

SERVED: April 18, 2008

NTSB Order No. EA-5381

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 16th day of April, 2008

_____)	
PETITION OF)	
)	
TYGHE L. NIELSEN)	
)	
for review of the denial by)	Docket SM-4801
the Administrator of the)	
Federal Aviation Administration)	
of the issuance of an airman)	
medical certificate.)	
_____)	

OPINION AND ORDER

Petitioner appeals the oral initial decision and order of Administrative Law Judge William A. Pope, issued in this proceeding on October 18, 2007, following a bifurcated evidentiary hearing.¹ By that decision, the law judge denied petitioner's appeal of the Administrator's denial of his

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

application for an unrestricted medical certificate. We affirm the law judge's order. The law judge's decision adequately addresses the facts and the issues, and we repeat them only as needed to understand our decision.

The Federal Air Surgeon (FAS) denied petitioner an airman medical certificate, based on a history of attention deficit disorder (ADD) requiring a disqualifying medication (Adderall) for control. The FAS determined that both the ADD and the Adderall were incompatible with aviation safety and that petitioner was ineligible for airman medical certification under the Federal Aviation Regulations (FAR), 14 C.F.R. §§ 67.107(c), 67.207(c), 67.307(c), 67.113(c), 67.213(c), and 67.313(c).² The FAS also considered the special issuance of a medical

² Under §§ 67.107, .207, and .307 (c) subsections, a personality disorder, neurosis, or other mental condition is a disqualifying condition for medical certificates if the FAS, based on the case history and appropriate, qualified medical judgment relating to the condition, finds that it makes the person unable to safely perform the duties or exercise the privileges of the airman certificate, or may reasonably be expected, for the maximum duration of the airman medical certificate, to make the person unable to perform those duties or exercise those privileges.

Under the 113, 213, and 313 subsections, a medication or other treatment disqualifies one for medical certificates if the FAS, based on the case history and appropriate, qualified medical judgment relating to the medication or treatment, finds that it makes the person unable to safely perform the duties or exercise the privileges of the airman certificate, or may reasonably be expected, for the maximum duration of the medical certificate, to make that person unable to perform the duties or exercise the privileges.

certificate, but determined that petitioner's medical condition precluded "the safe performance of airman duties under any condition that could reasonably be prescribed." Petitioner's appeal is essentially predicated upon his view that he is "safe to operate a plane and to exercise the privileges of an unrestricted third class medical."

Our review of the record establishes that petitioner's airman medical file contains evidence of a 2004 diagnosis of ADD and that he takes Adderall for the control of his symptoms. He discontinued taking Adderall on some weekends, but his symptoms returned, and he did not want to risk the symptoms because he believed that his decision-making abilities were affected.

Petitioner was a student pilot and already held a third-class medical certificate when he was diagnosed with ADD. On the application for renewal of his medical certificate, he disclosed his use of Adderall. The FAA requested a current psychological evaluation, and a clinical neuropsychologist found that petitioner's attention and concentration abilities were a significant weakness, but concluded that his neurocognitive abilities were sufficient to allow a pilot to safely operate an aircraft. A psychiatrist strongly recommended that petitioner continue Adderall indefinitely, but found no reason his diagnosis or treatment would pose any significant risk to himself or to the safety of others in piloting a plane.

At the hearing, petitioner's supervisor, accepted as an expert in the practice of family medicine, testified that petitioner did not exhibit symptoms of ADD when he was taking Adderall, and that he had not observed petitioner when he was not taking Adderall. Petitioner also testified, requesting that, "given [the] stability of [his] condition and the stability of [his] medication and no additional evidence that [he] pose[s] a threat to [him]self or anyone else in the air or in a hospital that [he] would be able to fly until something changes to prove otherwise."

The Administrator presented the testimony of psychiatrist Elin Berg, accepted as an expert in psychiatry.³ She reviewed petitioner's medical file, including the psychologist and psychiatrist evaluations, and concluded that petitioner was unable to operate an aircraft safely for the next 2 years, the duration of a third-class medical certificate. She testified, in effect, that the psychologist's *conclusion* that petitioner could safely operate an aircraft was belied by petitioner's test results in the psychologist's report.

