SERVED: March 23, 2012

NTSB Order No. EA-5622

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 21st day of March, 2012

Petition of RICHARD CHARLES BARTEL for review of the denial by the Administrator of the Federal Aviation Administration of the issuance of an airman medical certificate.	)	Docket SM-5186

OPINION AND ORDER

1. *Background*

Petitioner, who proceeds *pro se*, appeals the written order of Chief Administrative Law Judge William E. Fowler, Jr., issued on September 22, 2011.[1] In the order, the law judge *sua sponte* dismissed petitioner's petition and terminated the case, concluding the doctrine of

[1] A copy of the law judge's order is attached.

res judicata precluded petitioner's appeal.[2] In 2008, the Chief Administrative Law Judge determined petitioner was ineligible to hold a medical certificate due to petitioner's established medical history of coronary artery disease.[3] We deny petitioner's appeal.

1. *Facts*

On February 24, 2011, petitioner applied for a second-class airman medical certificate through the Federal Aviation Administration (FAA). On June 28, 2011, the Manager of the FAA's Aerospace Medical Certification Division denied petitioner's application under 14 C.F.R. §§ 67.111(a)(1), (2), and (3), 67.211(a), (b), and (c), 67.311(a), (b), and (c),[4] 67.113(b) and (c), 67.213 (b) and (c), and 67.313(b) and (c)[5] because of petitioner's history and clinical diagnosis

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[2] *Res judicata*, a Latin phrase meaning, "a thing adjudicated," refers to an issue that has been definitively settled by judicial decision. Black's Law Dictionary at 1425 (9th ed. 2009).

[3] Petition of Bartel, Docket SM-4907 (May 28, 2008). In the prior proceeding, the law judge determined petitioner was disqualified from holding an unrestricted airman medical certificate under 14 C.F.R. §§ 67.111(a)(3), 67.211(c), and 67.311(c). Petitioner did not appeal that decision to the Board.

[4] Each of these sections contain similar language, but apply to first-, second-, and third-class medical certificates, respectively. Section 67.211, specifically applicable to petitioner's application for a second-class medical certificate, states,

> Cardiovascular standards for a second-class medical certificate are no established medical history or clinical diagnosis of any of the following:
>
> (a) Myocardial infarction;
>
> (b) Angina pectoris;
>
> (c) Coronary heart disease that has required treatment or, if untreated, that has been symptomatic or clinically significant;

[5] Each of these sections contain similar language, but apply to first-, second-, and third-class medical certificates, respectively. Subsections 67. 213(b) and (c), specifically applicable to petitioner's application for a second-class medical certificate, state,

> The general medical standards for a second-class airman medical certificate are:

of myocardial infarction, angina pectoris, coronary artery disease requiring bypass surgery, hypertension requiring medication, and sleep apnea. Petitioner requested reconsideration of the decision and alternatively requested the FAA grant him a special issuance medical certificate. The FAA denied the reconsideration and special issuance requests on July 21, 2011. Petitioner then filed a petition for review with the law judge.

2. *Law Judge's Written Order*

The Chief Administrative Law Judge *sua sponte* issued an order dismissing the petition and terminating the proceeding. In his order, the law judge noted he had dismissed a prior appeal due to petitioner's medical history of coronary artery disease which was specifically disqualifying under §§ 67.111(a)(3), 67.211(c), and 67.311(c). The Chief Administrative Law Judge also noted the prior proceeding was final since petitioner did not appeal that decision to the Board. Thus, the law judge found petitioner's new claim barred under *res judicata* since

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(..continued)

> (b) No other organic, functional, or structural disease, defect, or limitation 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 make the person unable to perform those duties or exercise those privileges.
>
> (c) No medication or other treatment that the Federal Air Surgeon, based on the case history and appropriate, qualified medical judgment relating to the medication or other treatment 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 make the person unable to perform those duties or exercise those privileges.

petitioner was attempting to relitigate the same issue relating to his medical certificate. Finally, the Chief Administrative Law Judge found he lacked jurisdiction to review petitioner's argument relating to the FAA's denial of a special issuance medical certificate.

