

SERVED: February 25, 2014

NTSB Order No. EA-5705

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 25th day of February, 2014

_____)	
Petition of)	
)	
FREDERICK ROTH)	
)	
for review of the denial by)	Docket SM-5191
the Administrator of the)	
Federal Aviation Administration)	
of the issuance of an airman)	
medical certificate.)	
)	
_____)	

OPINION AND ORDER

1. Background

Petitioner appeals the oral initial decision of Chief Administrative Law Judge Alfonso J. Montañó, issued May 1, 2013.¹ By that decision, the law judge denied the petition for review, concluding petitioner failed to prove he fulfilled the medical standards to establish his eligibility for a first-class, unrestricted medical certificate. The law judge’s denial of the petition for review was based on the evidence the Administrator presented establishing respondent suffered

¹ A copy of the law judge’s oral initial decision is attached.

from psychosis and major depression, recurrent, which precluded him from holding an airman medical certificate under 14 C.F.R. §§ 67.107(a)(2) and (c), 67.207 (a)(2) and (c), and 67.307(a)(2) and (c).² We deny petitioner's appeal.

A. Facts

1. Procedural History

On August 17, 2011, petitioner applied for a first-class airman medical certificate. Dr. Joseph R. Tordella, a Federal Aviation Administration (FAA) designated senior aviation medical examiner (AME), examined petitioner. Based on petitioner's mental health history, Dr. Tordella deferred issuance of the medical certificate for further evaluation. On August 29, 2011, Dr. Michael Jones, FAA Regional Flight Surgeon, sent petitioner a final denial letter

² Sections 67.107(a)(2), 67.207(a)(2), and 67.307(a)(2) prohibit the Administrator from issuing a first-class, second-class, or third class medical certificate, respectively to an airman with an established medical history or clinical diagnosis of:

A psychosis. As used in [these]section[s], "psychosis" refers to a mental disorder in which:

- (i) The individual has manifested delusions, hallucinations, grossly bizarre or disorganized behavior, or other commonly accepted symptoms of this condition; or
- (ii) The individual may reasonably be expected to manifest delusions, hallucinations, grossly bizarre or disorganized behavior, or other commonly accepted symptoms of this condition.

Sections 67.107(c), 67.207(c), and 67.307(c), respectively, provide the Administrator may deny a medical certificate if the airman suffers from:

Other personality disorder, neurosis, or other mental 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 make the person unable to perform those duties or exercise those privileges.

denying his application for an airman medical certificate based on petitioner's history of alcoholism and psychosis.

On September 23, 2011, petitioner filed a petition for review with the NTSB Office of Administrative Law Judges. The Administrator filed an amended answer on October 20, 2011, to which the Administrator appended an amended denial letter, also dated October 20, 2011. In the amended letter, Dr. Frederick E. Tilton, FAA Federal Air Surgeon, denied petitioner's application for the issuance of an airman medical certificate based solely on petitioner's history of psychosis.

On June 25, 2012, the FAA Federal Air Surgeon sent petitioner a second amended final denial letter, denying petitioner's application for an airman medical certificate based on petitioner's history of psychosis and major depression, recurrent. On July 25, 2012, petitioner filed a motion to quash and strike the Federal Air Surgeon's amended denial letters from October 20, 2011 and June 25, 2012. The case proceeded to a hearing before the law judge on October 22-24, 2012 and April 30 and May 1, 2013.

2. Petitioner's Medical Records

Petitioner holds an airline transport pilot (ATP) certificate. In 1998, petitioner was convicted of driving under the influence (DUI).³ At that time, petitioner was a captain in the Fokker 100 for American Airlines and had just started training for the Boeing 777. Following the DUI conviction, petitioner continued drinking heavily and eventually entered an in-residence alcohol treatment program at Father Martin's Ashley in Havre de Grace, Maryland.⁴ After completing the in-residence program, petitioner enrolled in an outpatient program at Valley

³ Exh. A-1 at 568-70

⁴ Id. at 456-83.

Hope Outpatient Treatment Center in Denver, Colorado.⁵ While attending this program, petitioner first exhibited paranoid behavior, claiming he was being watched and his phones were tapped.

In February 1999, petitioner started meeting with Dr. Michael Sturges, a psychiatrist. Dr. Sturges prescribed petitioner 2.5 mg daily of Zyprexa, an antipsychotic drug.⁶ At that time, petitioner also began taking Paxil, an antidepressant drug.⁷

On August 10, 1999, petitioner was admitted to Charter Grapevine Behavioral Health (hereinafter, “Charter Grapevine”) in Grapevine, Texas. Upon his admission to Charter Grapevine, Dr. Conrad Schmitt, a psychiatrist, evaluated petitioner. Petitioner’s chief complaint upon admission was “severe depression and psychosis.”⁸ Dr. Schmitt noted petitioner was “non-functioning due to severe anxiety, grossly distorted thinking bordering on delusions with marked severe paranoia.”⁹ On the global assessment of functioning (GAF) scale upon admission, petitioner scored a 30, indicating he was non-functioning and required hospitalization.¹⁰ Petitioner was discharged from Charter Grapevine on August 25, 1999. Upon discharge, Dr. Schmitt prescribed petitioner Zyprexa and Paxil.¹¹ He noted petitioner’s discharge diagnosis as

⁵ Id. at 509-18.

⁶ Id. at 487, 513.

⁷ Id. at 513.

⁸ Id. at 487.

⁹ Id.

¹⁰ Id. at 488.

¹¹ Id. at 486.

DSM-IV code 296.34— major depression, recurrent, with psychotic features.¹²

Following his discharge from Charter Grapevine, petitioner participated in numerous counseling sessions with various counselors including Scott Lennox, Terry Busse, and Kenneth Osean.¹³ He also continued to see Dr. Schmitt and Dr. Sturges.

On November 17, 2000, petitioner was admitted to Millwood Hospital in Arlington, Texas.¹⁴ During petitioner's stay in Millwood, Dr. Schmitt was out of town and did not observe him.¹⁵ Upon admission to Millwood, petitioner was examined by Dr. A. Khan, a psychiatrist. Dr. Khan noted petitioner "presented with severe depression, paranoid delusions—thinks his phone [wa]s bugged, authorities [were] after him."¹⁶ Once again, upon admission, petitioner's GAF score was 30. While petitioner was at Millwood, both Dr. Khan as well as another doctor diagnosed him with major depression, recurrent, with psychotic features.¹⁷ Petitioner was discharged from Millwood on November 22, 2000.

In November 2001, Dr. Robert Elliott, a psychologist, evaluated petitioner for fitness for duty. Dr. Elliott noted petitioner was "experiencing psychological dysfunction of a moderate to severe nature. All test results [wer]e valid and all indicate psychopathology" and petitioner was "exhibiting borderline features as well as features associated with other personality disorders."¹⁸

¹² Id. See Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), American Psychiatric Association (1994).

¹³ Id. at 244-270.

¹⁴ Id. at 385-443.

¹⁵ Tr. at 704.

¹⁶ Exh. A-1 at 386.

¹⁷ Id. at 389, 396.

¹⁸ Id. at 333.

At that time, Dr. Elliott opined petitioner was not fit for duty as a commercial pilot on the basis of his mental health.¹⁹

In November 2002, Dr. Elliott conducted a follow-up evaluation of petitioner. At that time, Dr. Elliott found petitioner's major depression in full remission and recommended the FAA provide him a special issuance medical certificate with continued monitoring by Dr. Sturges.²⁰ Likewise, in 2003, 2006, and 2009, Dr. Garrett O'Conner found petitioner fit for duty, subject to monitoring, under the special issuance program.²¹ In 2009, Dr. Joseph Pursch, a psychiatrist, also recommended petitioner was fit to return to flight status with intensive monitoring.²² In 2011, Dr. George Glass, while acknowledging he did not examine petitioner in 1999 or 2000, opined petitioner was not psychotic at the time of this 2011 evaluation and recommended he "be given the opportunity to try to return to flying as it is something he would like to do, and his tenacity is something to note."²³ Also in 2011, Dr. Arthur Tarbox conducted psychological testing on petitioner. Dr. Tarbox stated he had "significant doubts as to whether [petitioner] had ever actually manifested full-blown [p]sychosis with a fixed paranoid delusional system."²⁴ He also recommended petitioner receive a special issuance medical certificate.

¹⁹ Id. at 336.

²⁰ Id. at 285. We note petitioner has not raised, nor does this Board have jurisdiction to consider, the issue of whether the Administrator should issue petitioner a special issuance medical certificate. See Petition of Bartel, NTSB Order No. EA-5622 (2012) (citing Petition of Reder, NTSB Order No. EA-4438 at 4 (1996)).

²¹ Id. at 277, 140-42, 214-22.

²² Id. at 138.

²³ Id. at 47.

²⁴ Id. at 55.

3. *Witness Testimony at Hearing*

At the hearing, Dr. Tordella testified on petitioner's behalf as an examining physician. While Dr. Tordella is a senior AME and trained in the Human Intervention Motivation Study (HIMS) program, he is a doctor of osteopathic medicine but neither a psychiatrist nor a psychologist.²⁵ Dr. Tordella did not believe petitioner's dosage of antipsychotic drugs were of a level to treat an actual psychosis and opined the treating physicians simply listed a diagnosis of psychosis as a worst-case scenario for insurance purposes. As part of his testimony, petitioner had also provided Dr. Tordella with a letter to review from Dr. Rick Pipkin, who knew petitioner for three years through the HIMS program and had worked at Millwood.²⁶ In the letter to Dr. Tordella, Dr. Pipkin asserted petitioner was misdiagnosed with psychosis while at Millwood.²⁷ During his testimony, Dr. Tordella acknowledged the medical records contained some indication "[petitioner] might be attempting to present himself to examiners in a more favorable manner which would cover up some degree of continuing emotional disturbance."²⁸

Next, Dr. Sturges testified as petitioner's treating physician. He first met petitioner in 1998 and "diagnosed [petitioner] mostly as a mess."²⁹ Dr. Sturges contended petitioner was never psychotic, stating, "I've seen plenty of psychotic people and you know they're psychotic, your bones feel it, and I didn't know that from seeing [petitioner] at all. I never felt that he was

²⁵ Tr. 34.

²⁶ Dr. Pipkin did not treat, examine, or meet petitioner during his hospitalization in 2000. He first met petitioner in 2009. Tr. 44, 74.

²⁷ Tr. 44; Exh. A-1 at 147-48.

²⁸ Tr. 133; Exh. A-1 at 273.

²⁹ Tr. 171.

that way. ...He's even a Bronco fan, so that's good."³⁰ Dr. Sturges admitted he prescribed petitioner Zyprexa, the antipsychotic drug, and acknowledged petitioner's GAF score of 30 indicated petitioner was experiencing significant problems functioning. On February 8, 2002, Dr. Sturges submitted papers on petitioner's behalf for insurance, noting petitioner suffered from major depressive disorder, recurrent, *without* psychosis.³¹ Dr. Sturges contended petitioner did not see him for psychotherapy.³²

Petitioner testified on his own behalf. After his arrest for the DUI, petitioner voluntarily entered the FAA's HIMS program. He had his last alcoholic drink on September 24, 1998. Petitioner recounted his medical history for the record. With respect to his stay at Millwood, petitioner asserted he only saw Dr. Kahn on one occasion for 15-20 minutes during his discharge.³³ During cross-examination, petitioner admitted he filled out insurance forms on which he listed intermittent anxiety and intermittent paranoia as his claimed illnesses.³⁴ Additionally, on those same insurance forms, Dr. Schmitt indicated his observations were petitioner suffered from depression, anxiety, and paranoia.³⁵

In 2011, petitioner obtained an unrestricted airman medical certificate from Canada. Petitioner admitted when applying for his Canadian medical certificate he indicated he had no family history of mental illness, knowing his mother and sister both suffered from mental illness.

³⁰ Tr. 176.

³¹ Tr. 216; Exh. A-1 at 726 (emphasis added).

³² Tr. 234.

³³ Tr. 323.

³⁴ Tr. 360-61, Exh. A-2 at 835-839.

³⁵ Exh. A-2 at 838.

He also admitted the Canadian officials reviewed records they obtained directly from him rather than from his doctors.

Dr. Stuart Gitlow, a psychiatrist with a private practice, testified in the Administrator's case-in-chief. Upon reviewing petitioner's entire medical record, Dr. Gitlow opined petitioner suffered from major depressive disorder with psychotic features.³⁶ In part, Dr. Gitlow based this opinion on comments in petitioner's medical records, such as the admission paperwork to Charter Grapevine in August 1999 which read, "patient has been non-functioning due to severe anxiety, gross distorted thinking bordering on delusions with marked severe paranoia."³⁷ He explained paranoia is one example of psychotic thought. He noted petitioner had been prescribed an antipsychotic medication. In response to some of the testimony in petitioner's case-in-chief, Dr. Gitlow explained while alcohol withdrawal can cause paranoia, petitioner's last alcoholic drink occurred one year prior to his admission to Charter Grapevine so the alcohol withdrawal was not the reason for petitioner's paranoia in this instance.³⁸

Dr. Michael Berry, FAA Manager of Medical Specialties Division, also testified on behalf of the Administrator. Like Dr. Gitlow, Dr. Berry reviewed the entire airman medical record and concluded petitioner suffered from major depression, recurrent, with psychotic features.³⁹ He noted the concern with this diagnosis from an aeromedical standpoint is the possibility of recurrence; thus, psychosis is a specifically disqualifying condition. He also noted major depression, especially with recurrence, increased risk factors and could be disqualifying as well.

³⁶ Tr. 419.

³⁷ Tr. 420.

³⁸ Tr. 422-23.

³⁹ Tr. 499.

Finally, at a second session of the hearing held on April 30, 2013, Dr. Schmitt testified at the request of the law judge.⁴⁰ Dr. Schmitt first met petitioner in mid-1999. He diagnosed petitioner with major depression with psychotic features.⁴¹ Dr. Schmitt treated petitioner intermittently from 1999 to 2003 and believed petitioner reconstituted quickly. In 2003, Dr. Schmitt left private practice to take a job with the United States Department of State in Africa, losing contact with petitioner. From 2003 to 2012, Dr. Schmitt had no contact with petitioner.

On March 21, 2012, Dr. Schmitt received an email message from petitioner asking him to revisit his diagnosis of DSM-IV code 296.34—major depression, recurrent, severe with psychotic features. In the email, petitioner asserted Dr. Schmitt’s diagnosis was the only reference in his medical record to psychosis and was the only thing standing in the way of him receiving his unrestricted airman medical certificate back from the FAA.⁴² Dr. Schmitt reviewed the medical records petitioner provided him and decided he may have “over-interpreted” his diagnosis of psychosis.⁴³ Dr. Schmitt testified, in large part, he changed his diagnosis because the intake clerk told him petitioner’s delusions were true. However, upon questioning by the law judge, Dr. Schmitt admitted he did not realize petitioner also claimed that he observed UFOs near military bases, that someone put cocaine in his drink, and that someone changed the locks on his mailbox.⁴⁴ Dr. Schmitt would have changed his diagnosis to one of DSM-IV

⁴⁰ The law judge continued the hearing for the purpose of assessing Dr. Schmitt’s credibility as to why he changed his diagnosis after more than a decade.

⁴¹ Tr. 662.

⁴² Tr. 666-67. See Exh. A-7, email message dated March 21, 2012, stating “[w]hat has come to light in the last years is that the *sole basis* for the FAA denials stems from my inpatient hospitalization at Charter Grapevine from 8/10/1999 to 8/25/1999.” [emphasis added].

⁴³ Tr. 670.

⁴⁴ Tr. 684-87.

code 296.33—major depression, recurrent, without psychotic features ten years earlier if he had known his diagnosis was all that stood in the way of petitioner flying again.⁴⁵ He admitted petitioner never provided him the records from Millwood; he thought he was the only doctor who diagnosed petitioner with psychosis.⁴⁶

B. Law Judge's Initial Decision

On May 1, 2013, the Chief Administrative Law Judge provided a detailed oral initial decision in which he denied the petition. The law judge discussed the procedural background of the case at length. He then provided a detailed summary of the testimony of all expert witnesses who testified at the hearing.⁴⁷

With regard to petitioner's expert witnesses, the law judge specifically noted they largely reviewed only those medical records provided to them by petitioner. The law judge made credibility determinations as to each witness and coupled those credibility determinations with findings of fact in the record. Based on his findings of fact, the law judge found the testimonies of Drs. Tordella and Sturges not credible. Additionally, the law judge found petitioner not credible. The law judge believed petitioner downplayed every aspect of his mental health treatment except for his participation in the HIMS program. He found clear evidence petitioner was trying to manipulate the clinicians.⁴⁸ He determined petitioner falsified documents in order to receive his Canadian medical certificates in 2011, 2012, and 2013.⁴⁹

As to the medical records, the law judge noted although some of the examining

⁴⁵ Tr. 664.