The Administrator also presented the testimony of a medical officer from the Aeromedical Certification Division of the FAA's

³ Petitioner's evaluating psychologist and psychiatrist did not testify at the hearing. Evidence from them was presented in the form of their narrative evaluations.

Civil Aerospace Medical Institute. Dr. Schwendeman, accepted as an expert in occupational medicine and aerospace medicine, and an instrument-rated private pilot, testified that Adderall is an amphetamine, and that it can affect judgment and brain function. He said that the effects of ADD in pilots are judged a threat to public safety and, therefore, the Office of Aerospace Medicine cannot issue medical certificates to persons who have symptoms of the condition or are taking medication to control them. He said medical examiners are instructed that psychotropic drugs such as Adderall are disqualifying for medical certification, and that persons with ADD must be further evaluated.⁴ He stated that a medical examiner may not issue a medical certificate to a person with ADD without FAS authorization. He emphasized that petitioner did not have the authority or the ability to judge his own condition. Dr. Schwendeman testified that Adderall can have serious and unpredictable side effects that can affect mood and judgment, and that is why it is potentially disqualifying, as is ADD, and that certainly they are potentially disqualifying in tandem.

Petitioner argues on appeal that the evidence does not support the conclusion that he is a danger to himself or others because of his diagnosis or his use of Adderall to treat his

⁴ This requirement occasioned petitioner's earlier-referenced psychological and psychiatric evaluations.

condition. Petitioner does not contest that he has ADD or takes Adderall. Instead, he argues that his psychological and psychiatric evaluations demonstrate that his neurocognitive abilities are "at least, at a level sufficient to allow a pilot to safely operate an aircraft." He also argues that, in contravention of Bullwinkel v. FAA and NTSB,⁵ the FAA is "using the medication to determine that a condition is severe enough to sustain denial of a third class medical." Petitioner argues that two doctors concluded he was "safe to fly," that his taking of Adderall "only helps him," and that the FAA should monitor him via the renewal process for medical certificates.

The FAR states that a certificate will not be issued if an individual has a mental condition that the FAS, based on case history and medical judgment, finds: (1) makes the person unable to safely perform the duties or exercise the privileges of the airman certificate; or (2) may be expected, for the duration of the medical certificate (2 years in this case), to make the person unable to perform the duties or exercise the privileges. Petitioner admittedly has a mental disorder described in the *Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association. He admitted, both at the hearing and to his doctors during their evaluations, to

⁵ 23 F.3d 167 (7th Cir. 1994).

recurring symptoms of ADD when he did not take the Adderall. Further, Dr. Schwendeman, a Board-certified aerospace medicine physician, testified that those ADD symptoms can adversely affect aviation safety.⁶

As for petitioner's suggestion that the FAA monitor his circumstances on a case-by-case basis, we recently said, in a case similar to the one at hand, but where the underlying condition was mild depression:

Although petitioner might want it so, the FARs do not provide an exception to the rule for cases where medication is controlling an individual's symptoms. The FAA cannot monitor and cannot be expected to monitor individuals to ensure that they stay on their medication, that they are having no adverse side effects from it, and/or that the medication is continuing to be effective.⁷

Petitioner also suggests that his doctors' observations are more reliable because his doctors interacted with him, while the Administrator's experts did not. We first point out that there

⁶ By way of illustration, regarding the particulars of this case, for example, poor concentration and questionable decision-making ability adversely affect a pilot's attention and capability to fly in even routine circumstances.

⁷ Administrator v. Pias, NTSB Order No. EA-5222 at 5 (2006). Interestingly, in Pias, the Administrator's experts were concerned (because Mr. Pias's doctor had not conducted cognitive testing) about the doctor's conclusion that Mr. Pias should be granted a medical certificate. In the instant case, the Administrator's experts were concerned that the testing that petitioner's doctors *had* done did not comport with their ultimate conclusions regarding aviation safety.

is scant evidence about the degree or quality of any interaction that petitioner had with his doctors. We also note that the FAA's experts, Dr. Berg and Dr. Schwendeman, appear to have considerably more knowledge than petitioner's doctors regarding aerospace medicine, and that Dr. Schwendeman has significant aviation knowledge. Finally, we note that petitioner's supervisor's testimony, even though he is also a doctor, was noteworthy as to his knowledge of petitioner's job performance only, not as to the supervisor's expertise in family practice, specifically; his expertise in the practice of medicine, generally; or his treatment or evaluation of petitioner as a patient.