3. *Issues on Appeal*

Petitioner appealed the law judge's decision. Petitioner claims his petition was not barred by the doctrine of *res judicata* because the FAA failed to provide evidence that petitioner cannot safely operate an aircraft. Petitioner also asserts the FAA's denial of a special issuance medical certificate was arbitrary and capricious.

2. *Decision*

Under 49 U.S.C. § 44703, this Board has jurisdiction to review petitions regarding the FAA's denial of issuance of an airman certificate.

A. *Res Judicata*

The doctrine of *res judicata* applies to certificate denial cases in which a petitioner submits successive petitions relating to a medical certificate.[6] This doctrine precludes a petitioner from relitigating the same claim in a second legal proceeding where there was: (1) an earlier decision on the issue,[7] (2) a final judgment on the merits,[8] and (3) the involvement of the same parties or parties in privity with the original parties.[9] All these elements exist in this case.

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[6] Petition of Arrigoni, NTSB Order No. EA-4365 at 5 (1995) (citing Petition of Parker, NTSB Order No. EA-4233 (1994) and Petition of Weiss, NTSB Order No. EA-3678 (1992)).

[7] Petition of Parker, NTSB Order No. EA-4233 (1994) (doctrine of *res judicata* bars relitigation of issues concerning specifically disqualifying medical conditions that have been adjudicated in a prior case).

[8] Petition of Weiss, NTSB Order No. EA-3678 (1992) (unappealed initial decision is administratively final, and no longer subject to procedural challenge; petition to review subsequent denial barred by doctrine of *res judicata*).

[9] Petition of Forrette, NTSB Order No. EA-5524 (2010).

In 2008, petitioner had a prior case involving this same issue. The 2008 decision became final after petitioner failed to timely appeal the case to the Board. The same parties were involved then and now—namely, petitioner and the Administrator. Therefore, the law judge did not error in finding the doctrine of *res judicata* precluded petitioner's appeal.[10]

B. *Jurisdiction to Review Denial of Special Issuance Medical Certificates*

Petitioner also argues the Board has jurisdiction to review the denial of a special issuance medical certificate since the Administrator's denial was arbitrary and capricious. We find the Board lacks jurisdiction to review such determinations by the Administrator.[11] While the Board is empowered under 49 U.S.C. § 44703 to review a denial of an airman certificate, the decision whether to grant a special issuance medical certificate under 14 C.F.R. § 67.401 completely is within the Administrator's discretion and, thus, not subject to Board review.[12]

ACCORDINGLY, IT IS ORDERED THAT:

1. Petitioner's appeal is denied;

2. The law judge's order is affirmed; and

3. The denial of petitioner's application for a medical certificate is affirmed.

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

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[10] To the extent petitioner contends the Administrator failed to prove he could not safely perform flight duties, such argument is irrelevant to the issue of whether petitioner's claim is barred under *res judicata*. Likewise, this argument misunderstands the burden of proof in these proceedings—in a certificate denial action, the burden of proof lies with the petitioner. See 49 C.F.R. § 821.25.

[11] See Petition of Reder, NTSB Order No. EA-4438 (1996); Petition of Peterson, NTSB Order No. EA-4216 at 5 (1994); Petition of Doe, 5 NTSB 41, 43 (1985).

[12] Petition of Reder, NTSB Order No. EA-4438 at 4.

Served: September 22, 2011

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

* *

Petition of

RICHARD CHARLES BARTEL

for review of the denial by the Administrator of the Federal Aviation Administration of the issuance of an airman medical certificate.