⁴⁶ Tr. 690-91, 701.

⁴⁷ See generally Initial Decision at 778-845.

⁴⁸ Id. at 817.

⁴⁹ Id. at 819.

physicians did not diagnose or see indications of psychosis in petitioner, all the examining physicians recommended petitioner only receive a special issuance airman medical certificate rather than an unrestricted certificate. The law judge gave greater weight to the medical records made at the time of petitioner's hospitalizations rather than the later revisions psychiatrists made in response to his specific requests.⁵⁰

With regard to the Administrator's case, the law judge found the testimonies of both Drs. Gitlow and Berry credible. He noted the Administrator's doctors, unlike those of petitioner, reviewed the entire medical record. Both doctors testified medical records from two different hospitals showed petitioner's physicians diagnosed him with major depression, recurrent, with psychotic features.

The law judge found Dr. Schmitt's testimony concerning his rationale for altering his opinion of petitioner's diagnosis was not credible. In making these findings, the law judge noted petitioner affirmatively sought out Dr. Schmitt and asked him to change his diagnosis. Petitioner informed Dr. Schmitt he was the only doctor to conclude petitioner was psychotic. Dr. Schmitt only reviewed those medical records provided him by petitioner, which did not include the Millwood records. Dr. Schmitt also agreed he prescribed petitioner an antipsychotic drug. Based upon all these findings of facts, the law judge determined to give greater weight to Dr. Schmitt's diagnosis made in the medical records created in 1999-2003.⁵¹

C. Issues on Appeal

Petitioner now appeals the law judge's oral initial decision. Petitioner argues the law judge's credibility findings were arbitrary and capricious, and the law judge erred in issuing such

⁵⁰ Id.

⁵¹ Id. at 840.

findings because credibility was not the controlling issue in the case. Petitioner contends the law judge erred in finding he was psychotic against the weight of the evidence and in disregard of the medical opinions of petitioner's treating physicians. Next, petitioner asserts the law judge erred in continuing the case for over five months to call Dr. Schmitt to testify, resulting in prejudice to petitioner. Petitioner also asserts the law judge erred in accepting the Millwood Hospital records as probative, reliable evidence while disregarding other reports. Finally, petitioner alleges the law judge erred in allowing the Administrator to amend the denial letters, as such amendment was prejudicial to petitioner's defense.

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. On appeal, we review the law judge's decision *de novo*, as our precedent requires.⁵²

A. Credibility Determinations

1. Arbitrary and Capricious Standard

We defer to the credibility findings of our law judges in the absence of a showing such findings are arbitrary and capricious.⁵³ In the case at issue, we find the evidence presented at the hearing and the law judge's findings of fact support the law judge's credibility determinations. Therefore, the law judge's credibility determinations were not arbitrary and capricious.

⁵² See Petition of Singh, NTSB Order No. EA-5663 (2013) (citing Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013); Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991); Administrator v. Schneider, 1 N.T.S.B. 1550 (1972) (in making factual findings, the Board is not bound by the law judge's findings)).

⁵³ Administrator v. Porco, NTSB Order No. EA-5591 at 13-20 (2011), aff'd, Porco v. Huerta, 472 Fed.Appx. 2 (D.C. Cir. 2012) (per curiam).

The law judge specifically discredited the testimony of petitioner and petitioner's expert witnesses. The law judge found Dr. Tordella's testimony not credible as to psychiatric issues because Dr. Tordella was neither a psychologist nor a psychiatrist and he did not know the meaning of the terms DSM-IV or GAF.⁵⁴ Likewise, the law judge found Dr. Sturges' testimony not credible as petitioner's purported treating physician. The law judge stated many of Dr. Sturges' responses were long, rambling, and never addressed the question asked of him.⁵⁵ The law judge also noted Dr. Sturges treated petitioner since 1998 but only had 14 pages of medical records and could not explain what was contained in or meant by his notes written in those 14 pages.⁵⁶ Finally, the law judge concluded Dr. Schmitt's testimony regarding the change in his diagnosis was not credible and instead based his findings on Dr. Schmitt's medical records and diagnosis. The law judge determined Dr. Schmitt's opinion was swayed by petitioner. He further noted petitioner requested Dr. Schmitt change his diagnosis based upon a presentation of limited medical records and petitioner's false assertions that all the purported delusions were, in fact, true and that Dr. Schmitt was the only physician who diagnosed him with psychosis.

As to petitioner's own testimony, as discussed *supra*, the law judge found petitioner not credible based upon the fact he downplayed all his mental health issues, he selectively provided medical records to the Canadian government and various medical providers, including Dr. Schmitt, and he falsified and omitted records. Overall, the law judge determined petitioner's testimony lacked credibility, concluding, "[p]etitioner has been shown by his testimony and the evidence in this case to essentially say anything and do anything and hide anything to get his

⁵⁴ Initial Decision at 793.

⁵⁵ *Id.* at 795-97, 802.

⁵⁶ *Id.* at 802-03.

airman medical back. I believe he has manipulated documents, provided incomplete documents, withheld documents and falsified documents that are a part of this case.”⁵⁷

We find the record before us contains more than ample support for the law judge’s findings of fact and corresponding credibility determinations in each of these regards. Therefore, under our jurisprudence, we decline to disturb the law judge’s credibility findings.

2. *Necessity of Credibility Findings*

Petitioner further asserts the law judge erred in making credibility determinations, as credibility was not the controlling issue in this case. We disagree. We find credibility of the expert witnesses was the controlling and central issue in this case where petitioner sought to impeach the diagnosis of psychosis contained in his medical records. Indeed, the entire case turns on which witnesses provided the most credible and reliable interpretation of petitioner’s medical records and history.

In his brief, petitioner cites to Petition of Witter⁵⁸ arguing the Board should give greater weight to the testimony of his physicians—Drs. Sturges and Schmitt who treated him and Drs. Tordella, Tarbox, Pipkin, Pursch, Elliott, and Dr. Glass who examined him—than the Administrator’s physicians who reviewed the medical records but never examined or spoke to petitioner. In Witter, the Board stated,

[t]he law judge was entitled...to weigh these shifting sands and competing theories in light of his experience and the presentation of the witnesses. We believe the administrative law judge has performed this task well, and that his determination to give greatest weight to the diagnosis of a fully-qualified physician with long personal observation of petitioner is well within bounds.”⁵⁹

⁵⁷ Id. at 819.

⁵⁸ NTSB Order No. EA-4500 at 22 (1996).

⁵⁹ Id. at 27.

Petitioner's reliance on Witter in an attempt to establish the law judge should have given more weight to the testimony of his treating physicians is misplaced. While Witter explains why treating physicians may be more credible, it also provides law judges with discretion to weigh the evidence in petitions for review of medical certificate applications, to include evaluating the credibility of witnesses and statements in exhibits.

Petitioner bears the burden of proving he does not suffer from psychosis and major depression.⁶⁰ In pursuing his theory of the case, petitioner attempted to discredit and/or revisit the diagnoses of psychosis contained in his voluminous medical records. To do so, he needed to discredit the records of Charter Grapevine and Millwood. Therefore, petitioner's own theory he set forth in attempting to establish his eligibility for a medical certificate made credibility a central issue for the law judge's determination. Thus, we find no error in the law judge's analysis, in which he predicated his conclusions on the credibility of the expert witnesses.

B. Finding of Psychosis

1. Weight of the Evidence

Petitioner contends the law judge erred in finding he was psychotic against the weight of the evidence. We find the overwhelming weight of the evidence supports the law judge's finding petitioner failed to carry his burden of proof. To begin, as discussed above, the law judge found the testimony of petitioner and his expert witnesses not credible. Neither Dr. Tordella nor Dr. Sturges reviewed the entire medical record; their conclusions and opinions were based only on the portions they reviewed. Furthermore, Dr. Schmitt, in changing his diagnosis, only relied on excerpts from the medical record that petitioner self-servingly chose to share with him. The evidence adduced at hearing clearly shows petitioner intentionally misled Dr. Schmitt by

⁶⁰ Id. at 3.

erroneously telling Dr. Schmitt he was the only physician to have ever diagnosed petitioner with psychosis and by failing to share the Millwood records with Dr. Schmitt when requesting Dr. Schmitt reconsider his decade old diagnosis.

We find it is not dispositive or persuasive that numerous physicians who examined petitioner after Dr. Schmitt did—Drs. Tarbox, Pipkin, Pursch, Sturges, Elliott, Tordella, and Glass—found no *current* evidence of psychosis.⁶¹ Dr. Gitlow, whom the law judge found credible, testified those subsequent evaluations showed signs of improvement in petitioner’s condition but cautioned they had no effect on the prior diagnosis because, as Dr. Gitlow described, mood disorders last forever.⁶² In this regard, he stated a mood disorder can act cyclically; it can go into remission and during the time of remission, a physician would make no findings of psychosis during a given examination.⁶³ Once manifest, however, psychosis is always at risk of recurrence.⁶⁴

In the case *sub judice*, we find petitioner’s contemporaneous medical records created by his treating physicians establish he had a specifically disqualifying medical condition due to his history of and diagnosis of psychosis. In 1999 and again in 2000, petitioner was admitted to medical facilities for treatment of major depression, recurrent, with psychotic features. Dr. Schmitt diagnosed him at Charter Grapevine and just over a year later, Dr. Kahn and another physician at Millwood reached the same diagnosis. During these hospital admissions, the doctors at Charter Grapevine and Millwood stated petitioner exhibited paranoid delusions and

⁶¹ We also note most of these doctors recommended petitioner have continued monitoring under a special issuance medical certificate rather than an unrestricted certificate.

⁶² Tr. 444.

⁶³ Id.

⁶⁴ Tr. 445.

grossly distorted thoughts, both of which are characteristics of psychosis. In addition, petitioner was prescribed Paxil, an antidepressant, and Zyprexa, an antipsychotic drug. When Dr. Elliott examined petitioner in November 2001, petitioner continued to exhibit paranoid delusions and grossly disorganized thoughts. Based upon the record as a whole, we find petitioner suffered from psychosis, which specifically disqualifies him from holding an airman medical certificate.

2. *Treating, Examining, and Reviewing Physicians*

Petitioner also contends the law judge erred in disregarding the medical opinions of petitioner's treating physicians. In this regard, petitioner relies on Witter and Lester v. Chater.⁶⁵ In his brief, petitioner states the Board in Witter held, "we place a great deal of significance on the proposition that those doctors who interviewed petitioner in person had the best opportunity to observe and diagnose his behavior."⁶⁶ To clarify, the quote proffered by petitioner in Witter actually came from the Board's discussion of the law judge's oral initial decision rather than the Board's holding and read, "[t]he law judge indicates that he placed a great deal of significance on the proposition, agreed to by experts for both petitioner and the Administrator, that those doctors who interviewed petitioner in person had the best opportunity to observe and diagnose his behavior."⁶⁷ In the Board's holding, the Board noted the law judge was entitled to determine the weight to give the evidence and concluded the law judge did not err in providing greater weight to certain physicians who personally observed the petitioner.⁶⁸

In Lester, the Court of Appeals for the Ninth Circuit stated, "[a]s a general rule, more weight should be given to the opinion of a treating source than to the opinion of doctors who do

⁶⁵ NTSB Order No. EA-4500 (1996) and 81 F.3d 821 (9th Cir. 1995).

⁶⁶ Appeal Br. at 5.

⁶⁷ NTSB Order No. EA-4500 at 22 (1996) (emphasis added).

⁶⁸ Id. at 27.

not treat the [individual]” and “[t]he opinion of an examining physician is, in turn, entitled to greater weight than the opinion of a nonexamining physician.”⁶⁹ However, the Court went on to explain,

An ALJ may reject the testimony of an examining, but non-treating physician, in favor of a nonexamining, nontreating physician when he gives specific, legitimate reasons for doing so, and those reasons are supported by *substantial record evidence*....Substantial evidence means more than a mere scintilla, but less than a preponderance.⁷⁰

Petitioner argues the law judge erred in rejecting the testimony of his treating physicians, Dr. Sturges, who concluded petitioner did not suffer from psychosis, and Dr. Schmitt, who subsequently changed his diagnosis from one of psychosis 13 years after the fact. This argument fails for several reasons. To begin, the law judge found not credible Dr. Schmitt’s reasons for changing his diagnosis to remove psychosis. He instead chose to rely on the medical records, including those of Dr. Kahn, who also was a treating physician. Both physicians affirmatively diagnosed petitioner with psychosis and found he suffered from delusions and grossly distorted thoughts. Likewise, Dr. Elliott, an examining physician also found petitioner suffered from delusions and grossly distorted thoughts. Finally, while the remaining examining physicians did not see evidence of psychosis at the time of their examinations, as Dr. Gitlow explained, those findings did not serve to reverse the prior manifestation of psychosis and notably, the majority of those examining physicians opined petitioner’s mental health rendered him ineligible to hold an unrestricted certificate.

Therefore, to the extent petitioner argues the law judge deviated from the diagnosis of petitioner’s treating physicians, we find the exact opposite is true: the law judge upheld the

⁶⁹ *Supra* note 64 at 830.

⁷⁰ *Id.* at 831 (internal citations omitted).

determinations of petitioner's treating physicians and concluded petitioner suffered from psychosis. Although the law judge's finding deviated from that of Dr. Sturges, also a treating physician, we find the law judge relied on substantial record evidence in deviating from Dr. Sturges' opinion based upon the law judge's finding as to Dr. Sturges' credibility.

C. Continuance of the Hearing

Petitioner asserts the law judge erred in continuing the case for over five months to permit Dr. Schmitt to testify, resulting in prejudice to petitioner. At the hearing, the law judge specifically asked petitioner's counsel if he objected to the continuance for purposes of obtaining Dr. Schmitt's testimony. Petitioner's counsel did not object, therefore, we find this issue waived.⁷¹

Notwithstanding the waiver, our law judges have significant discretion in overseeing testimony and evidence at hearings, and we typically review our law judges' evidentiary rulings under an abuse of discretion standard, after a party can show such a ruling prejudiced him or her.⁷² Likewise, our jurisprudence as well as the Federal Rules of Evidence permit a law judge to question or call a witness at a hearing.⁷³

Assuming *arguendo* petitioner had not waived this issue, petitioner still cannot show the law judge's conduct in continuing the hearing to allow the testimony of Dr. Schmitt prejudiced

⁷¹ See 49 C.F.R. § 821.48(b)(3) and Administrator v. Deville, NTSB Order No. EA-5055 at 6 (2003).

⁷² Administrator v. Walker, NTSB Order No. EA-5656 at 15n.39 (2013). See also, Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)). We will not overturn a law judge's evidentiary ruling unless we determine that the ruling was an abuse of discretion. See, e.g., Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001).

⁷³ See Administrator v. Mears, 2 N.T.S.B. 1943 (1975) and Federal Rule of Evidence 614.

him. Petitioner sought out Dr. Schmitt to request he reconsider his diagnosis. The hearing originally was set for May 2012 but was continued until October 2012 to permit the parties to depose Dr. Schmitt. As the law judge articulated on the record at the October 2012 hearing, Dr. Schmitt's testimony and credibility were key to determining why Dr. Schmitt changed his diagnosis.⁷⁴ The law judge, in properly exercising his discretion, decided Dr. Schmitt's testimony was necessary to resolve the case.

D. Reliability of Medical Records

In medical certificate denial cases, our jurisprudence allows a petitioner to impeach the reliability of medical records "by...showing that the diagnosis was incorrect, which may be occasioned either by a reversal of the diagnosing physician, or a contemporaneous diagnosis of another physician, to which greater weight can be given."⁷⁵

With regard to the Millwood records, Drs. Gitlow and Berry acknowledged the records were illegible in some parts and lacked elaboration. Despite the lack of discussion, however, both doctors opined the records were reliable as they were made contemporaneously with petitioner's hospitalization. In the records, Dr. Kahn indicated petitioner suffered from major depression, recurrent, with psychotic features. This diagnosis was consistent with Dr. Schmitt's prior diagnosis at Charter Grapevine. Additionally, while at Millwood, petitioner received a

⁷⁴ The law judge stated,

Petitioner[] argue[s] (sic) that if Dr. Schmitt's finding of major depression severe, recurrent, with psychotic features is removed, or at least the psychotic aspects of that diagnosis, then all subsequent references to that diagnosis should be given no weight, credence, and certainly no weight in these proceedings. Therefore, the reason why Dr. Schmitt changed his diagnosis, and his credibility as to the subsequent change, is of critical importance to [p]etitioner's case and certainly is of importance to the Administrator's case as well.

Initial Decision at 778-79.