Our Rules of Practice provide that, in proceedings under 49 U.S.C. § 44703, the burden of proof is on the petitioner.⁸ Only when a petitioner carries his burden of demonstrating that he is medically qualified to hold an unrestricted medical certificate will we grant a petitioner's appeal of the Administrator's order denying petitioner a medical certificate.⁹ Petitioner has failed to demonstrate by a preponderance of the evidence that the FAS was not reasonable in concluding that the cited FAR provisions prevented issuing an unrestricted medical certificate.

⁸ See 49 C.F.R. § 821.25.

⁹ See, e.g., Petition of Wade, NTSB Order No. EA-4941 (2002).

As in Pias, supra, Petition of Bullwinkel¹⁰ and Petition of Selbach¹¹ do not compel a different outcome. The posture of those cases was unlike the instant case. In Bullwinkel, the Board found on remand that the evidence of Mr. Bullwinkel's medical condition was not adequate to rebut his showing of lack of adverse effect to aviation safety. The FAS, in denying an unrestricted medical certificate to Mr. Bullwinkel, had relied primarily on the medication that controlled the condition, and not on the underlying condition itself. In fact, the FAA's expert testified that the underlying condition would not have been disqualifying in and of itself.

The United States Court of Appeals for the Seventh Circuit held that the FAA's over-reliance on the controlling medication as disqualifying (rather than Mr. Bullwinkel's underlying condition itself) was improper under the regulations at that time.¹² Our decision on remand was based on the record that had already been developed; given the court's decision, the controlling testimony therein was that of the FAA's expert, that is, that Mr. Bullwinkel's underlying disorder would not, alone, have been a disqualifying condition.

¹⁰ NTSB Order No. EA-4273 (1994), on remand from Bullwinkel v. FAA and NTSB, supra.

¹¹ NTSB Order No. EA-4267 (1994).

¹² The regulations have since been changed.

The Board decided Selbach after the remand in Bullwinkel, but the Selbach record had been developed before the remand. That pre-Bullwinkel record also focused on the medication, not the underlying condition. Selbach's mild depression, as opposed to the evidence before us in the instant case, manifested itself as an inability to enjoy life. The Board found that Selbach's inability to enjoy life was not sufficient to deny him a medical certificate.

In the instant case, however, the record clearly shows that the underlying diagnosis of ADD and petitioner's case history make him unfit to hold a medical certificate now and in the future 2 years. The record also shows that the medication used to control the ADD, Adderall, also disqualifies petitioner for the issuance of an unrestricted medical certificate, based on the change to the FAR since the Bullwinkel remand. The evidence offered by petitioner is insufficient to demonstrate that the FAS was wrong in declining to issue the certificate under either disqualifying reason, the underlying condition or the medication used to control the condition. Petitioner has not met his burden of proving that he is eligible for a medical certificate.

ACCORDINGLY, IT IS ORDERED THAT:

1. Petitioner's appeal is denied; and
2. The law judge's initial decision, denying petitioner's appeal of the Administrator's denial of his medical certificate,

is affirmed.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN,
HIGGINS, and CHEALANDER, Members of the Board, concurred in the
above opinion and order.

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

* * * * *

Petition of: *

TYGHE L. NIELSEN *

for review of the denial by the * Docket No.: SM-4801
 Administrator of the Federal *
 Aviation Administration of the *
 issuance of an Airman Medical *
 Certificate. *

* * * * *

National Transportation Safety Board
 490 L'Enfont Plaza East SW
 Washington, D.C. 20594

Thursday,
 October 18, 2007

The above-entitled matter came on for hearing, pursuant
 to Notice, at 9:45 a.m.