Docket SM-5186

* *

ORDER SUA SPONTE DISMISSING
PETITION AND TERMINATING PROCEEDING

Served: Richard Charles Bartel
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Comfort, Texas 78013

Richard Charles Bartel
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Albuquerque, New Mexico 87185

(BY CERTIFIED MAIL AT BOTH ADDRESSES)

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Federal Aviation Administration
Office of Chief Counsel
800 Independence Avenue, S.W.
Washington, D.C. 20591

(BY FAX)

On August 25, 2011, this office received from petitioner, acting *pro se*, an "Appeal From a FAA [(Federal Aviation Administration)] Medical Certificate Process," which was docketed as a petition for Board review of an FAA denial of airman medical certification.[1] Among the documents that were attached to that petition were copies of: (A) a June 28, 2011 letter, by which the Manager of the FAA's Aerospace Medical Certification Division informed petitioner that he had been found not to meet the qualifications for unrestricted airman medical certification under §§ 67.111(a)(1), (2) and (3), 67.211(a), (b) and (c), and 67.311(a), (b) and (c) of the Federal Aviation Regulations ("FAR," codified at 14 C.F.R.), due to a medical history of myocardial infarction, angina pectoris and coronary artery disease requiring medical treatment (coronary artery bypass surgery),[2] and FAR §§ 67.113(b) and (c),

[1] Petitioner subsequently filed an "Amended Appeal From a FAA Medical Certificate Process," which contained no significant changes to his original petition, on August 31, 2011.

[2] Those FARs contain similar language, but apply to first-, second- and third-class medical certificates, respectively. As the Aerospace Medical Certification Division Manager's denial relates

67.213(b) and (c), and 67.313(b) and (c), due hypertension requiring medication and sleep apnea;[3] (B) A July 17, 2011 letter petitioner transmitted to the FAA, in which he noted that he had been denied a second-class medical certificate, and "request[ed] . . . Panel Review (Reconsideration) of that decision based on a non-governmental consultant" and issuance of a restricted medical certificate; and (C) a July, 21, 2011 letter from the FAA Aerospace Medical Certification Division Manager, acknowledging the receipt of additional information from petitioner, but informing him that such information "provides no basis for reversing our previous denial."

In an earlier proceeding, *Petition of Bartel*, Dkt. SM-4907, the undersigned issued an Order (served on May 28, 2008) dismissing a petition that petitioner had filed for review of an FAA medical certificate denial, on the basis that he had medical history of coronary artery disease requiring medical treatment and was, thus, specifically disqualified from holding an unrestricted airman medical certificate under FAR §§ 67.111(a)(3), 67.211(c) and 67.311(c). Petitioner did not appeal that Order to the Board, and it, therefore, became final.

A medical history of coronary artery disease requiring treatment disqualifies an individual from holding an unrestricted airman medical certificate at any time in the future,

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to an application for a second-class medical certificate (*see* below) the applicable provisions are §§ 67.211(a), (b) and (c), which read as follows:

"§ 67.211 Cardiovascular.
Cardiovascular standards for a second-class airman medical certificate are no established medical history or clinical diagnosis of any of the following:
(a) Myocardial infarction;
(b) Angina pectoris;
(c) Coronary heart disease that has required treatment or, if untreated, that has been symptomatic or clinically significant."

[3] Again, these regulations contain the same language, but apply to first, second and third-class medical certificates, respectively. The provisions relating to second-class medical certification, which are §§ 67.213(b) and (c), read:

"§ 67.213 General medical condition.
The general medical standards for a second-class airman medical certificate are:

* * * * *

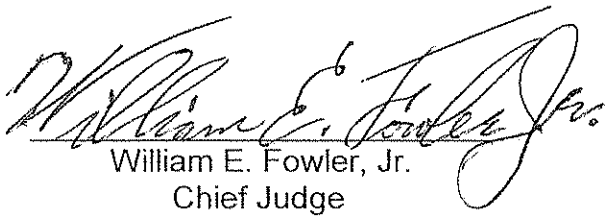
(b) No other organic, functional, or structural disease, defect, or limitation [(than diabetes mellitus requiring insulin or any other hypoglycemic drug for control, which is disqualifying by history under § 67.213(a))] that the Federal Air Surgeon, based on the case history and appropriate, qualified 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 certificate applied for or held, to make the person unable to perform those duties or exercise those privileges.
(c) No medication or other treatment that the Federal Air Surgeon, based on the case history and appropriate, qualified medical judgment relating to the medication or other treatment involved—
(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 certificate applied for or held, to make the person unable to perform those duties or exercise those privileges."