⁷⁵ Administrator v. Whalen, 1 NTSB 625, 625 (1969).

second opinion from a different doctor who corroborated Dr. Kahn's diagnosis as well. The records were corroborated further by Dr. Elliott's assessment in November 2001 during which he noted petitioner continued to suffer from delusions and grossly disorganized thoughts. We find the law judge admitted the Millwood records and acknowledged the shortcomings in the records. However, he found them sufficiently corroborated to be of probative value in resolving the case.

Furthermore, even if the law judge had not considered the Millwood records, Dr. Schmitt's diagnosis of psychosis at Charter Grapevine in 1999 alone would serve to support the denial of petitioner's medical certificate. A single diagnosis or occurrence of psychosis is specifically disqualifying for purposes of the Federal Aviation Regulations. Notwithstanding the Millwood records, we find sufficient evidence of psychosis based upon Dr. Schmitt's diagnosis. The Federal Aviation Regulations prohibit a petitioner who has been diagnosed with psychosis from receiving an unrestricted medical certificate; as a result, the evidence in the record supports the Administrator's denial of petitioner's medical certificate.

E. Amendments to the Denial Letter

Finally, petitioner alleges the law judge erred in permitting the Administrator to amend the final denial letter on October 20, 2011, and June 25, 2012.⁷⁶ The October 20, 2011 amendment denied petitioner's application for the issuance of an airman medical certificate based solely on petitioner's history of psychosis, removing the allegation of alcoholism. The June 25, 2012 second amendment denied petitioner's application based on his history of psychosis and major depression, recurrent. We find the law judge correctly held under the Board's Rules of Practice, the Administrator was permitted to file an amended answer, without leave, at any time

⁷⁶ We note on page 775, line 19 of the law judge's oral initial decision, he erroneously stated the date of the second amendment was January 25, 2012.

more than 15 days prior to the start of the hearing.⁷⁷

As to the first amendment in October 2011, it clearly occurred more than 15 days in advance of the hearing and it served to remove alcoholism as a basis for denial of the issuance of the medical certification. Since it only removed, rather than added a basis for denial, we find no prejudice to petitioner.

The final amendment to the denial letter in this case occurred more than 90 days prior to the start of the hearing. Additionally, the law judge found, and we agree, the decision to amend the June, 25 2012 denial letter was reasonable in light of the additional information obtained from Dr. Schmitt.⁷⁸ The evidence adduced at hearing demonstrates petitioner does not attempt to refute the major depression diagnosis; instead, he simply sought to prove he had not had a recurrence of major depression since 2000. Therefore, assuming *arguendo*, the law judge should not have permitted the second amended denial letter, we find no prejudice to petitioner, as he sought to introduce this information into the proceedings.

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.

⁷⁷ See 49 C.F.R. § 821.12(a) and tr. at 9-10. We note the amendments at issue occurred prior to the enactment of the Pilot's Bill of Rights, Pub. L. 112-153, 126 Stat. 1159 (August 3, 2012), which required compliance with the Federal Rules of Civil Procedure to the extent practicable. Because the amendments occurred prior to the enactment of the statute, we apply only § 821.12(a) of our Rules of Practice to resolve this issue.

⁷⁸ Tr. 10.

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

* * * * *

Petition of: *

FREDERICK ROTH *

for review on the denial by the * Docket No.: SM-5191
 Administrator of the Federal * JUDGE MONTAÑO
 Aviation Administration of the *
 issuance of an airman medical *
 certificate. *

* * * * *

Vol. 5

Department of Education
490 L'Enfant Plaza East, S.W.
2nd Floor, Suite 2100-A
Washington, D.C.

Wednesday
May 1, 2013

The above-entitled matter came on for hearing, pursuant
to Notice, at 2:00 p.m.

BEFORE: ALFONSO J. MONTAÑO
Chief Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE MONTAÑO: This has been a proceeding under the provisions of 49 U.S.C. Section 44703. Frederick Roth filed a petition for a review of the denial by the Administrator of the Federal Aviation Administration of the issuance of an airman medical certificate.

1 On August 17th, 2011, Mr. Roth applied for a first-class
2 airman medical certificate. He was examined by Joseph R.
3 Tordella, D.O., a designated aviation medical examiner, who
4 deferred issuance of the medical certificate for further
5 evaluation.

6 On August 29th, 2011, Michael Jones, M.D., Regional
7 Flight Surgeon, sent the Petitioner a final denial letter denying
8 Petitioner's application for an airman medical certificate under
9 the standards of 14 CFR 67.107(a)(4), 67.207(a)(4) and 307(a)(4),
10 and 67.107(a)(2), 67.207(a)(2) and 67.307(a)(2). The basis for
11 that denial was a history of alcoholism and psychosis.

12 On October 20th, 2011, the Administrator filed an
13 amended answer to Mr. Roth's petition for review appended to which
14 was the Administrator's amended denial letter, dated October 20th,
15 2011, which denied the Petitioner's application for the issuance
16 of an airman medical certificate based on Petitioner's history of
17 psychosis under the standards under 67.107(a)(2), 67.207(a)(2) and
18 67.307(a)(2).

19 On January 25th, 2012, Frederick E. Tilton, M.D.,
20 Federal Air Surgeon, sent Petitioner another amended final denial
21 letter denying Petitioner's application for an airman medical
22 certificate under the standards of 14 CFR 67.107(a)(2) and (c),
23 67.207(a)(2) and (c), and 67.307(a)(2) and (c). That denial was
24 based on Petitioner's history of clinical diagnosis of psychosis
25 and major depression, recurrent.

1 On July 25th, 2012, Petitioner filed a motion to quash
2 and strike the Federal Air Surgeon's amended denial letters. I
3 discussed the arguments in my ruling denying Petitioner's motion
4 to quash at the beginning of these proceedings, and that's in the
5 record and, therefore, I will not reiterate them at this point.

6 This matter has been heard before me as the
7 Administrative Law Judge that has been assigned this case and, as
8 required -- or as provided by the Rules, I am issuing an Initial
9 Oral Decision in this matter.

10 Pursuant to notice, this matter initially came on for
11 hearing on October 22nd and 23rd and 24th of 2012 in Washington,
12 D.C. Petitioner was represented and is represented by Joseph
13 Michael Lamonaca, Esquire. The Administrator was and is
14 represented in this proceeding by staff counsel Amanda K. Bruchs
15 and Joseph Conte, Esquire, both of the FAA Office of Chief
16 Counsel. In this latest proceeding, Ms. Bruchs has been the only
17 attorney for the Administrator that's presented the case.

18 The initial hearing was continued for the purpose of
19 taking the live testimony of Dr. Conrad V. Schmitt. The hearing
20 could not be rescheduled until April 30th and May 1st, 2013.

21 The parties were afforded full opportunity to offer
22 evidence, to call, examine and cross-examine witnesses, and make
23 arguments in support of their respective positions. Mr. Roth has
24 been present throughout this hearing.

25 I will not discuss all of the evidence in detail. I

1 Petitioner has the burden of proof in this case.
2 Petitioner asked me to give the testimony of these experts and
3 treating physicians, Dr. Sturges and Dr. Tordella, the greater
4 evidentiary weight in this matter. Petitioner testified on his
5 own behalf and has essentially asked me to find him credible that
6 he has never suffered from major depression severe, recurrent,
7 with psychotic features and therefore is entitled to an
8 unrestricted first-class airman medical certificate.

9 I asked that Dr. Conrad V. Schmitt testify in this case
10 at the conclusion of my first hearing because he was the first
11 psychiatrist to diagnose the Petitioner with major depression -
12 severe, recurrent, with psychotic features, and that was in 1999.
13 Dr. Schmitt subsequently changed his 1999 diagnosis of psychosis
14 after being contacted by Petitioner in March of 2012.

15 It is Petitioner's theory that Dr. Schmitt's diagnosis
16 of major depression severe, recurrent, with psychotic features,
17 was simply carried over to subsequent hospitalization and was not
18 an independent diagnosis by later treating physicians or
19 clinicians. It was simply copied from the first diagnosis to the
20 next diagnosis and so on down the line with every hospitalization
21 that the Petitioner had. Therefore, the Petitioners argue that if
22 Dr. Schmitt's finding of major depression severe, recurrent, with
23 psychotic features is removed, or at least the psychotic aspects
24 of that diagnosis, then all subsequent references to that
25 diagnosis should be given no weight, credence, and certainly no

1 weight in these proceedings. Therefore, the reason why
2 Dr. Schmitt changed his diagnosis, and his credibility as to the
3 subsequent change, is of critical importance to the Petitioner's
4 case and certainly is of importance to the Administrator's case as
5 well. I felt his testimony was important because it would help me
6 decide how much weight to give that change in diagnosis and which
7 could substantially affect the outcome of this case.

8 The Petitioner has also asserted that other clinicians
9 and practitioners reviewed the records in this case and either
10 questioned the diagnosis of psychosis or outright asserted that
11 it's not supported by the medical records in this case -- by the
12 medical records, the histories and medication treatment in this
13 case. The Petitioner asserts that many of these subsequent
14 reviewers find or have found that he is fit to fly.

15 In addition, Petitioner maintains that the records
16 indicating that he was having delusions about the FBI following
17 him, that people were taking pictures of him, that locks on his
18 mailbox were changed, that people were moving things in his home
19 and were moving his car without his knowledge and that powdered
20 sugar was actually cocaine are incorrect in the medical records.
21 Those statements, he asserts, were not delusions but were, in
22 fact, true and the result of an angry ex-wife's actions.
23 Petitioner produced the testimony of his attorney to provide
24 testimony to support that argument.

25 As far as the witnesses are concerned in this case, I

1 will discuss their testimony. While the Administrator had at one
2 point denied Petitioner's application due to alcoholism in their
3 final denial letter, that denial letter was subsequently amended,
4 and that issue is no longer before me.

5 Both the testimony of Captain Smith and retired Captain
6 John. W. Jirschele focused on Petitioner's efforts and recovery
7 from these alcohol-related problems. The testimony of these two
8 witnesses has minimal relevance as to the issues that are
9 currently before me. Captain Smith testified that Petitioner
10 participated in the HIMS program and he attempted to help him
11 through the union to have American Airlines recertify him as a
12 pilot. That effort was unsuccessful. He made no mention of
13 Petitioner's psychiatric well-being or any psychiatric problems in
14 his testimony.

15 He testified that Petitioner was anxious about his
16 divorce, his financial situation and his custody battles. Captain
17 Smith did not explain why American Airlines did not recertify
18 Petitioner and really did not go into any detail as to why he
19 believes that Petitioner could be hired back at American Airlines
20 if he receives his medical certificate as the result of this
21 hearing.

22 John W. Jirschele is a retired American Airlines captain
23 and he was the chief pilot in the Chicago crew base. He testified
24 he got to know Mr. Roth as one of the pilots assigned to Chicago.
25 He testified about the HIMS program and the Petitioner's

1 participation in that program. He did not testify as to
2 Petitioner's psychiatric problems.

3 I found that both of these witnesses testified credibly
4 as to their description of the efforts and the dedication that
5 Petitioner brought to the HIMS program to deal with his alcohol-
6 related programs [sic], and they certainly speak highly of him
7 relative to those efforts on his part.

8 As to the specific issues before me, Dr. Joseph Tordella
9 was the first witness for Petitioner. He owns his own medical
10 practice known as Air, Land and Sea, LLC. He testified he
11 specializes in transportation medicine. Dr. Tordella is a D.O.
12 He is a senior airman medical examiner. He is trained in the
13 Human Intervention Motivation Study, which I've noted, the HIMS
14 program. He has served as Mr. Roth's airman medical examiner.

15 He testified that Mr. Roth came to see him to seek
16 assistance to obtain his unrestricted medical in about 2009.
17 Dr. Tordella testified that he reviewed the records that were
18 provided to him by Mr. Roth and spoke to him. Mr. Roth provided
19 him with volumes of information.

20 He testified that he did not know if he reviewed all of
21 the records in the blue ribbon file and there might be some
22 records in that file that he is not familiar with or he's not
23 seen. He said he read reports from Dr. Sager and Dr. Pakull -- I
24 believe that's the way it's pronounced. He testified that based
25 on his review of the records and discussions with Mr. Roth, he

1 felt that the diagnosis of psychosis was questionable. He thought
2 that the diagnosis may have been made a part of the record to
3 ensure that insurance paid for Mr. Roth's treatment during the
4 hospitalizations that he had to undergo.

5 Dr. Tordella testified he also reviewed four different
6 reports that were provided to him. The first was a report by
7 Dr. Joseph A. Pursch, P-u-r-s-c-h, M.D., dated April 24, 2009.
8 Dr. Pursch indicated that Petitioner had chronic alcoholism in
9 full remission and major depressive disorder in full remission and
10 did not mention psychosis in his reports. Dr. Pursch concluded
11 that there was no danger to safety of flight and Petitioner was an
12 excellent performer, and he should have intensive monitoring,
13 however, for the remainder of his flying career.

14 The second report upon which Dr. Tordella relied is a
15 report from Dr. Rick Pipkin, Ph.D., dated June 1st, 2009, which
16 indicated that the report was in support of Petitioner seeking his
17 first-class medical. The report indicates that Dr. Pipkin was of
18 the professional opinion that Petitioner was inaccurately labeled
19 as psychotic in the records from Millwood Hospital in Texas. The
20 reports indicate that he knew this because he had been the
21 utilization review director during the period of time that
22 Petitioner had been at this facility Millwood in Texas. And he
23 testified -- or he indicated in his report that the doctor who
24 diagnosed Petitioner was notorious for making a diagnosis without
25 seeing the patient and not subsequently correcting that diagnosis.

1 He was apparently referring to Dr. Kahn.

2 An objection was made as to hearsay in the nature of the
3 testimony. Dr. Tordella was offered and qualified without
4 objection as an expert in aviation medicine and as an AME and as a
5 HIMS-trained physician. He was so qualified, as I said, without
6 objection, but he was -- and the reason for that qualification is
7 so that he could render opinions relative to documents that he
8 reviewed in the file despite those documents constituting hearsay.

9 Dr. Pipkin's report indicates that Petitioner was
10 admitted voluntarily to Millwood on Friday, November 17, 2000.
11 His report indicates that there was a discrepancy as to the time,
12 and the diagnosis at that admission was major depression,
13 recurrent, with psychosis. Dr. Pipkin believed that the
14 interviewing social worker misunderstood Petitioner when he said
15 that he was being closely monitored since he lost his job at
16 American Airlines. Dr. Pipkin seemed to think that the social
17 worker thought that this was paranoia and that he believed the
18 social worker possibly believed he was closely being monitored by
19 the FBI or some other agency, when in reality, he was being
20 monitored for the HIMS program.

21 Dr. Tordella stated that he assumed the Petitioner was
22 in the HIMS program at that time, and apparently, he was, but he
23 was not sure. Dr. Tordella testified that he speculated there may
24 have been a mix-up in the records between whether or not the
25 person taking the history thought he heard FBI monitoring the

1 Petitioner or when, in reality, it was the FAA that was monitoring
2 the Petitioner or the federal air marshal. Dr. Pipkin opined that
3 the record does not reflect that Petitioner was paranoid,
4 delusional or psychotic, and again, he's referring to the Millwood
5 records. Dr. Tordella testified that he agreed with Dr. Pipkin
6 and that Dr. Pipkin had pretty much confirmed his suspicions.

7 Dr. Tordella then testified as to Dr. Pursch's five-page
8 report dated April 24th, 2009, in which he opined that there was
9 no sound clinical or documented evidence warranting a psychotic
10 episode diagnosis.

11 Dr. Tordella then testified as to the report by
12 Dr. Garrett O'Connor at pages 140, 141 and 142 of the blue ribbon
13 file. That report was dated August 31st, 2009. Dr. O'Connor had
14 seen Petitioner to provide a second opinion. Dr. O'Connor spoke
15 to Petitioner and his wife, Gayla -- his second wife, Gayla, and
16 Dr. O'Connor concluded that Petitioner was in full remission and
17 therefore a suitable candidate for a special issuance of a medical
18 certificate.

19 Dr. Tordella testified the Petitioner is dedicated to
20 the HIMS program and attended about 25 AA meetings a month. He
21 testified about Dr. Pursch's April 27th, 2009 evaluation in which
22 that doctor indicated he did not present a danger to flight
23 safety. He testified that Dr. O'Connor recommended that the
24 Petitioner be returned to flight status and be monitored for the
25 remainder of his career as a commercial pilot.

1 Dr. Tordella then testified about the letter he sent to
2 Dr. Sager from the FAA, which was dated on September 18th, 2009,
3 in which he said that he, Dr. Tordella, said the Petitioner was
4 not a danger to flight, and he opined that was based on all of the
5 documents given to him, apparently, by Mr. Roth.