BEFORE: WILLIAM A. POPE,
 Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

Autumn Killingham
Federal Aviation Administration
800 Independence Avenue, Southwest
Washington, D. C. 20591
(202) 287-7728

On behalf of the Petitioner:

GARLAND L. WATLINGTON, ESQUIRE
247 S. Main Street
Jonesboro, Arkansas 72401

1 ORAL INITIAL DECISION AND ORDER

2 ADMINISTRATIVE LAW JUDGE POPE: And I'm going to now
3 give my oral initial decision in this case.

4 All right. The following is my oral initial decision in
5 the Petition of Tyghe L. Nielsen, Docket number SM-4801 for review
6 of the Denial by the Administrator of the Federal Aviation
7 Administration of the issuance of an airman medical certificate.
8 This is a proceeding under 49 USC section 44703(d) and the
9 provisions of the Rules of Practice in Air Safety Proceedings of
10 the National Transportation Safety Board to review a refusal by
11 the Administrator of the Federal Aviation Administration to issue
12 a third class airman medical certificate to the Petitioner. The
13 Respondent's Petition for Review dated March 16, 2007 appeals the
14 decision of Warren S. Silverman, D.O., MPN, Manager Aerospace
15 Certification Division, Civil Aerospace Medical Institute, dated
16 February 28, 2008, in which Dr. Silverman denied the Petitioner's
17 Request for Reconsideration of the group previous denial of the
18 issuance of a medical certificate because he was continuing to
19 take a currently unacceptable medication, Adderall.

20 By letter of April 30, 2007, the Federal Air Surgeon
21 notified the Petitioner, he determined the Petitioner is
22 ineligible for the issuance of a medical certificate under 14 CFR
23 section 67.107(c), 67.207(c) and 67.307(c) because of a history of
24 Attention Deficit Disorder requiring a disqualifying medication,
25 Adderall, for control.

1 The Administrator's Answer to the Petition for Review
2 dated April 27, 2007 states that the Petitioner's medical records
3 support the medical findings by the Federal Air Surgeon and,
4 therefore, the Petitioner is generally disqualified from medical
5 certification under 14 CFR sections 67.107(c), 67.207(c),
6 67.307(c), 67.113(c), 67.213(c) and 67.313(c).

7 SUMMARY OF THE EVIDENCE

8 The Petitioner testified in his own behalf. He stated
9 that he is a physician in his second year of family medicine
10 residency. He received his pilot's license in November 2004. He
11 last flew in August or December of 2006.

12 He stated he was diagnosed with ADHD in August or
13 September 2004. He stated that at the end of his second year of
14 medical school, when he was starting clinical rotation, he failed
15 the first round of the medical board exams and he was pulled from
16 the rotations and required to take a six or eight week board
17 preparation class in Kansas City. He stated that he struggled
18 fiercely with every round of tests and did very poorly. Then he
19 tried one of his brother's Adderall tablets and found that it
20 helped him. His brother had childhood Attention Deficit Disorder.
21 He said the way he comprehended when taking the drug was
22 different. He was able to recall things that he read.

23 His family doctor scheduled him to take a battery of
24 tests with Alice Carrott, C-a-r-r-o-t-t, a psychologist at the
25 University of Kansas Medical Center in August 2004. But she went

1 on vacation before they were finished. Dr. Kennedy, his family
2 doctor, started him on Adderall XR, 20 milligrams, as a trial
3 until she returned. And, he said, it worked well for him. He
4 said it helped him immensely in the way he saw things, read things
5 and processed things. He had taken the Medical College Admissions
6 Test five times before he received the minimum score needed to get
7 into medical school.

8 He said he knew that he was being tested for Adult
9 Attention Deficit Disorder and he finished the tests when she
10 returned. She told him that he had scored fine on most of the
11 tests and she did not know if he really carried the diagnosis, but
12 by then he was on medication. He said he got through the boards
13 this time with a significantly higher score than before.

14 He is now on Adderall, 20 milligrams, twice daily. He
15 has been on this dose for two years. It gives him a sense of
16 quieting and allows him to focus on whatever he needs to do. He
17 actually is able to retain what he reads and does not have to go
18 back and re-read what he just read.

19 A little over a year ago he switched physicians to Dr.
20 William Hoke, H-o-k-e, in July 2006, when he moved to Jonesboro,
21 but he has not been tested by him for 15 or 16 months. The
22 Petitioner said he has not specifically talked to Dr. Hoke about
23 what might happen in the future.

24 The Petitioner said that there are some weekends when he
25 does not take his medication and he kind of experiences things the

1 way they were before. He said he noticed that his symptoms return
2 when he tries to read things and has difficulty comprehending what
3 he read. He said he does not want to try a trial of not taking
4 his medication as a test because it might affect his decision-
5 making on behalf of his patients.

