

SERVED: March 1, 1994

NTSB Order No. EA-4100

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 20th day of February, 1994

Petition of)
)
GARY LEE WHITE)
)
for review of the denial by) Docket SM-4056
the Administrator of the)
Federal Aviation Administration)
of the issuance of an airman)
medical certificate.)
)

ORDER DENYING MOTION AND DISMISSING APPEAL

On September 22, 1993, the law judge, following an evidentiary hearing, rendered an oral initial decision concluding that the petitioner had established that he was qualified for a medical certificate. He therefore reversed a decision by the Federal Air Surgeon denying the petitioner a third class medical certificate on the ground that he did not meet the requirements of section 67.17(d)(2)(i)(b) of the Federal Aviation Regulations (FAR) medical standards, 14 CFR Part 67.¹ The Administrator filed a timely notice of appeal from the law judge's decision, but he, admittedly through oversight, failed to perfect his appeal by filing a timely appeal brief.² By motion filed

¹FAR section 67.17(d)(2)(i)(b) disqualifies from medical certification an individual who has had a "disturbance of consciousness without satisfactory medical explanation of the cause." Petitioner appears to have suffered an episode of so-called "transient global amnesia" (TGA) on June 15, 1992.

²The Administrator's appeal brief was due on or before

November 19, 1993, the Administrator asks for leave to file his appeal brief out of time. We will deny the request, which the petitioner opposes.

The Administrator concedes in his motion that his failure to meet the deadline for filing an appeal brief is not excusable for any reason amounting to good cause, and he acknowledges, citing Administrator v. Hooper, 6 NTSB 559 (1988), that good cause is the standard the Board applies in determining whether to accept an untimely appeal brief. The Administrator nevertheless argues that, beginning with this case, we should except from the good cause requirement any denial of airman certification case arising under Section 602(b)(1) of the Federal Aviation Act of 1958, as amended, "where public safety requires the full Board's substantive review of the merits of an appeal" (Motion at 3).³ We are not persuaded that any change in our policy is warranted.⁴

The pre-Hooper precedent the Administrator relies on in support of his motion, Administrator v. Mosely, 2 NTSB 1831 (1974), reconsideration denied, 2 NTSB 1833, did conclude that waiving or relaxing a procedural rule in order to permit full Board review in medical qualification cases is appropriate to ensure a "proper resolution" because such cases "not only [affect] the individual rights of the airman [but also have] a direct impact on safety in aviation and the public interest." Nevertheless, our adoption of a good cause standard in Hooper reflected our judgment that procedural decisions should no longer be based on post-default generalities or presumptions about the importance or the desirability of reaching the merits of a case a party had not handled in accordance with applicable rules. The
(..continued)

November 12. Although counsel for the Administrator had obtained, on November 8, consent of counsel for petitioner to an extension of time until November 26, to file an appeal brief, he subsequently neglected to seek such an extension from the Board.

³This is not the first time the Administrator has sought an exception to the good cause standard. In Administrator v. U.S. Jet, Inc., NTSB Order EA-3150 (1990), the Administrator, arguing that the public interest demanded full Board review where issues of qualification were at stake, urged us to accept a late brief in a certificate revocation case. We declined, observing that such a modification of our policy "in effect, would allow the Administrator to escape responsibility for compliance with rules of practice we strictly apply to all others." Id. at 2.

⁴Notwithstanding the Administrator's broad reference to certificate denials under Section 602(b)(1), his motion appears to be directed only to medical certificate denials. The statutory provision he cites, of course, authorizes Board review of the denial of many other airman certificates as well.

Administrator's motion does not persuade us that medical qualification cases, any more than any other case involving a certificate holder's qualification, see U.S. Jet, supra, should survive procedural flaws for which no adequate extenuating reason can be demonstrated.

We continue to believe that requiring parties to exercise a high level of diligence in the prosecution of their appeals to us is the best way to ensure that all cases, and especially those that may involve extraordinary air safety concerns, will be heard by the full Board. As to those few, non-routine cases that stumble procedurally before full Board review has been obtained, we perceive no reason to assume that the law judge's decision will not have adequately taken into account all relevant public interest issues.

In view of the foregoing, the Administrator's appeal will be dismissed for his failure to file a timely appeal brief, pursuant to Section 821.48(a) of our rules of practice.⁵

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion for leave to file an appeal brief out of time is denied; and
2. The Administrator's appeal is dismissed.

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

⁵Section 821.48(a) provides as follows:

§ 821.48 **Briefs and oral argument.**

(a) Appeal briefs. Each appeal must be perfected within 50 days after an oral initial decision has been rendered, or 30 days after service of a written initial decision, by filing with the Board and serving on the other party a brief in support of the appeal. Appeals may be dismissed by the Board on its own initiative or on motion of the other party, in cases where a party who has filed a notice of appeal fails to perfect his appeal by filing a timely brief.