6 Dr. Tordella then testified about his letter to
7 Mr. Lamonaca at pages 736 and 737 of the records. These records
8 are sequentially paginated. In those documents, Dr. Tordella said
9 that the diagnosis of psychosis or psychotic features was
10 questionable. He testified he believed that diagnosis was more of
11 a problem with semantics than an illness. He also stated that
12 based on his review of Fred Roth's records, the Petitioner, and
13 the last four reports we've mentioned -- I've talked about, he
14 believed it supported his request for -- I believe he said a
15 special issuance.

16 He testified that based on his review of the records and
17 his evaluation, he felt that the Petitioner was qualified for an
18 unrestricted medical. He has been going through the process of
19 fighting to get his license back and he has not once broken down
20 psychologically. Dr. Tordella testified that he felt that --
21 therefore, he believed the records as far as the diagnosis of
22 psychosis was more of an issue of semantics rather than a frank
23 illness.

24 He testified he last saw the Respondent in 2011 for his
25 last medical at which time he presented as a normal person, but he

1 admitted that there's not much in the way of a psychiatric
2 evaluation in an airman medical evaluation. He said that
3 Petitioner was, as always, complying with the HIMS program, went
4 to AA, Alcoholics Anonymous, 24 times a month, and the HIMS
5 program actually only requires 2 visits to AA a month.

6 On cross-examination, Dr. Tordella testified he reviewed
7 all the records that were given to him by Mr. Roth and
8 Mr. Lamonaca, but he testified he could not compare them as to
9 whether they were the same documents that were admitted as Exhibit
10 A-1 and A-2 in this case. He testified, as I mentioned, that
11 there may be other documents in Petitioner's blue ribbon file that
12 he has never seen.

13 Dr. Tordella testified that a large part of his practice
14 is spent trying to help pilots obtain a special issuance. This
15 involves medical review, medical record review, and he agreed with
16 counsel for the Administrator that in order to be of assistance,
17 he had to have a complete record in order to provide an expert
18 opinion.

19 He testified that while the bulk or the majority or,
20 actually, all of the testimony on direct dealt with Millwood
21 records, he also indicated that Petitioner had been hospitalized
22 at Charter Grapevine in August of 1999 for a period of 2 weeks.
23 After that, Petitioner was discharged and he was in outpatient
24 care for 5 or 6 weeks at Charter Behavioral Systems.

25 He testified he reviewed Dr. Schmitt's records, who had

1 diagnosed Petitioner with major depression with psychosis.
2 Dr. Tordella testified that he is not familiar with the DSM,
3 Diagnostic and Statistical Manual, used in diagnosing psychiatric
4 issues. He agreed that Dr. Schmitt's documentation of the records
5 did indicate that Petitioner was delusional. He testified that he
6 thought that there was a mistake in the records as to whether or
7 not the FBI was after him or whether or not the FAA was after him.

8 Counsel for the Administrator pointed out records for
9 Charter Grapevine, which also made reference to the fact that
10 Petitioner thought the FBI was after him. Dr. Tordella agreed on
11 cross-examination that there were Millwood records that indicated
12 the Petitioner in those records also believed the FBI was after
13 him.

14 Dr. Tordella was asked about the two reports from
15 Dr. Pursch and Dr. Pipkin, dated June 1st, 2009, Exhibits A-1, 152
16 and 133. Both Dr. Pipkin and Dr. Pursch addressed him in a letter
17 from June 1st as an M.D., when in fact he is a D.O. Dr. Tordella
18 did not know if that letter was mailed to him or if Mr. Roth had
19 brought it in. He agreed that Dr. Pipkin's letter which indicated
20 he disagreed with the diagnosis of psychosis was based on
21 Dr. Pipkin's review of the Millwood records, but he testified that
22 Dr. Pipkin did not personally know Petitioner at the time he was
23 hospitalized in Millwood.

24 He agreed that he reviewed the Millwood records in June
25 9th, 2009 and noted that the Millwood records indicated bipolar

1 disorder with psychosis, which he says is the root of the FAA's
2 problem. He agreed the record was also indicating the Petitioner
3 was on a suicide watch.

4 Dr. Tordella testified on cross that he knew that there
5 was alcoholism in Petitioner's family from a review of the
6 records, but he did not see depression in the family history.
7 However, counsel for the Administrator pointed out in the records
8 that indicated that his mother suffered from depression and had a
9 nervous breakdown. There was also indication of siblings having
10 some mental problems as well.

11 Counsel for the Administrator brought to the attention
12 of Dr. Tordella the Millwood records indicating that admission was
13 at 2 p.m. in the afternoon on the day of admission. He also
14 pointed out the Millwood records that indicated that Petitioner
15 had been at Grapevine Charter under the care of Dr. Schmitt. And
16 the records also indicated an admission that Petitioner thought
17 his phone was bugged and that authorities are after him. The
18 record also indicates the Petitioner is suffering from delusions
19 and hallucinations, and insight was reported as poor and his
20 abstract thinking was also reported as poor.

21 The Administrator's counsel pointed out that none of the
22 information about depression, anxiousness, poor judgment, poor
23 insight, impaired thinking was mentioned in Dr. Pipkin's letter to
24 him, that none of these symptoms or any reference to Charter
25 Grapevine was referenced in Dr. Pipkin's letter to Dr. Tordella.

1 Dr. Tordella also agreed that the records indicated an
2 initial diagnosis of major depression, recurrent, with psychosis,
3 and there was documentation in the record which seemed to indicate
4 that bipolar disorder should be ruled out.

5 Counsel led Dr. Tordella through A-1, Exhibit A-1, to
6 acknowledge medication approach included antidepressant medication
7 and antipsychotic medication. That antipsychotic medication is
8 Zyprexa. Also, on page 396 of the records, there is an indication
9 that Petitioner felt his wife was going to call the FBI, and this
10 was also recorded in Dr. Schmitt's records at Charter Grapevine in
11 August of 1999.

12 Page 396 of the records include a diagnosis of major
13 depression with psychosis. Nursing notes indicate that Petitioner
14 continues to believe his wife will call the FBI and get him in
15 trouble. On page 419 of the records, it indicated that
16 medication, Paxil and Zyprexa -- that he had been taking Paxil and
17 Zyprexa for 1 year prior to his admission at Charter Grapevine
18 Hospital. Dr. Tordella had testified that Petitioner had only had
19 a small amount of Zyprexa for a couple of days, 2.5 milligrams
20 twice a day, and therefore, that led to his conclusion that -- or
21 one of the things that led to Dr. Tordella's conclusion that the
22 diagnosis of psychosis was not correct.

23 Counsel pointed out in the record that indicated the
24 Petitioner had been taking about 5 milligrams per day of Zyprexa
25 for about a year prior to June 2000. The last dose of that

1 Zyprexa appeared to be in June of 2000.

2 On page 422, again, there's a record that indicates that
3 Petitioner had told the historians that he feels he's on
4 surveillance, under surveillance, there's anonymous notes in his
5 mailbox at work. The record also indicates that Dr. Kahn saw
6 Petitioner on November 17th at about 2 p.m. Dr. Pipkin's letter
7 indicated that Dr. Kahn did not see Petitioner until November
8 17th. And Dr. Pipkin also in his report indicated that a possible
9 bipolar disorder was never discussed during the stay at Millwood
10 Hospital.

11 The discharge diagnosis on page 147 of the record
12 indicates major depression with psychosis, rule out bipolar
13 disorder. Dr. Pipkin also said in his report that he thought the
14 person making the entries erroneously entered the FBI was after
15 Petitioner rather than the FAA was after the Petitioner, but the
16 records indicate two different individuals made the entries
17 relative to Petitioner's concern that the FBI was after him.

18 The Administrator's counsel then asked questions as to
19 how the letters addressed to Dr. Tordella were addressed and how
20 one referred to him as an M.D. and the other as an O.D. He also
21 talked about questionable letterhead and the differences between a
22 June 1st letterhead that indicates Pipkin, Ph.D., LPC, SAP, and
23 then there was a second letter which just indicated that
24 Dr. Pipkin was a Ph.D. This line of questioning, apparently, was
25 made in an attempt to bring out the question as to whether or not

1 the information that Dr. Tordella was reviewing, based his opinion
2 on from Dr. Pipkin, was authentic.

3 Dr. Tordella agreed that Dr. Pursch's letter was one of
4 the documents that he relied upon in forming his opinion.

5 However, Dr. Pursch does not indicate he reviewed the medical
6 records from Charter Grapevine of August 1999. He only discusses
7 -- that's Dr. Pursch -- only discusses the Millwood records.

8 Regarding Dr. O'Connor's letter to Dr. Tordella,
9 O'Connor stated he relied on Dr. Pipkin's July 30th, 2009 unsigned
10 letter. He opines that Millwood medical records is the basis of
11 concern relative to Petitioner's mental status. Thus, his report
12 appears to indicate that Dr. O'Connor only reviewed the Millwood
13 records and not the records from Charter Grapevine. Dr. O'Connor
14 indicates that his report, that the Petitioner should be monitored
15 for the remainder of his career as a commercial pilot.

16 There is also an October 25th, 2003 from Dr. O'Connor to
17 Thomas Bettles, B-e-t-t-e-s, at American Airlines, page 272 through
18 page 277 in the record, in which Dr. O'Connor indicates that he
19 relied on Dr. Elliott's November 2002 report in rendering his
20 opinions. In that report, Dr. Elliott indicated that he wanted to
21 review the Millwood records, but his report indicates he was not
22 provided those records. He did not review those medical records
23 in preparing his final report. Thus, Dr. Elliott's records
24 identify the Petitioner had four or five hospitalizations for
25 major depression, some of which were with and some without

1 psychotic manifestations.

2 The record also indicates that Petitioner might be
3 attempting to present himself to examiners in a more than
4 favorable manner, which would cover up some degree of continuing
5 emotional disturbance.

6 Dr. O'Connor reports indicates an Axis I diagnosis, on
7 page 277 of the records, of major depression with and without
8 psychiatric features in full sustained remission. Dr. Tordella
9 agreed that this medical note, dated September 18th, 2009,
10 indicated that in his quest for a special issuance, Petitioner
11 would follow up with Dr. Tordella, be part of AA, and have an
12 annual psychiatric evaluation. That is the recommendation that
13 Dr. Tordella had made to the Petitioner on September 18th, 2009.

14 At the conclusion of the questioning by the attorneys, I
15 asked if a person could receive an unrestricted medical
16 certificate if a person requires monitoring, and he said that that
17 was up to the FAA. He did testify on redirect -- and this was
18 before I asked him my questions -- he testified he did not believe
19 Petitioner required monitoring. He read the July 30th, 2000
20 letter by Rick Pipkin, the unsigned letter, he testified. He
21 testified he believed that the letter, unsigned letter was from
22 Dr. Pipkin. He testified that to the best degree of medical
23 probability, the Millwood records cast great doubt on the accuracy
24 of the records and the diagnosis of psychosis noted in the
25 Millwood records by Dr. Kahn.

1 On recross, he was reminded that in his internal note of
2 September 18, 2009, he himself had recommended Petitioner be on a
3 standard HIMS program and have an annual psychiatric evaluation,
4 continue counseling two or three times per months, and that he
5 should see Dr. Tordella monthly. Dr. Tordella agreed that if
6 Petitioner's only problem was alcohol use, he would not have to
7 come and see Dr. Tordella once a month.

8 Dr. Tordella acknowledged that Dr. Elliott, on page 336,
9 stated Petitioner is not fit for duty as a commercial pilot at
10 this time, and on the basis of 67.107(a), (c), his opinion was
11 that Petitioner did not meet the mental standards of the Federal
12 Aviation Regulations. Dr. Tordella was asked that if Dr. Elliott
13 is saying that Petitioner was not fit for service because of (a)
14 or (c), and one of those sections deals with psychosis, then
15 Dr. Elliott is basically opining that Petitioner is not fit for
16 duty due to psychosis. As I said, Dr. Tordella acknowledged that
17 question.

18 Based on the testimony and the cross-examination of
19 Dr. Tordella, I have to note that Dr. Tordella is not a
20 psychiatrist or a psychologist. He did not know what the DSM-V,
21 DSM stood for, or what the GAF, Global Assessment of Function,
22 represented. His testimony was not convincing or persuasive
23 relative to the psychiatric issues in this case. He testified
24 that he felt that the medical prescriptions that were prescribed
25 for the Petitioner did not indicate that psychosis was a

1 diagnosis; however, Zyprexa is a antipsychotic medication and
2 Paxil is for depression.

3 One the one hand, he testified that he did not believe
4 that Petitioner needed monitoring for his alcoholism or anything
5 else, and yet in his 2009 report, he suggests monthly visits to
6 him by Petitioner and that Petitioner should see a psychiatrist
7 for evaluation every year and he should continue with Alcoholics
8 Anonymous.

9 Dr. Sturges then testified for Petitioner. He was
10 qualified as an expert in psychiatry. He has been a psychiatrist
11 for 40 years. He started out running alcohol and drug programs
12 for about five years. Then he was hired by American Airlines, I
13 believe, and worked for them for 15 years as a regional medical
14 director in psychiatry. He worked there until 1992 and then
15 worked for the Department of Defense, Mental Health Section and
16 was subsequently hired by the Veterans Administration.

17 He testified he first met Petitioner in 1998 when
18 Petitioner made an appointment to see him. He talked to
19 Petitioner and was unclear as to whether -- Dr. Sturges was
20 unclear as to whether or not he evaluated him. Dr. Sturges
21 testified that Petitioner came back to see Dr. Sturges in 1999,
22 and at that time, Dr. Sturges testified, he evaluated him but he
23 did not diagnose him with a condition, but gave him some
24 medication. Dr. Sturges was unclear as to what medication he
25 prescribed.

1 Dr. Sturges testified that he saw Petitioner just prior
2 to the Millwood Hospital admission. He testified Dr. Kahn had
3 labeled Petitioner with psychosis, and he, in review of the
4 records, did not see a frank diagnosis of psychosis. He testified
5 he saw paranoia and what he thought was due to the crisis he was
6 going through in his life, but he did not see psychosis as a
7 diagnosis. He testified that he started Petitioner on Zyprexa 2.5
8 milligrams again.

9 He testified he did not see Petitioner before the
10 Grapevine hospitalization but saw him after. He described
11 Petitioner's condition after his discharge from Grapevine as being
12 tender. When asked how often he saw him, him being the
13 Petitioner, after the Grapevine hospitalization, Dr. Sturges
14 stated that he did not think he was doing psychotherapy for
15 Petitioner but was rather providing some kind of supportive
16 process to help him solve problems. Dr. Sturges testified he saw
17 the Petitioner for five to six weeks after his discharge.

18 Dr. Sturges testified he did not agree with Dr. Kahn's
19 diagnosis of psychosis in Petitioner because he had seen psychotic
20 people before, and he can feel it in his bones, he testified.
21 When asked if Petitioner had ever presented to him as psychotic,
22 he responded that no, Petitioner is a Denver Broncos fan. He
23 testified that he had been -- he testified that he had seen
24 Petitioner the week before the hearing, but he did not describe
25 what was discussed before that hearing in October of 2012.

1 He testified he spoke to Dr. Kahn about the diagnosis of
2 psychosis and Dr. Kahn told him that that is the diagnoses that
3 were made based on the information available at the time of the
4 hospitalization and that documentation or that diagnosis remains
5 unchanged.

6 Dr. Sturges testified that he was head of a board at a
7 hospital in Denver that went bankrupt and psychiatric patients had
8 to be transferred to other hospitals. He testified it was not a
9 happy time for psychiatry. He testified that, as Dr. Pipkin had
10 stated in his report, that perhaps physicians stretched a
11 diagnosis to obtain insurance reimbursement, but he testified he
12 did not know that for sure, or for a fact.

13 He testified that he saw paranoia in Petitioner, but he
14 did not think it was psychosis. He thought Petitioner was
15 paranoid about his ex-wife calling the FAA. He testified he did
16 not have any concerns as to safety of flight if Petitioner
17 received an unrestricted medical certificate. When asked why he
18 felt that way, he began to go through a long response and then
19 told counsel for Petitioner that he forgot the question.

20 He then testified that he did not think the FAA were bad
21 guys to cause Petitioner trouble. He stated that he thinks the
22 FAA is spooked by 2011 [sic] and that people can actually fly into
23 buildings with jet aircraft. But he testified he was curious as
24 to why the FAA was so cautious about Petitioner. He testified
25 that he did not get it, but that he learned that -- but he

1 testified he has learned that he may not have all the data and
2 that he has learned to relax because it's not up to him, but it's
3 up to these guys -- I believe he means the FAA -- who have all the
4 data to make that decision.

5 As to whether Petitioner presents to him with major
6 depression, he testified no. He testified he has not seen the
7 Petitioner depressed. He said that he's seen the Petitioner
8 disappointed, sad and hurt.