6 He said he had flown for 110 hours before his medical
7 certificate was suspended. He said he does not understand why he
8 is not allowed to fly simply because he is taking the medication.

9 He said the only side effect he has observed is occasionally
10 finding it hard to go to sleep.

11 On cross-examination he said the FAA requested a current
12 psychological evaluation, which was performed by Dr. Bassin,
13 B-a-s-s-i-n. He was requested not to take his medication for
14 three days prior to the examination. He said the tests showed his
15 attention concentration abilities were in the average range, but
16 were the lowest of the things that were tested. He acknowledged
17 that A-15, a copy of the evaluation by Dr. Bassin says at page 15,
18 that "However, his attention concentration abilities falls
19 somewhat variable and were found to be a significant weakness."
20 Page 43 of the exhibit is a letter from Dr. Hoke in which he
21 recommends that the Petitioner continue on Adderall and states
22 that the Petitioner focuses better when he is on Adderall.

23 He acknowledged that the FAA also requested a
24 psychiatric evaluation. Exhibit A-2 is Dr. Blaylock's evaluation
25 dated June 11, 2007. He said that he had never read this

1 evaluation. He said he told Dr. Blaylock that irritability was
2 numero uno on this list, but after he started taking Adderall it
3 evaporated. He said he told Dr. Blaylock that his wife can
4 definitely tell the difference when he is not on his medication,
5 that he cannot multitask when he is not on Adderall and it is like
6 he is dyslexic because he has to read every word very slowly to
7 understand what he is reading.

8 He also acknowledged that before starting to take
9 Adderall he took Lexapro for a couple of months because he was
10 upset at the difficulty he was experiencing taking tests. He did
11 not continue taking the drug because he did not think it was doing
12 anything.

13 On redirect examination he said Dr. Blaylock said, in
14 his opinion, it was safe for the Petitioner and others for him to
15 fly an aircraft. The Respondent said he pleaded for the Court to
16 understand that given the stability of his condition and the
17 stability of his medication he does not pose a threat to himself
18 or anyone else while he's in the air.

19 On re-cross examination, he said it was correct that he
20 had been diagnosed with mild depression before he had indicated on
21 his medical application, Exhibit A-1, that he had no mental
22 illness.

23 The Petitioner's next witness, Dr. John Stallings, was
24 detained and the parties agreed that his testimony should be taken
25 at a later time by telephone. Dr. Stallings testified by

1 telephone conference call on October 17, 2007, with the
2 Petitioner, his attorney and the Administrator's attorney
3 participating. I heard the testimony of Dr. Stallings, who
4 testified under oath and his testimony was recorded by a court
5 reporter.

6 Dr. Stallings was accepted as an expert in family
7 medicine. He is Director of the Family Residency Program at St.
8 Bernard Medical Center, Jonesboro, Arkansas. The Petitioner is a
9 resident physician under Dr. Stallings' supervision. He has known
10 the Petitioner for three years. He stated that Dr. Nielsen is an
11 excellent physician. He is able to multitask and makes decisions
12 regarding multiple patients. Dr. Stallings is aware that Dr.
13 Nielsen takes Adderall for ADHD, but he is not Dr. Nielsen's
14 treating physician. Dr. Stallings said that Adderall is useful in
15 treating ADHD and ADD, but he would not consider it to be a
16 psychotropic drug. He likens ADHD and ADD to high blood pressure,
17 once stabilized the patient is monitored, but further problems are
18 not expected.

19 Based on the publication Adult ADHD Evaluation and
20 Treatment in Family Medicine in the American Family Physician, he
21 does not consider a prescription for Adderall, 40 milligrams per
22 day, to be excessive. He agreed that Adderall is an amphetamine
23 and a controlled substance and it is important to monitor its
24 usage.

25 He said that Dr. Nielsen does not exhibit any symptoms

1 while taking this medicine and he has not observed him not taking
2 his medication.

3 Administrator's Exhibit A-2 is an initial psychiatric
4 evaluation dated 6-11-07 by Dr. Jerry D. Blaylock, M.D., in which
5 Dr. Blaylock states that the Petitioner, Dr. Nielsen, presents a
6 history compatible with undiagnosed and untreated Attention
7 Deficit Hyperactivity Disorder dating back to elementary school.
8 He was able to compensate for inattentiveness with intellectual
9 prowess, but years later as an adult the rigors in advanced
10 academics began to overpower his compensatory capacity.