even if his or her cardiac symptomatology subsequently subsides. As petitioner's lack of qualification for an unrestricted airman medical certificate has previously been determined in adjudication, the legal doctrine of *res judicata* bars him from now re-litigating the issue of his entitlement to such certification.[4] Accordingly, the undersigned will, *sua sponte*, dismiss the petition in the instant proceeding.

The undersigned notes that petitioner has, in his petition, as amended, requested the Board "to remand the [July 27, 2011] Reconsideration to the Administrator . . . , or to the Secretary of Transportation, as appropriate, to consider the request which was made with the original Application . . . , to permit the issuance of [a] medical [certificate] with a restriction requiring a co-pilot (and permit Recreational flight [without a co-pilot], or for purposes of Federal Employment in the 1815 and 1825 OPM [(Office of Personnel Management)] Occupational series, but not for ATC [(air traffic control)] or 2181 piloting; 1815 and 1825 series employees are generally non-flying desk jobs). Safety is thus maintained."[5] It is, however, well-established that the grant, denial or continuance of special issuance status is a matter that is *wholly within the FAA's discretion*, and the Board has no jurisdiction whatsoever to review an FAA denial of special issuance status or to direct the FAA to reconsider a special issuance denial. *See Petition of Doe*, 5 NTSB 41, 43 (1985); *Petition of Sleeter*, 5 NTSB 686, 688-89 (1985); *Petition of Reder*, NTSB Order EA-4438 (1996). Additionally, the Board is completely without authority to either order the FAA to review any medical information provided by an applicant or to instruct it to evaluate such information in a certain way.[6]

THEREFORE, IT IS ORDERED that petitioner's petition in this matter is DISMISSED, and that this proceeding is hereby TERMINATED on that basis.

Entered this 22nd day of September, 2011, at Washington, D.C.



William E. Fowler, Jr.
Chief Judge

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[4] In this regard, see, *e.g.*, *Petition of Cooper*, 2 NTSB 1503 (1975), affirmed *sub nom. Cooper v. NTSB*, 546 F.2d 870 (10th Cir. 1976); *Petition of Schevchuk*, 4 NTSB 4 (1982), *Petition of Layfield*, 6 NTSB 218 (1988).

[5] In the June 28, 2011 denial letter, the Aerospace Medical Certification Division Manager informed petitioner that, in addition to his being denied an unrestricted medical certificate under the FARs cited above, he had been "further considered . . . for a special issuance [(restricted)] medical certificate under the provisions of [FAR] Section 67.401," but was found unqualified for special issuance certification "due to significant residual coronary artery disease and objective evidence of myocardial ischemia by radionuclide scintigraphy."

[6] The Board's authority in these matters is limited to a review of administratively final certificate denials (*see* 49 U.S.C. §§ 1143, 44703(d)(1)), and it, therefore, has no jurisdiction to direct the FAA as to what medical information it must review, how that information should be reviewed and/or when such a review should take place.

APPEAL (DISPOSITIONAL ORDER)

Any party to this proceeding may appeal this order by filing a written notice of appeal within 10 days after the date on which it was served (the service date appears on the first page of this order). An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 4704
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this order. An original and one copy of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080
FAX: (202) 314-6090

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by any other party within 30 days after that party was served with the appeal brief. An original and one copy of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on all other parties to this proceeding.

An original and one copy of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other parties.

The Board directs your attention to Rules 7, 43, 47, 48 and 49 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.7, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.