9 When Dr. Sturges was asked if he knew when the last time
10 Petitioner had a drink, Dr. Sturges said that that was a great
11 question. He gave a long rambling response that did not end up
12 answering the question.

13 In cross-examination, he was very evasive and non-
14 responsive. When asked if he reviewed all of the records of the
15 blue ribbon file, he responded, "How should I know?" He testified
16 that he was not provided the copy of the two binders in evidence
17 prior to this hearing.

18 He testified he is not familiar with other records,
19 medical records, such as the Swedish Memorial Hospital, which are
20 in the blue ribbon file. His memory was refreshed, which
21 indicated that he, Dr. Sturges, had started Petitioner on Zyprexa
22 as early as February 1999, as is indicated in the records from
23 Valley Hope Association. That's at page 513 and 514. Those
24 records also reflect that Petitioner had been tested for HIV and
25 then came back for a second test because he was fearful that they

1 -- not specific as to who they are -- had infected him when he had
2 undergone the first HIV test.

3 Dr. Sturges testified he was not familiar with the other
4 hospital visits to Swedish Medical Center in February of 1999,
5 when the records indicated he presented with -- when Petitioner
6 presented with increased sensations of paranoia. Another record
7 indicated he came to the ER for what Petitioner believed was
8 pneumonia, when, in fact, his lungs were clear and he had no
9 fever, and he was not coughing very much.

10 Dr. Sturges was shown the Charter Grapevine records,
11 that indicated that Petitioner had been seen by Dr. Sturges for
12 his problems. The records indicated that the chief complaint was
13 severe depression with psychosis. The records indicated grossly
14 distorted thinking bordering on delusions with marked paranoia.
15 The records also indicate Petitioner feels people are coming into
16 his house, moving things around, people are putting cocaine in his
17 sugar, people were following him, taking pictures of him.

18 Dr. Sturges was shown a diagnosis in the record that
19 showed Petitioner's mother had had a nervous breakdown and that he
20 was diagnosed with major depression, recurrent, severe, with
21 psychotic features, as well, with a Global Assessment of
22 Functioning of 30. Dr. Sturges testified that a GAF score of 30
23 indicated severe significant problems with functioning.

24 Dr. Sturges agreed that the Petitioner had been admitted
25 to Grapevine from August 10th until he was discharged, and at that

1 time, Petitioner also thought that the FBI was after him, and the
2 records indicate the Petitioner stated that fear as well in the
3 November 2000 records at Millwood. The discharge diagnosis
4 indicated DSM Code Axis I 296.34, which means major depression
5 with psychosis. He stated he did not recall seeing any other
6 records prepared by Dr. Schmitt.

7 He testified as to his own records. He testified he
8 sent -- the transcript indicates that he sent in 14 pages of his
9 notes in response to the FAA subpoena. The earliest note appears
10 to be February 2001; however, he agreed that he had met Petitioner
11 before that time. He testified that his records included the name
12 of a Conrad Schmitt in February of 2001, which he indicated was in
13 the record because he was just trying to get clear facts from
14 Dr. Schmitt. He testified he was not really trying to figure out
15 Petitioner's diagnosis; he was just trying to be helpful to him.

16 He had a difficult time during his testimony explaining
17 his own notes. For example, hockey bag moved, he described as
18 hockey boy moved, and then could not really explain that. He then
19 changed his testimony and agreed that it indicated -- the records
20 indicated, or Petitioner's records indicated that a hockey bag was
21 moved. He stated that he wrote down positive conspiracy theory in
22 Petitioner's record, but he could not explain what he meant by
23 that or why he wrote it down other than Petitioner -- there's
24 something still going on.

25 Dr. Sturges testified that his records also included

1 forms which he had filled out, a disability insurance form, and
2 indicated that -- on those forms, Dr. Sturges indicated that
3 Petitioner suffered from major depressive disorder, recurrent,
4 without psychosis.

5 In a letter to Dr. Tordella, Dr. Sturges said that he
6 was baffled why the FAA did not recertify the Petitioner; the term
7 psychosis is only in one hospital stay. However, when confronted
8 with other documents, he admitted that he had seen the Millwood
9 admission in 2000 and the Charter Grapevine care in 1999 and
10 outpatient care for five or six weeks at Charter Behavioral
11 System. He then testified that he should have said that there had
12 been three hospital stays that mentioned psychosis.

13 On cross-examination, again, he could not testify that
14 doctors at Charter Grapevine were committing insurance fraud when
15 Petitioner was diagnosed, but he did testify he committed
16 insurance fraud when he filled out the forms for Petitioner for
17 disability insurance. He however then backtracked, changed the
18 testimony, and said that he perhaps distorted the truth. He then
19 testified that he provided a third explanation saying that he made
20 an honest assessment of Petitioner's condition and documented it
21 on those forms.

22 Dr. Sturges seemed to be unclear as to whether he was
23 providing psychotherapy to Petitioner in 1999, but then he
24 testified that he was and had prescribed Zyprexa and Paxil to
25 Petitioner. He testified that he was not sure when he spoke to

1 Dr. Kahn about the diagnosis of psychosis. He was not sure if it
2 was two weeks after the admission or two or three years after that
3 admission. He testified he did not obtain a release from
4 Petitioner to speak to Dr. Kahn about the diagnosis of psychosis,
5 and he also admitted that there was no mention of him,
6 Dr. Sturges, as a treating physician in the Millwood Hospital
7 records.

8 I asked him to clarify as to whether or not he was
9 Petitioner's treating physician, and he responded that he was one
10 of Petitioner's treating psychiatrists. He said that Dr. Schmitt
11 was another, but he did not know of any other treating
12 psychiatrists. Again, I asked him to clarify his testimony
13 regarding his diagnosis on the disability insurance forms. He at
14 first said he committed fraud, then he said he did not and that he
15 made an honest diagnosis. In response to my question, he said
16 that the diagnosis was accurate. When I asked where there was a
17 falsity in that document, he said the falsity was in his moral
18 judgment.

19 Dr. Sturges has been identified as Petitioner's treating
20 psychiatrist who's seen him from -- at least from his records,
21 since 2001. Dr. Sturges' records consist of 14 pages. He's
22 unsure whether he provided any treatment, any psychotic -- any
23 type of therapy to the Petitioner. I believe he testified there
24 were other documents that he didn't turn over to Federal Aviation
25 Administration, but those aren't before me.

1 I didn't find this witness to be convincing or
2 persuasive or credible. His testimony was vague and unclear on
3 direct. On cross-examination, it was even more vague, but he was
4 also evasive and nonresponsive. He testified he treated
5 Petitioner since 1998, and again, the records only consist of 14
6 pages of notes, and he could not even explain the entries on those
7 notes. And it's clear he did not review all of the documents in
8 this case and testified he was not provided with the two binders
9 used as evidence in this case, which are the documents in evidence
10 and include the blue ribbon file for Petitioner.

11 He was unclear and not credible as to whether he talked
12 to Dr. Kahn, when he talked to Dr. Kahn about the diagnosis of
13 psychosis. He did not have a release to talk to Dr. Kahn from the
14 Petitioner, and under the circumstances, since he was not noted
15 anywhere in the Millwood records as the treating psychiatrist,
16 that he would have access to Petitioner's records from Millwood.

17 The only part of his testimony I found credible was
18 where he testified that he did not think the FAA were bad guys
19 trying to cause Petitioner problems. He thinks the FAA is spooked
20 by 2001, that people can actually fly into buildings. But he said
21 he was curious why the FAA is so cautious about Petitioner. He
22 testified he did not get it, but he had learned that he may not
23 have all the data and he has learned to relax because it's not up
24 to him and it's up to "these guys" -- I believe he is referring to
25 the FAA -- who have the data.

1 Based on his testimony and his medical records, I cannot
2 give his testimony any weight as a psychiatrist as an expert
3 testimony, and there is a question as to whether he was even
4 Petitioner's treating psychiatrist.

5 The Respondent presented the testimony of Timothy S.
6 Polgar. He's an attorney who testified that he represented, with
7 the consent of Mr. Roth -- Mr. Roth waived the attorney/client
8 privilege in court and relative to the subject matter which
9 Mr. Polgar was going to testify about. Mr. Polgar is employed by
10 JetBlue Airways Corporation as a manager of contractor
11 negotiations. He has known Mr. Roth for many years, since he was
12 a child. Mr. Roth is a friend and a friend of his family.

13 Mr. Polgar was initially identified as Mr. Roth's
14 attorney during the divorce from his ex-wife. However, during
15 testimony, it was clarified that he provided legal advice on
16 visitation and alimony and support payments after the divorce was
17 finalized. He testified that he was involved with Mr. Roth in
18 late 2001 and he represented him as a favor while the Petitioner
19 was going through bankruptcy.

20 He also helped Petitioner obtain custody of the couple's
21 children -- of his children in 2006 and 2009. Petitioner claimed
22 his ex-wife was going to call the FBI to arrest him unless he did
23 as she demanded. However, Mr. Polgar testified that he helped
24 settle the matters with his ex-wife's attorney relative to
25 stopping her from communicating with Petitioner and that all

1 future communications were to be conducted through her attorney
2 and through his attorney, Mr. Polgar. He provided no documentary
3 support as to his testimony that Petitioner's ex-wife had made
4 such threats despite the fact that he said he filed court papers
5 to help Petitioner obtain custody of his two children.

6 On cross-examination, he was asked if he was with the
7 firm that handled the divorce and if he knew anything relative to
8 Mr. Roth's letter during that proceeding indicating he was
9 incapable of attending the divorce proceedings. Mr. Polgar
10 indicated that he was not involved in the divorce proceedings.

11 Mr. Polgar's testimony was not specific as to when
12 Petitioner's ex-wife may have alleged threats to report him to the
13 FBI, but it is clear from his testimony that he represented him in
14 late 2001, well after the hospitalizations documented at Millwood
15 and Charter Grapevine, where there was documentation that he
16 feared the FBI was after him and his room was being bugged.

17 As I stated, Mr. Polgar provided no documentation as to
18 those threats and conversations with opposing counsel or court
19 documents he had filed to obtain custody. Also, if she indeed
20 made threats as to reporting Petitioner to the FBI, this
21 contradicts Dr. Tordella's opinion that those threats were not
22 about the FBI but were about the FAA. It also contradicts other
23 documents and other testimony in which there is an attempt to
24 indicate that Petitioner's fear of the FBI was actually a fear of
25 the FAA. Unfortunately, in these types of cases, you can't have

1 it both ways.

2 Frederick Roth then testified. He currently works in
3 guest relations and security for the Denver Broncos. He's also a
4 relief U.S. Postal Service carrier. He has a long-term disability
5 from American Airlines. He started flying at Colorado State. He
6 took flying lessons. He became a flight instructor in Durango,
7 Colorado. He then went to Farmington, New Mexico as an instructor
8 and worked for an air taxi company. He worked as an air traffic
9 controller for the FAA from 1981 to 1984, and then he was hired
10 with Evergreen Airlines. He then got a job at American Airlines
11 in April of 1985. He became captain in 1992.

12 He testified he had been married for 10 years to his
13 first wife and had a son and daughter. On August 6th, 1998, he
14 hired a divorce lawyer and started proceedings to divorce his
15 first wife. That night, he testified, he got drunk and had an
16 auto accident and was charged with DUI. He reported it to the
17 FAA, which he indicated he was supposed to, and he was assigned --
18 he reported it to the FAA and to his employer within the time
19 limits he was supposed to.

20 This occurred at a time when he was to begin his
21 training for flying the 777. He testified because of all the
22 problems, he was having trouble with the training, but he did pass
23 that training on August 31st of 1998. He testified he continued
24 to drink during that period he completed the training. And then
25 he was referred to Captain Smith by the Pilots Association.

1 He went to a HIMS conference and then went into
2 treatment for alcoholism at Father Martin Ashley's in Maryland.
3 He went through a 28-day treatment and then enrolled in an
4 outpatient program in Valley Hope Outpatient Program. He was
5 having problems grasping the alcohol recovery program. He then
6 began to participate in the HIMS program in Chicago, and he had to
7 report once a month for a meeting, and then return to Colorado.
8 He said he missed four or five monitoring meetings when he was
9 working for Colorado in a fish hatchery. Other than that, he
10 testified that he has been dedicated to his participation in the
11 HIMS program, and that is clearly established by the record in
12 this case.

13 He testified he was referred to Dr. Sturges because his
14 counselor at Valley Hope thought that the divorce was taking a
15 toll on him and he may need medication. He testified that there
16 was a prescription for Paxil when he saw Dr. Sturges in February
17 of 1999.

18 He testified he had filed a complaint with the police
19 because his apartment had been accessed and the locks on the
20 mailbox had been changed. And he said the landlord had not done
21 -- did not do it. He reported it to Helen Hyland, who told him
22 that he could not stay in Colorado any longer and he had to go to
23 Texas, and then she had someone else check him in in Texas to
24 Charter Grapevine for treatment. He said he was there two weeks
25 under the care of Dr. Conrad Schmitt. He testified he saw

1 Dr. Sturges seven or eight days before the admission and a couple
2 of days after the admission. He testified he was already taking
3 Zyprexa at that time.

4 He described the treatment as a normal alcohol or
5 psychiatric treatment program at Grapevine. He was asked about
6 notes in the records about paranoia, and he described that his
7 first wife was a very angry person and that she threatened to call
8 the FBI when she was not getting what she wanted and that he had
9 reported this to the physicians and historians that he spoke to.
10 He said that this whole process went on with his ex-wife until
11 2006.

12 He stated that he left Charter Grapevine and went to a
13 halfway house, stayed there for a year and a half and remained
14 sober. He began to have financial problems. He lost one of his
15 disability policies and had to file bankruptcy. He said he was
16 distraught and his aftercare counselor, Ken Ocean, who, along with
17 others, decided he should go to Millwood to be stabilized.

18 He testified that he himself went to Millwood, and he
19 testified he showed up in the afternoon and sat in the waiting
20 room for six or seven hours. He testified he did not see Dr. Kahn
21 that day, but he was put on medication called Celexa; doesn't
22 really indicate who prescribed it. He testified he did not
23 remember exactly when he saw Dr. Kahn, if it was either Monday or
24 Tuesday or the following week. He said he called Dr. Scott
25 Lennox, a licensed clinical social worker, who was involved in his

1 hospitalizations, and he asked Mr. Lennox to come and help change
2 his medication. He said that he saw Dr. Kahn for about 15 to 20
3 minutes, and then he saw her again -- he saw Dr. Kahn again on
4 discharge.

5 He said he interacted with nurses and multiple
6 individuals during his stay for maybe once or twice but then did
7 not see them again. On discharge, he was on medication that
8 Dr. Schmitt had placed him on, Paxil and Zyprexa. He was
9 discharged, went to a halfway house, back to the halfway house,
10 and worked at a car dealership. He said he had been distraught
11 about not being able to see his children between the Charter
12 Grapevine and the Millwood hospitalizations. He said he was
13 accused of molesting his daughter, but he was subsequently cleared
14 of that allegation. Of course, I have no record in this matter
15 about that, but as Petitioner indicated, he had been cleared of
16 that charge.

17 He said he continued the HIMS program with American
18 Airlines. He went through an evaluation with Dr. O'Connor. He
19 provided documentation to Dr. Elliott, who provided them to
20 Dr. O'Connor. So Mr. Roth himself provided documentation to
21 Dr. Elliott who then provided those documents that were provided
22 by Mr. Roth to Dr. O'Connor.

23 Then Dr. Pipkin became involved, and Dr. Pipkin told him
24 that he knew the players at Millwood and that he was there at the
25 same time the Petitioner was there. And this led Petitioner to

1 believe that his records at Millwood were incorrect. As I
2 previously stated, Dr. Pipkin was of the opinion that certain
3 doctors at Millwood would basically diagnose for insurance
4 reimbursement purposes.

5 He testified that Dr. Elliott and Dr. O'Connor found him
6 fit to fly in 2003 and that that information was passed on to
7 American Airlines. He testified that Paul Hoover, the employee
8 assistance manager, told the Petitioner that had no interest in
9 Petitioner returning to flight status. Petitioner does not
10 remember when that happened. Aside from the comment, no one has
11 testified why he assumed he was unfit to fly and why his request
12 to be recertified by American Airlines was denied. Petitioner
13 stated that he thought it was because of Paul Hoover's influence,
14 so he went to Dr. Pursch to try to bolster his evaluation.

15 He testified that Dr. Hoover felt his history of
16 alcoholism was pretty ugly and that that's why he did not want
17 Petitioner to return to flight. He said that Petitioner had
18 partaken in some very strange things while he lived in Nevada,
19 which he thought scared Mr. Hoover. He testified he does not do
20 that anymore. And he testified that he had asked a friend who
21 passed away by the name of Audie Davis. It appeared Mr. Davis,
22 who was of course unavailable, stated to Petitioner that
23 Mr. Hoover did not like the fact that the Petitioner was involved
24 with some sexual activities in Nevada.