11 He told Dr. Blaylock that as a grade school student he
12 was inattentive, distractible and short tempered. He said that
13 after he started taking Adderall his irritability evaporated. He
14 told Dr. Blaylock that his wife can tell if he is not taking his
15 medicine, because she notices that he gets real testy and
16 disorganized starting a task and leaving it go to start another
17 one. He told Dr. Blaylock that when I am not taking my medicine
18 it's like dyslexia. I can read, but I have to read it ever so
19 slowly, concentrating every word to comprehend it. He said that
20 it is now a pleasure to learn and he feels like a totally
21 different person. Life has become without effort for him. He
22 said if he had to choose between Adderall and his pilot's license,
23 he would have to choose his medicine even though he loved flying.
24 He does not want to become like he was again.

25 Dr. Blaylock said that the Petitioner has never been

1 treated for a mental disorder. He has never been treated for a
2 seizure disorder, and has never had an incidental seizure or lost
3 consciousness. Dr. Blaylock diagnosed that the Petitioner has
4 Attention Deficit Hyperactivity Disorder and recommended that he
5 continue taking Adderall indefinitely. He said he saw no reason
6 why he should be denied a pilot's license.

7 Administrator's Exhibit A-1, page 15, is a neuropsych
8 consult by Dr. Christopher R. Bassin, Doctor of Psychology, dated
9 January 5, 2007. Dr. Bassin said he used neuropsychological tests
10 to provide objective and reliable data regarding the Petitioner's
11 neurocognitive functioning. He listed nine tests that he said
12 provided important information regarding specific areas of
13 cognitive and related function of various areas of the brain.

14 He stated that Dr. Nielsen reported that in October of
15 2004 he was evaluated for and diagnosed with Adult ADHD of early
16 childhood onset for which he was prescribed Adderall XR, 20
17 milligrams. Dr. Nielsen reported that this medication resulted in
18 marked improvement of his prior difficulties with attention and
19 concentration. He reported that per the instructive letter from
20 the FAA, which requested this evaluation, he was not taking his
21 Adderall.

22 Dr. Bassin reported that Dr. Nielsen's overall level of
23 measured intelligence was a superior verbal IQ score of 124, a
24 high average performance IQ of 111 and a superior full-scale IQ
25 score of 120. He said there is a significant discrepancy between

1 his obtained verbal and performance IQ, indicating that his verbal
2 abilities are somewhat better developed than his non-verbal
3 skills. He said that this is not uncommon, however.

4 Dr. Bassin reported that the memory test showed that his
5 immediate memory was within normal limits, while his auditory
6 delayed memory was high compared to his visual delayed memory.
7 However, his variable level of attention was unexpectedly in the
8 borderline range. Consistent with weakness in attention and
9 concentration, he exhibited significant retroactive interference
10 on such learning along with borderline to mildly impaired short
11 and long delayed recall trials.

12 On the language functioning test, Dr. Nielsen's
13 attention concentration abilities were found to be a significant
14 weakness. Compound visual screening and sequencing requiring
15 cognitive flexibility fell in the low average range.

16 In summary and impression, Dr. Bassin said that Dr.
17 Nielsen performed at or above average on most tasks administered
18 to him across all neurocognitive domains assessed. Specifically,
19 he demonstrated intact intellectual abilities, processing speed,
20 language function, executive functioning and fine motor skills;
21 however, he demonstrated features of variable weakness with
22 respect to attention and concentration abilities. Dr. Bassin
23 concluded that it appears that Dr. Nielsen's only weakness is some
24 fluctuation in attentional abilities with the remainder of his
25 abilities in those areas assessed being average or better. Dr.

1 Bassin concluded that Dr. Nielsen's neurocognitive abilities are
2 at least at a level sufficient to allow him to pilot safely and
3 operate an aircraft.

