaluation of those events as most  
3 credible. In that flight, that IOE flight, Captain Metzner  
4 believed by his continued query of the Petitioner, Are you okay?,  
5 are you okay?, he did not think it was a training event because he  
6 called a management pilot on the telephone from the cockpit to  
7 come and meet that flight. And that's not something that a  
8 training captain would do if he thought there was a training  
9 problem. He would have just written it up. That's certainly the  
10 way it was interpreted as I understood the testimony of both  
11 Captain Small and Captain Craig.

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22 ORDER

23 THEREFORE, I FIND THAT based on the comments that I've  
24 just shared with you folks that the petition of Newton R. Dickson  
25 for the review of the denial by the Administrator of the Federal

1 Aviation Administration for the issuance of an airman medical  
2 certificate will be denied. Specifically I find that Petitioner  
3 has failed to meet his burden of establishing that the denial was  
4 not valid under the circumstances of this case. And it will be so  
5 ordered.

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7 EDITED ON

8 AUGUST 31, 2009

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WILLIAM R. MULLINS

Administrative Law Judge