25 Petitioner testified he subsequently obtained custody of

1 his daughter. His son then moved out when he was 18 and moved in
2 with his mother's friend, and then moved in with his son's next
3 door neighbor.

4 He testified that from 2005 to the day of the hearing,
5 he did not have any alcohol. There is no indication that he has.
6 He testified he spoke to American Airlines and that he had been
7 told that if he was successful at this hearing, he would be
8 reemployed by American Airlines. He said that he had an e-mail to
9 prove that, but he did not produce that e-mail for my review or
10 the FAA's review, and that's not part of the record.

11 On cross-examination, he was asked if he was on
12 medication prior to the Charter Grapevine hospitalization, and he
13 indicated that he was. He agreed that he was on Paxil and Zyprexa
14 for about a year before the Charter Grapevine admission, but he
15 thought that it was at a lower dose.

16 He was asked about Dr. Pipkin who had become part of the
17 Employee Assistance Program at American Airlines, about those two
18 documents, dated June 2009 and July 2009. He testified that he
19 reviewed the documents and that they were referred to him by
20 Mr. Lamonaca.

21 He testified his divorce was final in May 2000 and the
22 records were permanently sealed, if I understood his testimony
23 correctly, in 2009. There's no explanation as to why the records
24 were permanently sealed. He testified he was cleared of the child
25 molestation accusations in February of 2000, and that's at page

1 815.

2 He signed releases for Northwest Insurance Company and
3 Disability Management Services Company, which is life insurance.
4 He had to show disability to waive payments for his life insurance
5 company doing the disability. He testified he authorized
6 Dr. Schmitt and Dr. Sturges to provide -- periodically to provide
7 assessments about his condition to the insurance companies.
8 That's at A-2, pages 757, 758, 835 and 839.

9 He testified that when he applied for disability, he
10 indicated that he did not know when the illness started, and he
11 described it is major depression and alcohol dependence. He also
12 stated that he had also indicated on the forms that he also had
13 anxiety that was intermittent and paranoia, which was also
14 intermittent.

15 In response to a question about listing all of his
16 physicians, psychologists, practitioners, counselors,
17 chiropractors and other care providers and hospitals that had
18 treated him for his condition, he wrote down Conrad Schmitt from
19 August 10th, 1999 to the present, and Millwood Hospital. He did
20 not mention Charter Grapevine or Dr. Sturges.

21 At Exhibit A-1, page 1154, he testified that he was --
22 as far as that document is concerned, he testified he was trying
23 to extend his disability from 18 months to 8 years. And he
24 testified that he saw Dr. Elliott on November of 2001 for that
25 purpose, and he admitted to Dr. Elliott that he had smoked pot and

1 shortly thereafter flew with another pilot in a general aviation
2 aircraft.

3 He testified he was back on antidepressants in July of
4 1999. He testified he and Dr. Sturges decided that he should be
5 back on antidepressants. He then changed his testimony to state
6 that Dr. Schmitt put him on Zyprexa and Paxil and managed his
7 medication from 1999 to February 2001.

8 He testified he holds an unrestricted first-class
9 medical from Canada. He testified he went to the U.K. to try to
10 obtain a medical certificate from the United Kingdom. He met Paul
11 Collins Howgill and P. Hayden Smith, and the letters from the
12 British doctors are in the record, where he discussed a medical
13 history. None of those documents mention the Charter Grapevine
14 hospitalization. When he was asked about that, the Petitioner
15 testified that Dr. Collins Howgill and Dr. Hayden Smith were not
16 interested in those documents, but he didn't really explain why
17 they were not interested in that hospitalization. Dr. Collins
18 Howgill also indicated in a letter that he had requested a
19 discharge summary from Millwood, and the Respondent had stated
20 that he wanted a typed discharge summary, which he could not
21 provide, and therefore, his medical was denied by the United
22 Kingdom.

23 He testified that he had told Dr. Elliott and other
24 doctors, including Dr. Pursch and Dr. O'Connor, that he had had a
25 family history of depression. He has also told them about his

1 mother's history of depression and the nervous breakdown. Since
2 the Canadian medical application is in the record, I have to note
3 that in his application for that medical dated July 19th, 2011, he
4 checked there was no family history of mental illness. He also
5 checked no history of mental history on his July 9th, 2012
6 application. He also checked no history of mental illness in his
7 2013 application, which has now been admitted into evidence as J-3
8 [sic]. When he was asked about that, he said he did not provide
9 that information because he had already provided all the other
10 records and he did not think it was necessary to provide anything
11 further.

12 He had marked "yes" on the form that he had been treated
13 for psychiatric or neurological problems. When counsel asked him
14 if the Canadian authorities had the Charter Grapevine records,
15 Petitioner evaded the question but then testified he provided them
16 with the records he had, but he could not specify which one, which
17 specific records there were.

18 He was asked about his contact with Dr. Schmitt in 2012,
19 and he affirmed that I, the Judge in this case, had asked him to
20 file an affidavit of his contact, describing his contact with
21 Dr. Schmitt. He was shown documents he prepared in response to my
22 request, and it is pointed out that his first e-mail to
23 Dr. Schmitt was in March of 2012. And he testified that he sent
24 Dr. Schmitt medical records in a PDF format.

25 He was asked if he recalled the e-mail to Dr. Schmitt in

1 which he allegedly told Dr. Schmitt that if Dr. Schmitt was not
2 willing to withdraw the descriptor psychosis that Petitioner would
3 have no further correspondence with him and he would not tell the
4 FAA that he and Dr. Schmitt communicated. I believe he testified
5 that he recalled that e-mail.

6 He testified that, yes, when he was asked if he recalled
7 Dr. Pursch recommending that he not receive an unrestricted
8 medical certificate but that he should be monitored for the rest
9 of his flying career. He testified Dr. O'Connor wrote three or
10 four letters over the years, and in each one, he did not recommend
11 that Petitioner get an unrestricted certificate but that he be
12 monitored for the rest of his career.

13 He was asked if one of Dr. O'Connor's letters indicated
14 that he cautioned people who read the letter, that the letter
15 indicated that what Petitioner told Dr. Schmitt early in 2001 did
16 not match up with what Petitioner had told Dr. Elliott in another
17 document. Petitioner had stated that he didn't recall that.
18 Petitioner did recall that Dr. O'Connor wrote that sometimes the
19 Petitioner presents himself to one clinician in one light without
20 telling the clinician everything that's going on in his life. He
21 tries to create a favorable impression but provides different
22 information to other clinicians.

23 He was asked if he recalled seeing Dr. Glass and
24 Dr. Glass writing a note of the meeting and that Petitioner had
25 sent a correction sheet after that meeting, and he responded that

1 he had. He corrected information in that interview where it had
2 indicated that Dr. Tordella had known him since the late 1990s,
3 but he changed that to Dr. Sturges.

4 The e-mails were admitted showing Petitioner contacted
5 Dr. Schmitt in Oregon, which indicated that he forwarded records
6 that the FAA did not have and had only obtained from an insurance
7 company, and that did not occur until -- it was just before
8 Dr. Schmitt's deposition, so they could not review those documents
9 or use them in their deposition of Dr. Schmitt.

10 Petitioner testified that he had made corrections to
11 Dr. Glass's notes relative to some aspects of the notes relative
12 to Dr. Sturges, but he did not correct the fact that he said that
13 Dr. Pipkin knew him in 2000 and had opined that Petitioner was not
14 psychotic. On cross-examination, he admitted on cross that
15 Dr. Pipkin knew him from 2006 and not 2000.

16 Redirect, he testified his union peer group pilots, that
17 he had never -- his peer pilot had never seen him psychotic. His
18 aftercare counselor indicated Petitioner was an odd duck but never
19 psychotic. His AA sponsor testified that Petitioner was doing
20 well. Dr. Tordella had testified that he was anxious and
21 uncomfortable but not psychotic. Dr. Sturges said he was not
22 psychotic. Dr. O'Connor said Petitioner was never psychotic.
23 Dr. Elliott said the comments relative to psychosis diagnosis was
24 from other records.

25 He testified that he told Dr. Hayden Smith and

1 Dr. Collins Howgill. However, his testimony is not credible
2 because he told them Dr. Kahn only saw him for 20 minutes. He
3 testified he tried to find out if there was a written discharge
4 summary from Millwood, and he was told that there was not. And so
5 the documentation he provided was not acceptable to the United
6 Kingdom. He testified he had a letter specifically denying his
7 medical from the United Kingdom, but that was not in the FAA
8 records and he didn't provide one for this hearing.

9 On recross, he agreed that Dr. Elliott had tested him
10 and found him to have a pathology for paranoia and other things.
11 He denied he had a conversation with Dr. Elliott and had requested
12 he, Dr. Elliott, remove the description of psychosis from his
13 reports. He said that he talked to Dr. Elliott about being denied
14 an airman medical based on his history of psychosis, but he had
15 not asked him to remove that document from Dr. Elliott's records.

16 He was shown Exhibit A-2, page 1488, which indicated
17 Dr. Elliott wrote that he had a conference call with Petitioner
18 and Dr. Elliott had told Petitioner that he would not write a
19 letter detailing why he did not believe Petitioner was not
20 psychotic in 2001. Petitioner admitted that Dr. Elliott refused
21 to write the letter but attempted to explain the reasons for his
22 refusal, which is not documented in the record. He said
23 Dr. Elliott told him that the request had to come from the FAA,
24 but again, that's nowhere in the records or any letters from
25 Dr. Elliott. He testified he could not remember if Dr. Elliott

1 had recommended or suggested that he go back on medication in
2 2001.

3 I asked him if he had received a letter denying the U.K.
4 license, and he indicated he had, but again, he did not provide it
5 for this hearing.

6 I have some difficulty with Mr. Roth's credibility. I
7 don't find him credible. His direct testimony wasn't credible.
8 He went through his direct testimony never mentioning any
9 psychiatric problem to any degree. He downplayed every aspect of
10 his treatment except for his HIMS treatment. He talked about
11 stressors such as divorce and child custody issues, did not talk
12 about his psychiatric diagnosis. He only summarily discussed his
13 hospitalizations. He was critical of Dr. Kahn, indicating that he
14 was only seen by Dr. Kahn for 15 to 20 minutes. If his testimony
15 on direct was true, he would currently be flying and we wouldn't
16 be having this hearing.

17 On cross-examination, the Administrator's questions made
18 it clear that the Petitioner has made every attempt to present
19 himself in a very positive light to different clinicians. He has
20 attempted to manipulate the evidence in this case, as indicated by
21 his contact with Dr. Schmitt and his offers not to mention the
22 contact to the FAA if Dr. Schmitt could not help him out and not
23 agree to change his psychiatric diagnosis of psychosis.

24 It is also clear that he has also faxed Dr. Schmitt
25 records that the FAA did not have and did not provide those to the

1 FAA. The FAA had to obtain those records through subpoenas from
2 an insurance company.

3 I had requested that Petitioner provide a sworn
4 affidavit describing his contact with Dr. Schmitt, because under
5 the circumstances, I found it a little suspect. He did provide a
6 sworn affidavit; however, in that affidavit he only swears as to
7 the authenticity of the e-mails, but he did not swear as to the
8 authenticity or the truthfulness of his written narrative of his
9 contact with Dr. Schmitt. I understand why he didn't do that
10 based on the fact that he indicated in that handwritten document
11 that he hadn't spoken to Dr. Schmitt, when, in fact, Dr. Schmitt
12 testified under oath that he had a number of conversations with
13 Petitioner.

14 Petitioner also attempted to get Dr. Elliott to write
15 him a letter explaining why he did not believe Petitioner was not
16 psychotic [sic], and Dr. Elliott refused. Petitioner's
17 explanation for that refusal by Dr. Elliott appears to be a spur
18 of the moment explanation that was not credible.

19 It appears that even his doctors that represent the
20 Petitioner was not psychotic did not have the records from Charter
21 Grapevine. Dr. Tordella apparently did not review all of the
22 records from the blue ribbon file. On cross-examination, Dr.
23 Tordella placed some of the documents he relied upon from Dr.
24 Pipkin in question as to their authenticity. One of those
25 documents is a July document that was submitted after he met face-

1 to-face with Petitioner and that document is unsigned. I'm not
2 finding that those documents are not authentic, but again, I find
3 them suspect. Dr. Sturges testified he did not review all of the
4 records and that he apparently relied heavily on what Petitioner
5 had told him.

6 Petitioner has clearly falsified documents he submitted
7 to receive his first class Canadian medical in 2011, 2012 and
8 2013. He indicated that there was no family history of mental
9 illness when he knew for a fact that there was and that he had
10 made those statements on medical records in this case. I tend to
11 believe that he did not provide the Grapevine Hospital medical
12 records to the United Kingdom when he tried to obtain a U.K.
13 medical certificate. Again, he testified that they were not
14 interested in those records but never explained why.

15 Petitioner has been shown by his testimony and the
16 evidence in this case to essentially say anything and do anything
17 and hide anything to get his airman medical back. I believe he
18 has manipulated documents, provided incomplete documents, withheld
19 documents and falsified documents that are a part of this case. I
20 find his testimony to be completely without credibility.

21 I give the greater weight to the contemporaneous medical
22 records that were closer in time to the events that were not
23 subject to the influence of Mr. Roth. The records establish that
24 he was diagnosed with major depression with psychotic features.
25 Attempts by Petitioner to establish that diagnosis was incorrect

1 at its inception and simply carried out over time is not
2 persuasive or supported by the totality of the evidence in this
3 case. Dr. Conrad V. Schmitt testified also, but I will save his
4 testimony for my discussion as to the legal issues in this case.

5 As far as the Administrator's case is concerned, again,
6 the Administrator does not have the burden of proof in this case,
7 but I will discuss their testimony for the purpose of
8 completeness.

9 Dr. Gitlow is a psychiatrist who specializes in
10 addiction. He was qualified as an expert in general, forensic and
11 addiction psychiatry without objection. He reviewed the entire
12 blue ribbon file. He opined to a reasonable degree of medical
13 certainty that the Petitioner has a history of major depressive
14 disorder, recurrent, with psychotic features. He testified that
15 the Charter Grapevine records indicate that Petitioner was
16 exhibiting psychosis as demonstrated by grossly distorted thinking
17 bordering on delusions, and with marked severe paranoia. Records
18 indicate he was on Zyprexa, an antipsychotic; and Paxil, an
19 antidepressant.

20 He testified that alcoholic paranoia is similar in that
21 an individual may have psychosis or a form of psychosis during
22 alcohol withdrawal. However, in this case, he testified that
23 Petitioner had stopped drinking a year early. He opined that the
24 record did not indicate an acute alcohol withdrawal but a separate
25 primary psychiatric illness that was not from alcohol.

1 He testified that there is objective findings on page
2 488 of the records observed by examining clinician. Petitioner is
3 described as extremely distressed, extremely anxious,
4 significantly distorted through -- having significantly distorted
5 thought processes and paranoid ideation, and he has poor
6 concentration.

7 Dr. Gitlow testified that the symptoms were consistent
8 with a diagnosis of major depression, recurrent, severe with
9 psychotic features, and alcohol dependency in remission. His GAF
10 score of 30 is quite low, in his opinion, and indicated that that
11 person would be a severely impaired in multiple domains.

12 As to DSMV Code 296.34, he testified it is used for
13 depressive disorders, recurrent, severe with psychotic features
14 and that the Diagnostic and Statistical Manual is used to review a
15 diagnostic criteria for any of the psychiatric diagnoses. He
16 testified that the records indicated that Petitioner had a history
17 of alcohol-related disease, but that record indicated no use of
18 alcohol since 1998. His recovery from alcoholism has continued
19 uninterrupted. The alcohol-related diseases stand separate and
20 distinct from his depression and psychosis.

21 He testified that Petitioner had seen Dr. Ocean whose
22 notes indicate that he had a concern with Mr. Roth's inability to
23 handle his day-to-day responsibilities and move forward in his
24 recovery process. He also noted that Petitioner's problems appear
25 to get worse after cessation of his antidepressant medication.

1 He testified he had reviewed the Millwood documents and
2 found them to have difficulties with legibility and not
3 particularly elaborate in terms of narrative. However, he did not
4 believe this affected their reliability, and he did not believe
5 the record at Millwood was unreliable.

6 He testified the records indicated that Petitioner came
7 into the facility experiencing paranoia and delusions, which are
8 explicitly described in the brief history of present illness. He
9 noted to have delusions and hallucinations and noted to have
10 paranoid delusions. He was placed on Celexa, Zyprexa, Trazodone
11 and Ativan for anxiety. And he was diagnosed with major
12 depressive disorder, recurrent, with psychosis, with a GAF of 30.
13 He also noted a diagnosis of anxiety disorder, with a GAF of 30.