4 The Administrator's first witness was Dr. Elin Berg, a
5 psychiatrist, who was accepted as an expert in psychiatry. She
6 said that Attention Deficit Hyperactivity Disorder is classified
7 as a mental illness by the Diagnostic and Statistical Manual,
8 Fourth Edition. It has three main categories of symptoms.
9 Category one, inattention, difficulty paying attention and
10 focusing. Category two, impulsivity and acting before thinking.
11 And category three, hyperactivity as manifested in physical
12 hyperactivity and restlessness. The diagnostic criteria for
13 Attention Deficit Hyperactivity Disorder are listed in the
14 Diagnostic and Statistical Manual of Mental Disorders, Fourth
15 Edition, published by the American Psychiatric Association. Being
16 diagnosed with the inattention part of the disorder requires six
17 or more of nine symptoms as does the hyperactivity part. These
18 symptoms that affect aviation are problems with inattention and
19 with impulsivity as far as acting before you have thought a
20 situation through completely.

21 She said she is familiar with the Petitioner's medical
22 records. She said that cognitive skills can be tested. Cognitive
23 skills are basically your ability to think and your skillfulness
24 of perceiving information from your surroundings, whether by
25 speech or seeing, by reading, by listening or by seeing how you

1 find yourself in relation to your environment, like while riding a
2 bicycle or driving a car. They deal with the activities of daily
3 living all the way up to the more sophisticated areas of academic
4 cognitive skills. The cognitive skills for a pilot include the
5 ability to gather information efficiently and accurately then
6 prioritize which parts of the information are more important than
7 others in processing the information so that you can determine
8 what action to take in a certain situation.

9 Page 15 of Exhibit A-1, the neuropsych consult by Dr.
10 Bassin does not list any testing for any kind of medications the
11 Petitioner might have had in his system. Page 16 lists the tests
12 which include the various psychometric testing that was performed
13 on Dr. Nielsen. The test results show that Dr. Nielsen's full
14 scale IQ is superior and his verbal score is superior. She said
15 the tests showed that his verbal abilities were way below normal
16 range. The testing psychologist concluded this poor performance
17 was because of problems with inattention during a narrative and
18 memory parts of the test. With respect to memory, the longer
19 since the initial part of the test the harder it was for him to
20 recall the initial part of the test. The initial parts and
21 material that he -- she said that if you are not able to have a
22 working memory of all relevant factors, you will have a problem
23 operating machinery because unless you have all those relevant
24 factors present in your working memory, you're not going to have
25 the correct basis for what you decide to do.

1 She said that Dr. Bassin interpreted the test results as
2 if Dr. Nielsen had a problem with multitasking or paying attention
3 to various bits of information simultaneously. That made him
4 score weakly on his language test. She said that with respect to
5 a pilot she was concerned about the tasks requiring divided
6 attention. If you have a problem with that, you might have a
7 problem being a safe aviator, especially if conditions were less
8 than ideal.

9 She said the test results were interpreted by Dr. Bassin
10 as if Dr. Nielsen has low ability in the skill of cognitive
11 flexibility. He was in the low average range. She said his
12 attention would be distracted and he would not be able to take
13 into consideration all factors.

14 She said that the things she was concerned about were
15 his working memory and his problems with attention and
16 concentration and also his problems with divided attention
17 according to Dr. Bassin's report. It seems that those areas are
18 significantly weaker than his full scale IQ and cognitive
19 abilities would indicate. She said those areas are of concern in
20 a pilot where you have to make quick decisions and pay attention
21 to a lot of incoming data.

22 She identified Exhibit A-5 as an article from
23 Occupational Medicine, April/June 2002, entitled "Guidelines for
24 the Psychological Evaluation of Air Crew Personnel." She said it
25 lists six cognitive skills that are critical for a pilot. They

1 are perceptual motor activities, spatial abilities, working
2 memory, attentional performance, perceptual motor activities and
3 planning or sequencing abilities.

4 She said that Adderall is a controlled substance, which
5 has numerous side effects, some of which are very serious. She
6 said it is an amphetamine. She said that Adderall does not affect
7 or improve multitasking very efficiently. There is somewhere
8 between a 25 to 50 percent response rate in adults.