14 He testified that he found the diagnosis of anxiety
15 disorder, with a GAF of 30, in those records as well, but he did
16 not find support for that diagnosis in the records. This is a
17 record which indicates that -- it has Mr. Roth's name penciled in
18 at the bottom with the words indicating that there was an error.
19 The person's name who is on the record is scratched out and
20 Petitioner's name is put into the record.

21 The record indicates that Petitioner felt he was being
22 watched, that there was anonymous notes in his mailbox. A second
23 of that opinion was conducted several days after admission, on
24 November 21st, four days after admission, and diagnosis at that
25 time was major depressive, recurrent, with psychosis. He said he

1 displayed a guarded effect, which is consistent with findings of
2 paranoid delusions and consistent with major depression. He said
3 that the discharge diagnosis at Millwood was bipolar disorder with
4 psychosis, and he did not agree that there was enough evidence to
5 find bipolar disorder, but there was evidence to find psychosis.

6 Petitioner was evaluated on November 11th by a
7 neuropsychologist, Dr. Robert Elliott. Dr. Elliott prepared a
8 report indicating fitness for duty post-treatment psychological
9 and neuropsychological evaluation. He performed cognitive
10 testing, which revealed significant cognitive weakness in a
11 variety of areas: math calculations, complex reasoning, visual
12 motor tracking and mental flexibility.

13 Dr. Elliott concluded that Petitioner was not fit to fly
14 because of an established medical history of clinical diagnoses of
15 delusions, disorganized behavior and neurosis that would make him
16 unable to safely perform the duties or exercise the privilege. He
17 testified this was significant because Dr. Elliott performed
18 cognitive testing and examinations and arrived at these
19 conclusions when Petitioner was out of the hospital and off of all
20 medication.

21 He said the records also indicated that the Petitioner
22 appeared to improve over time; however, he testified that once you
23 are diagnosed with major depression, it's a diagnosis that remains
24 with you, but you can be in partial remission or full remission,
25 as the case may be. Certainly, that is the same for psychosis.

1 He testified the medical literature indicates that if an
2 individual has one episode of major depressive disorder, he has a
3 50/50 chance of another episode. A person with two episodes has a
4 3 in 4 chance of another episode. In this case, there were two
5 episodes of depression which required hospitalization. He said
6 that the significance of this is that the chances that someone
7 would experience a dangerous set of symptoms while in control of
8 an aircraft. Dr. Elliott had records that indicate that he had
9 diagnosed him -- his diagnostic impressions were major depressive
10 disorder, recurrent, in partial remission, with alcohol dependency
11 in remission.

12 He testified if all the delusions Petitioner described
13 were true, it would change his opinion, but if one of the two of
14 these documented delusions was true that it would probably it
15 would not change his opinion. He gave the example of the
16 Petitioner's belief that someone was putting cocaine in his sugar
17 and the FBI was chasing after him.

18 He testified that Dr. Elliott's report indicated he
19 spoke to Petitioner's second wife, Gayla, who indicated that
20 Petitioner was imagining that there were hidden cameras in his
21 apartment taking pictures of him, that powdered sugar was cocaine
22 and that people were taking pictures of him in his apartment, and
23 his apartment was bugged. Dr. Elliott testified that he
24 interpreted these delusions to be consistent with psychotic
25 thinking -- I'm sorry -- Dr. Gitlow testified that these symptoms

1 were consistent with psychotic thinking. Petitioner told
2 Dr. Elliott again about people taking pictures, but he also
3 claimed that his vehicle had been moved and he had seen UFOs in
4 close proximity to military bases.

5 Dr. Gitlow testified that he reviewed the entire blue
6 ribbon file, but he did not rely on Dr. Sager's opinion, which is
7 an internal document. He said he wanted to make his own opinions
8 based on his objective review of the files.

9 On cross-examination, he testified that while he
10 believed Dr. Elliott's identified psychotic symptoms -- he agreed
11 that Dr. Elliott did not diagnose Petitioner with psychosis. He
12 testified that he, Dr. Elliott, testing revealed Petitioner is an
13 individual with strange beliefs, mental disorganization, and
14 perhaps a thought disorder. The cognitive section of this testing
15 indicated that the way the Petitioner is constituting reality is
16 unconventional and idiosyncratic to such an extent that
17 Dr. Elliott concludes that Petitioner can be expected to behave
18 unconventionally. According to Dr. Gitlow, all of that is
19 consistent with psychosis.

20 He testified that while Dr. Elliott may have concluded
21 he was -- he had a different diagnosis, the consistency of his
22 testing and the symptoms indicated that there were indications of
23 psychosis. While Dr. Elliott may have found him fit to fly,
24 Dr. Gitlow testified on cross that he did not feel that Petitioner
25 was fit to fly based on his -- under the regulatory basis in this

1 case.

2 He agreed that there was no evidence of relapse and
3 symptoms in the last decade, but the fact did not lessen the risk
4 ratios for a relapse. He agreed that Dr. O'Connor had found him
5 fit for duty.

6 Dr. Gitlow testified that the two major depressive and
7 psychotic episodes were recorded in Grapevine and Millwood records
8 and also in the records of Mr. Ocean, and that was expressed when
9 Mr. Ocean expressed his concern regarding the form of thought
10 Petitioner had during the period of time.

11 He was asked about Dr. Schmitt's change of psychosis
12 diagnosis, and Dr. Gitlow indicated he had not read Dr. Schmitt's
13 deposition testimony. He was asked more questions about that. He
14 said that it did not change his opinion because he relied on the
15 primary data, such as actual findings of clinicians upon
16 examination, Petitioner's own description of his experiences, and
17 collateral data from his family, from nurses, from social workers
18 and other individuals at the same facility. He testified that the
19 records in this case are much more than just one doctor's opinion.

20 When asked if Dr. Schmitt's diagnosis would just get
21 passed down from one examiner to another, Dr. Gitlow said that
22 that was a possibility.

23 He testified that Dr. Sturges did not say Petitioner was
24 psychotic but that he had heard Dr. Sturges testify, and what he
25 testified to was consistent with Petitioner being psychotic at

1 some point in the past. He testified Dr. O'Connor did not find
2 Petitioner psychotic at the time. Dr. Elliott indicated that he
3 had not observe psychosis. Dr. Gitlow testified that he does not
4 know when Dr. Tordella examined Petitioner; however, Dr. Tordella
5 did testify that at that time Petitioner was not psychotic.

6 He testified that the Millwood records did include
7 errors, and he was concerned about one document which stated
8 Axis I diagnosis, anxiety disorder. He testified that document
9 does include wording that it was an error with a different patient
10 name and that was crossed and the Petitioner's name written in.

11 On redirect, he was handed the regulatory standard,
12 which indicates that the mental standards are that no established
13 medical history of clinical diagnosis of any of the following
14 conditions, and psychosis is one of them. And psychosis, as used
15 in this section, refers to mental disorders in which the
16 individual has manifested delusions, hallucinations, grossly
17 bizarre or disorganized behavior, or other commonly accepted
18 symptoms of this condition; or (2) the individual may reasonably
19 be expected to manifest the symptoms again.

20 He testified that from his review of the records,
21 Dr. Elliott had observed these symptoms and said that the
22 recommendations paragraph under fitness for duty, Petitioner had a
23 clinical diagnosis of delusion and disorganized behavior. He
24 agreed that that description matched the medical standard he was
25 just read.

1 Dr. Gitlow testified it did not appear that Dr. Elliott
2 had reviewed the Millwood records. He specifically said so on
3 page 323. In response to my question, he indicated that an
4 individual who is diagnosed with major depression severe,
5 recurrent, with psychotic features, that's a lifelong diagnosis.
6 The symptoms may improve and an individual may respond to
7 medication, or they can go through cycles where there are no
8 symptoms.

9 On recross, he was asked if Dr. Schmitt was Petitioner's
10 treating physician, and Dr. Gitlow indicated that he believed that
11 Dr. Schmitt was Petitioner's treating physician; however, in his
12 deposition testimony Dr. Schmitt indicated he was not Petitioner's
13 treating psychiatrist.

14 Dr. Michael A. Berry then testified he's manager of the
15 Medical Specialties Division for the FAA in Washington, D.C. He
16 received his BA from Texas Christian University and received his
17 M.D. from the University of Texas Southwest Medical School in
18 Dallas. He gave a history of his background. He indicated he has
19 been with the FAA for about seven years. He was qualified as an
20 expert in the field of aerospace medicine without objection.

21 He testified he reviewed the entire medical record in
22 this case. Based on his review of the entire medical record, he
23 testified to a reasonable degree of medical certainty that
24 Petitioner has a diagnosis of depression severe, recurrent, with
25 psychotic features. He testified that Petitioner meets the

1 criteria within Part 67.107, 67.207 and 67.307 that referred to
2 psychosis.

3 He testified he based his opinion upon the review of the
4 entire medical record. He testified the records from Charter
5 Grapevine clearly confirm or indicate a diagnosis of major
6 depression. The symptoms in those records are very important from
7 a regulatory standpoint because those symptoms may occur again in
8 the future. He testified that the diagnosis psychosis is
9 unpredictable and is potentially incapacitating. He testified
10 that the FAA does not want someone flying with that diagnosis
11 because it's unpredictable and it's unknown when it may occur
12 again.

13 He testified he agreed with Dr. Gitlow's testimony and
14 came to the same conclusion about the recurrence, possible
15 recurrence of the symptoms of psychosis. He testified psychosis
16 is a specifically disqualifying diagnosis and there are generally
17 disqualifying conditions as well, one of which is -- he testified
18 major depression is one of the things that -- depression, which is
19 recurrent.

20 He testified that the second basis for denial of
21 Petitioner's case, aside from psychosis, the recurrent depression,
22 he agrees with Dr. Gitlow that once it occurs or that diagnosis is
23 made, the likelihood that it may reoccur is unpredictable. It's
24 unpredictable -- its predictability is too high, and unless one is
25 treated, the FAA would never give a regular certification with an

1 individual suffering from such a diagnosis.

2 He testified major depression, recurrent, is generally
3 disqualifying. The risk of recurrence in this situation that
4 would prevent Petitioner from safely exercising his privileges of
5 his first-class medical certificate is of great concern to the
6 FAA.

7 He said depression affects the way pilots think and
8 perform, and therefore, cannot perform their piloting tasks they
9 normally would if they did not have major depression, which was
10 recurrent. He testified a long state of remission does not
11 extinguish the risk, both depression and psychosis come on
12 insidiously and are unpredictable. He testified individuals
13 themselves may not recognize that the episode is coming on without
14 warning. He too testified that the FAA had to rely upon the
15 contemporaneous medical records in making its decisions.

16 He said he testified that he reviewed Dr. Schmitt's
17 deposition and had sat in on the deposition, but he could not
18 really tell why Dr. Schmitt had changed his diagnosis. He
19 testified that -- or opined that perhaps Dr. Schmitt was simply
20 trying to help out his former patient.

21 On cross-examination, he testified that the records at
22 Millwood Hospital were sloppy and could be more descriptive and
23 seem to contain an error as to an Axis I diagnosis of anxiety
24 disorder. However, Dr. Berry, like Dr. Gitlow, found the records
25 to be reliable. The fact that there had been an error in the

1 records did not make the diagnosis by Dr. Kahn of major depression
2 severe, recurrent, with psychotic features go away. He reviewed
3 them as a whole and found them to be reliable.

4 As to other clinicians' and doctors' opinions as to the
5 diagnosis of psychosis, Dr. Berry credibly testified that those
6 evaluations were made long after the diagnosis by Dr. Schmitt and
7 Dr. Kahn in 1999 and 2000. Professionals may differ in their
8 opinions, but the contemporaneous records established that
9 Dr. Schmitt and Dr. Kahn's diagnoses were correct at the time they
10 were made.

11 He also testified that the other opinions in the medical
12 records that indicated that Petitioner did not exhibit psychosis
13 and he was fit to fly were describing how Petitioner presented at
14 the time of the examination or the review of the records.

15 Dr. Berry testified that this is not the regulatory standard used
16 to deny an airman's medical. He also testified that while other
17 evaluators assert that Petitioner did not exhibit the full range
18 of symptoms for psychosis as described in the DSM, he testified
19 that the DSM is not the standard, the regulation is the standard.

20 I found Dr. Berry's testimony to be objective, credible,
21 both on direct and cross-examination, and as previously noted, his
22 opinion was based on his review of the entire record in this case,
23 as was the testimony of Dr. Gitlow.

24 As to discussion of the regulations I have to decide in
25 this case, the issue before me relates to the Administrator's

1 denial of Petitioner's application for an airman medical
2 certificate under the standards I have previously mentioned,
3 67.107(a)(2) and (c), 67.207(a)(2) and (c), 67.307(a)(2) and (c),
4 based on his medical history of a clinical diagnosis of psychosis
5 and major depression, recurrent.

6 Those standards specifically state, 67.107, mental
7 standard for a first-class airman certificate, are no established
8 medical history of clinical diagnosis of the following. Under
9 number (2) "A psychosis. As used in this section, 'psychosis'
10 refers to a mental disorder which: (i) The individual has
11 manifested delusions, hallucinations, grossly bizarre or
12 disorganized behavior or other commonly accepted symptoms for the
13 condition."

14 As far as (c) is concerned, there is no other
15 personality disorder, neurosis or other mental condition that the
16 Federal Air Surgeon based on case history and appropriate
17 qualified medical judgment relating to a condition involved. The
18 Administrator alleges that the Petitioner's major depression,
19 recurrent, falls within this standard.

20 In order to prevail, the Petitioner must prove by a
21 preponderance of evidence that (1) he does not have an established
22 medical history of clinical diagnosis of psychosis or the medical
23 condition of major depression, recurrent. He can also prevail if
24 he provides convincing expert medical opinion to establish by a
25 preponderance of the evidence that the diagnosis of psychosis or

1 the medical condition of major depression is not correct based on
2 that medical expert opinion.

3 As I said, there is records from Charter Grapevine,
4 records from Millwood Hospital, and volumes and volumes of record
5 in this case. Again, the Respondent argues that the initial
6 diagnosis of major depression, recurrent, with psychotic features,
7 by Dr. Conrad Schmitt was the based for all of the subsequent
8 diagnoses of this illness, that illness, of course, being major
9 depression severe, recurrent, with psychotic features.

10 Petitioner was able to locate Dr. Schmitt. Again, it's
11 the Petitioner's position that if Dr. Schmitt's opinion is
12 redacted or taken out of the medical records, then all subsequent
13 records that follow should also be ignored and should not be
14 considered as valid or accurate. Petitioner, as I stated, was
15 able to locate Dr. Schmitt, who is currently retired. Petitioner
16 communicated with Dr. Schmitt by e-mail and provided Dr. Schmitt,
17 as I said, with documents.

18 Again, I asked Dr. Schmitt to testify in person after he
19 provided a deposition in this case, and the reason, again, was so
20 that I could test his credibility as to why he changed his
21 opinion. Dr. Conrad V. Schmitt currently resides in Oregon. He
22 previously lived in Nairobi, Kenya, has worked for the State
23 Department. He has also been stationed in other countries.

24 He said that he was in private practice from 1990 to May
25 of 2003, when he joined the State Department. He received his BA

1 in psychology from San Jose State; master's in psychology as well
2 from that university. He also earned a Ph.D. and an M.D. from
3 Texas A&M. He's board certified in psychiatry, but because he's
4 now retired, he just no longer -- has not renewed that board
5 certification.

6 He testified he came to know Petitioner in mid-1999 when
7 he was a staff physician at Charter Grapevine. Petitioner was
8 admitted to the hospital, and Dr. Schmitt stated that he was
9 assigned to treat Petitioner. He testified Petitioner was very
10 depressed, had had a DUI, which he had reported to his employer.
11 He had been in treatment prior to coming to Charter Grapevine
12 Hospital. Dr. Schmitt indicated he felt that Petitioner was very
13 depressed, agitated, confused and felt he had psychiatric
14 symptoms.

15 When he was asked about his change of his diagnosis from
16 major depression severe, recurrent, with psychotic features, he
17 said he changed his diagnosis because of conversations he had had
18 with Helen Hyland back in, apparently, 1999, who told him that all
19 of that information about the Petitioner being followed turned out
20 to be true. Dr. Schmitt testified that that was not the only
21 reason he had changed his opinion, but that he had also thought
22 back about the treatment he had provided to Mr. Roth and he had
23 thought about the man and he had changed his opinion.

24 He testified he changed the modifier on the diagnosis
25 code of 34, psychotic features, to 33, which means without

1 psychotic features. He testified that he was Petitioner's
2 treating physician at the time, but it was pointed out by counsel
3 for the Administrator that under sworn testimony, he was not
4 Petitioner's treating psychiatrist.

5 He testified Petitioner was on medication, then
6 subsequently discontinued the medication and did well. He
7 testified he filled out a couple of letters for Petitioner to
8 obtain disability benefits. And Dr. Schmitt testified Petitioner
9 consistently reconstituted quickly and, in retrospect, he,
10 Dr. Schmitt, could have changed his diagnosis earlier, but he had
11 never thought it was an important issue.

12 Cross-examination, he testified he had had communication
13 with Petitioner by e-mail beginning in March of 2012 and that
14 Dr. Schmitt was provided documents from Petitioner, that he had
15 had phone conversations with Petitioner. He testified the
16 Petitioner had sent him these documents and the Petitioner had
17 asked him to consider whether he would review them and consider
18 changing his diagnosis.

19 He testified that the Charter Grapevine records indicate
20 that he diagnosed Petitioner, again, with having depression over a
21 year prior to his alcohol problem. He agreed he had diagnosed
22 Petitioner with major depressive disorder that was recurrent.
23 When asked if that meant that he had -- there had been a prior
24 episode of major depression, Dr. Schmitt testified most likely.

25 Dr. Schmitt testified that the only documents he

1 reviewed were the documents that Petitioner provided. He also
2 testified he did not even read all of those documents. He said
3 that he did not read the psychological testing that had been
4 forwarded to him. He did not ask for additional records. He
5 thought that he had the Charter Grapevine documents, but he could
6 not say if he had reviewed them before changing his opinion. He
7 agreed that he had prescribed Zyprexa, an antipsychotic drug; and
8 Paxil for depression for the Petitioner.

9 When he was read the admission diagnosis for August
10 10th, 1999 record for Petitioner, which indicated the Petitioner
11 was not functional, had grossly distorted thinking and with mixed
12 paranoia, Dr. Schmitt agreed, as he had testified in the
13 deposition, that those were the symptoms of psychosis.

14 He testified he wrote on page 487 of the records that
15 Petitioner had been nonfunctional, with grossly distorted thoughts
16 bordering on delusions. He also agreed he wrote, on page 488,
17 that Petitioner suffered from significant distorted thought
18 process and delusional ideation. He also diagnosed him with major
19 depression, recurrent, severe.

20 He testified he does not deny that that's what he
21 interpreted at the time; however, he is of the opinion that he may
22 have over-diagnosed at that time. He said he changed the modifier
23 on the DSM code which removed psychotic features from the
24 diagnosis. He testified that change was not based on what the
25 Petitioner was currently doing, but was based on a reassessment of

1 the four years he treated him. He also testified that he did not
2 believe that the Petitioner back in 1999 was psychotic, but was
3 bordering on psychotic. He testified he changed his opinion based
4 on what other people had told him and his own thoughts about what
5 treatment he provided to Petitioner.

6 Dr. Schmitt testified that he was not provided the
7 Millwood Hospital records. He was not told that Petitioner was
8 diagnosed with major depression, recurrent, severe with psychotic
9 features, at Millwood. He testified that he thought Petitioner
10 may have said, back when he was treating him, that he had been at
11 Millwood.

12 On redirect, he agreed that he had changed his opinion
13 because he had talked to some people, reassessed his treatment,
14 but also, he relied on records. Subsequently, when I asked him
15 what records he relied upon, he really could not identify what
16 records helped him change his mind. I also asked him if he was
17 told the Petitioner's statement that someone was putting cocaine
18 in his sugar was true. He said he had not heard anything about
19 that. When I asked if the delusion was a symptom of psychosis, he
20 testified it could be. He also indicated he did not hear of the
21 Petitioner's statement that he had seen UFOs near military
22 installations or that someone else had changed his locks on his
23 mailbox and it was not the landlord.

24 In response to my question, Dr. Schmitt testified the
25 Petitioner had told him, Dr. Schmitt, that he was the only doctor

1 that had diagnosed him with psychosis. He testified that he had
2 conversations with Petitioner on the phone and -- after the
3 initial contact with the Petitioner, but then subsequently decided
4 that the conversation should stop, but he did not say why. As I
5 said, Petitioner filed a sworn affidavit relative to that contact.

6 He also said that he talked to Mr. Lamonaca by
7 telephone, and again, Administrator's counsel was not involved in
8 those conversations. Dr. Schmitt testified he had not spoken to
9 Petitioner since 2003 and did not know what had happened to him
10 since or what occurred in Petitioner's life since 2003 to the
11 present.

12 I found Dr. Schmitt's testimony to be unpersuasive and,
13 frankly, not credible. He simply states he changed his opinion
14 because what he heard from people, and he simply reassessed his
15 treatment of Petitioner in 1999 and 2000. While counsel for
16 Petitioner tried to get Dr. Schmitt to expand on his testimony
17 with questions as to what documents he relied upon to make that
18 change of diagnosis, Dr. Schmitt could not describe or identify
19 which documentations led to his change in his opinion.

20 The facts are clear. He was contacted by Petitioner.
21 He was provided specific evidence by Petitioner. He was not
22 provided Millwood documents. He was told that he was the only
23 doctor that had diagnosed Petitioner with psychosis. That, in
24 fact, is not true. Dr. Kahn had also diagnosed Petitioner with
25 major depression, recurrent, with psychotic features.

1 Petitioner had a number of conversations with
2 Dr. Schmitt, as we've indicated. Again, I cannot find that his
3 testimony to be credible or persuasive. I find his change of
4 diagnosis is based on limited information and, apparently,
5 misinformation provided relative to who else had diagnosed
6 Petitioner with psychosis.

7 I give his testimony and his change of diagnosis no
8 weight in my evaluation of this case. I give the greater weight
9 to the contemporaneous medical records in which he diagnosed
10 Petitioner with major depression, severe, recurrent with psychotic
11 features. That record remains an established medical history and
12 a clinical diagnosis of psychosis.

13 As far as expert testimony is concerned, the next issue
14 I address is whether Petitioner provided expert medical opinion
15 which establishes by a preponderance of the evidence that the
16 diagnosis of major depression severe, recurrent, and psychotic
17 features is incorrect. During his testimony, Dr. Tordella
18 testified that in his letter to Mr. Lamonaca that -- he said the
19 diagnosis of psychosis or psychotic features was questionable. He
20 testified that it was more an issue of semantics rather than an
21 actual illness. He testified that to a reasonable degree of
22 medical probability, the Millwood records cast great doubt on the
23 accuracy of the records and that he would discard the Millwood
24 diagnosis.

25 Dr. Tordella did not provide an expert opinion to a

1 reasonable degree of medical certainty that Petitioner's diagnosis
2 of major depression severe, recurrent, with psychotic features was
3 incorrect nor did he provide testimony that, to a reasonable
4 degree of medical certainty, his opinion, based on his review of
5 the records, indicated that Petitioner was not suffering from
6 major depression severe, recurrent, with psychotic features.

7 Dr. Tordella testified he only reviewed the records he
8 was given. He testified that there could be documents in the blue
9 ribbon file he had not reviewed. I must also note that the
10 reports upon which he relied to formulate his opinion indicate
11 that the authors of those reports did not review all of the
12 records before completing those reports.

13 Dr. Pursch did not state that he reviewed the Charter
14 Grapevine records in his report and does not mention those
15 records. Dr. O'Connor's report indicates he reviewed Millwood
16 Hospital records and does not mention Charter Grapevine records.
17 Dr. Elliott asked for copies of Millwood records, but they were
18 not provided, so that was not included in his analysis or medical
19 review. And in coming to his conclusion, Dr. Pipkin's report
20 indicates that he did not review the Charter Grapevine records and
21 he only reviewed the Millwood records. Thus, any opinions these
22 doctors have expressing that the diagnosis of psychosis was
23 incorrect or questionable, those opinions are based on incomplete
24 information and incomplete records, and I cannot give them any
25 weight.

1 I also note that Dr. Tordella testified that he believed
2 the medications prescribed to Petitioner did not support a
3 diagnosis of psychosis. Dr. Tordella is not a psychiatrist, not
4 familiar with the DSM; he had to be reminded what a GAF score
5 represented. I give his testimony little weight as to his opinion
6 as to the proper medication to deal with the diagnosis of major
7 depression, recurrent, severe with psychotic features. I give the
8 greater weight to the psychiatrist who actually prescribed
9 Zyprexa, an antipsychotic medication; and Paxil, an antidepressant
10 medication. And those records are in the Charter Grapevine
11 records.

12 I also note that Dr. Pipkin makes the same argument in
13 his report, but I give that opinion no weight, as he is a
14 psychologist and is not authorized to prescribe medications,
15 specifically, Zyprexa and Paxil.

16 Petitioner's other expert, Dr. Sturges, did not provide
17 an opinion to a reasonable degree of medical certainty that the
18 diagnosis at issue was correct nor did he provide an expert
19 opinion as to the treating psychiatrist that, in his professional
20 opinion, his review of the records led him to a different
21 diagnosis based on all the records before him. He testified he
22 questioned the diagnosis of psychosis by Dr. Kahn and spoke to her
23 about it; however, he did not render a different opinion or try to
24 have that record changed.

25 Thus, I cannot find that Petitioner has provided expert

1 medical opinion that establishes by a preponderance of the
2 evidence that the diagnosis of major depression, recurrent, severe
3 with psychotic features is not a correct diagnosis, nor do I find
4 that they've provided any expert opinion that would provide a
5 basis for me to find that their opinion, the opinion of
6 Dr. Tordella and Dr. Sturges, would supersede the diagnosis in the
7 medical record.

8 I'll now talk about the Millwood medical records. There
9 was significant testimony as to the problems with the medical
10 records. Dr. Tordella testified about that. He testified that
11 they should be discarded or ignored because of problems with them.
12 Petitioner's counsel has argued on more than one occasion about
13 the documentations as an Axis I diagnosis of anxiety disorder with
14 Petitioner's name written in over the name of another Petitioner.
15 Certainly, that appears to be an error. He also points out that
16 there is a record in the file with no patient name on it at all.

17 The reports by other individuals in the other reports in
18 the blue ribbon file also indicate similar problems or echo
19 similar problems. However, the Petitioner has not provided
20 evidence to render Dr. Kahn's diagnosis to be incorrect or that
21 the problems in those medical records specifically affected
22 Dr. Kahn's diagnosis. They seem to be peripheral to Dr. Kahn's
23 diagnosis.

24 The Administrator acknowledged that there were problems
25 with the Millwood records through the testimony of Dr. Berry and

1 Dr. Gitlow. Both of these doctors testified that while there may
2 be some errors in the records, they did not render the entire
3 medical record unreliable nor do these errors nullify Dr. Kahn's
4 diagnosis of major depression severe, recurrent, with psychotic
5 features.

6 I found the testimony of Dr. Berry and Dr. Gitlow to be
7 objective and credible, and I therefore give more weight to their
8 testimony relative to whether or not I should consider the
9 Millwood records. While I understand the records could be more
10 legible and there could be more narrative in the records, based on
11 the evidence before me, I cannot find that those records are
12 unreliable and should be excluded and not considered.

13 As far as the delusions are concerned, as noted,
14 Petitioner's allegations that documentations of delusions in the
15 record should not be considered because, in fact, those statements
16 are based on true facts. To address that issue or that assertion,
17 again, the Petitioner provided the testimony of Timothy Polgar.
18 Again, he testified that he was involved with Mr. Roth in late
19 2001, and that was after Petitioner's hospitalizations at Charter
20 Grapevine and Millwood. Petitioner claimed his ex-wife, again,
21 was going to call the FBI to arrest him unless she did as he
22 demanded. There is no documentation that Mr. Polgar provided that
23 would corroborate his testimony that, indeed, Petitioner's ex-wife
24 had made these threats and had him followed, or had his furniture
25 moved or had his car moved or any of the other things that he

1 described. Unfortunately, there is nothing in the record that
2 supports that other than the fact that Mr. Polgar testified to
3 that fact. But his testimony relates to instances after 2001
4 -- in late 2001. Based on this evidence, I do not believe
5 Petitioner has proven this assertion by a preponderance of the
6 evidence.

7 I must also note that while Petitioner has expended
8 significant time and resources to attack the diagnosis of
9 psychosis, he has presented little evidence to dispute the
10 diagnosis of major depression.

11 Finally, I must note that for the reasons I have noted
12 in my evaluation of Petitioner's expert testimony, I cannot give
13 their testimony, Dr. Tordella and Dr. Sturges, the greater weight
14 in my decision in this case. I could not find their testimony to
15 be consistent, that it lacked depth, logic and persuasiveness, and
16 I did not find it credible to a large degree, as I have already
17 indicated.

18 On the other hand, Dr. Berry and Dr. Gitlow testified
19 they reviewed the entire record, while Dr. Sturges and
20 Dr. Tordella indicated they did not review the entire record.
21 They only reviewed portions of it provided to them by Petitioner
22 and Petitioner's counsel.

23 Dr. Berry and Dr. Gitlow testified they reviewed the
24 entire record. The testimony on direct and cross was credible,
25 responsive. Each of their analyses of the records provided depth

1 and logic to their opinions. While the Administrator does not
2 have the burden of proof in this case, I give the expert testimony
3 of Dr. Gitlow and Dr. Berry the greater weight.

4 I find the Administrator's decision to deny Petitioner's
5 first-class medical certificate to be based on a reasonable
6 assessment of the records and the possible risk of recurrence in
7 this case.

8 This is a difficult case in the sense that Petitioner
9 has appeared to be winning the battle of his problems with alcohol
10 and has been through a long period of remission relative to his
11 psychiatric problems. However, as Board precedent holds, a
12 medical diagnosis such as this cannot be cured by time and
13 recovery. It stays with a person. That is the case of
14 Administrator v. Bohnen, EA-381.

15 I am also bound by precedent, case precedent in the
16 regulatory standard and evidence in this case before me. Based on
17 the evidence before me, I found that Petitioner Frederick Roth has
18 not sustained his burden of establishing his medical qualification
19 to hold a first-class or any medical certificate by a
20 preponderance of the evidence. Therefore, his petition is denied.

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1 ORDER

2 IT IS THEREFORE ORDERED that, based on the evidence
3 before me and my evaluation of all of the evidence, that safety in
4 air commerce and safety in air transportation does not require the
5 petition of Mr. Frederick Roth be affirmed. I specifically find
6 that he did not meet his burden of proof by a preponderance of
7 reliable, probative and credible evidence. Therefore, the
8 petition will be denied.

9 Entered this 1st day of May 2013, in Washington, D.C.

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12 ALFONSO J. MONTAÑO

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14 Chief Administrative Law Judge

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APPEAL

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ADMINISTRATIVE LAW JUDGE MONTAÑO: I do note that the records clearly indicate that Mr. Roth has been consistent with his HIMS program. He has not had a recurrence of psychiatric problems. He needs to be credited for that and lauded for that.

My hands are tied by the evidence before me. I have made some findings that I did not want to make and I do not want to make and I do not -- I am not happy that I had to make.

The evidence seems to suggest the things that I talked about, Mr. Roth. Maybe things were not of your doing. Maybe I simply misinterpreted the things and blamed you for them. That's

1 a possibility. Unfortunately, that's the way that I looked at the
2 evidence and was bound by the evidence.

3 That is why there is an appeal for my decision. That
4 appeal is to the Board, and I've handed out that process to each
5 of the parties. Certainly, Mr. Lamonaca is an experienced
6 aviation lawyer and he knows how to appeal these proceedings. And
7 certainly, he will make every effort to find that I have abused my
8 discretion or have made an error of law. But that's the beauty of
9 the system is that perhaps I have and perhaps the full Board may
10 reverse my findings. And if they do, then that's simply the way
11 the matter will proceed.

12 But in any event, again, that is the evidence I have
13 before me. That's the decision I had to make. I wish you the
14 best of luck, Mr. Roth. And again, I'm sorry to be so harsh in
15 these findings, but I had to -- that was based on the evidence and
16 how I interpreted it. I don't doubt that you are a good person
17 and that you are recovering from your problems with alcohol and
18 you're in sustained remission for psychiatric problems.
19 Unfortunately, for me, this is the decision sometimes I have to
20 make.

21 And with that, I will end my comments and my Oral
22 Initial Decision. The parties have the appeal rights as to when
23 those deadlines are. And certainly, I would advise the parties to
24 proceed with an appeal if they feel it is appropriate.

25 And with that, thank you all very much. I wish you all

1 the best, and I'll go off the record at this point.

2 (Whereupon, at 5:00 p.m., the hearing in the above-
3 entitled matter was adjourned.)

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CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Petition of Frederick Roth

DOCKET NUMBER: SM-5192

PLACE: Washington, D.C.

DATE: May 1, 2013

was held according to the record, and that this is the original,
complete, true and accurate transcript which has been compared to
the recording accomplished at the hearing.

Timothy J. Atkinson
Official Reporter