9 Exhibit A-6 is a copy of the information on Adderall XR
10 in the Physicians Desk Reference. It has a black box warning that
11 it has a high potential for abuse and may lead to drug dependence
12 and also that misuse of amphetamines may cause sudden death and
13 serious cardiovascular adverse events. It says physicians should
14 periodically reevaluate patients for long-term usefulness of the
15 drug for the individual patient because of the possibility of
16 serious cardiovascular events, adverse psychiatric events,
17 including emergence of new psychotic or manic symptoms, and visual
18 disturbances. There is a warning for patients that amphetamines
19 may impair the ability of the patient to engage in potentially
20 hazard activities, such as operating machinery or vehicles and
21 patient should be warned accordingly. Among adverse events
22 reported by five percent or more of adults receiving Adderall XR
23 are weakness, headache, agitation, anxiety, dizziness and
24 insomnia. Among adverse events reported by two to four percent of
25 patients are inability to control mood, irritability and

1 testiness, cannot speak clearly, twitching of muscles, shortness
2 of breath. All of these can be of concern or create problems for
3 a pilot.

4 Exhibit A-1 shows that the dose of Adderall prescribed
5 by the Petitioner between 2004 and 2006 for ADHD has increased
6 from 20 milligrams per to 30 milligrams per day, with 20
7 milligrams in the morning and 10 milligrams in the evening to 40
8 milligrams twice a day.

9 Exhibit A-7 is an FDA alert from August 2005 that says
10 that the FDA is still evaluating the side effects of Adderall and,
11 in particular, sudden, unexplained death. It says at that time
12 the FAA could not conclude that recommended doses of Adderall can
13 cause sudden cardiac death.

14 A-10 is a medication guide for Adderall XR that advises
15 reading the medication guide that comes with Adderall XR before
16 starting to take it. The problems referenced in the medication
17 guide are sudden death in patients who have heart problems or
18 heart defects, stroke and heart attack, increased blood pressure
19 and heart rate. Under mental psychiatric problems, it is new
20 onset or worse than the behavioral or thought problems. Other
21 side effects include eyesight changes or blurred vision,
22 trembling, nervousness, mood swings, dizziness and headache. The
23 recommended dose for Adderall is once a day.

24 Dr. Berg stated that, in her opinion, Petitioner has a
25 psychiatric disorder, ADHD combined typed, and a condition and

1 severity that indicates the need for continuing medication in the
2 foreseeable future. His condition and medication needs will
3 likely remain unchanged in the next two years. That would cause
4 him to be unable to operate an aircraft safely.

5 On cross-examination she said that there is no
6 indication in the record of side effects from Adderall in Dr.
7 Nielsen, other than he admitted to not being able to go to sleep.
8 The PDR says that sustained use can cause side effects.

9 She said that the details in Dr. Bassin's report are not
10 commensurate with the conclusion that he drew that Dr. Nielsen is
11 a safe pilot. She said she agrees with his diagnosis and the need
12 for continuing treatment with Adderall, but she disagreed with his
13 statement that Dr. Nielsen is a safe pilot. She acknowledged that
14 she did not know if he will have any side effects in the future.

15 The Administrator's next witness was Dr. Steven Arthur
16 Schwendeman, who is a medical officer in Aeromedical Certification
17 Division of the FAA's Civil Aerospace Medical Institute. Without
18 objection, he was accepted as an expert in occupational medicine
19 and aerospace medicine. He is an instrument rated private pilot.

20 He was present in court for the testimony of Dr. Berg
21 during the hearing. He said that people who have a diagnosis of
22 ADHD and ADD have a higher rate of motor vehicle accidents. He
23 said that transportation on the ground involves only two degrees
24 of freedom; that is, forward and back and right and left, in
25 contrast to flight, which involves control of three-dimensional

1 motion. The three most common causes of general aviation
2 accidents all relate to judgment, running out of fuel, continuing
3 flight into decreasing or declining weather and aerobatics. He
4 said there are a lot of distractions in flight and many more
5 bodily sensations that can be misperceived and which can be
6 intensely distracting.

7 He said that Adderall can affect judgment. Rising
8 levels of amphetamines are associated with sensations and well-
9 being, perhaps elation and, in some cases, euphoria. Decreasing
10 concentrations of Adderall can be associated with decreased mood,
11 sensation of concern or worry or helplessness. Severe withdrawal
12 symptoms may be suicidal. In someone taking an amphetamine the
13 blood concentration goes up and down. The drug affects changes
14 very rapidly. There is no way to monitor body changes from
15 psychotropic medications except by constant testing. Adderall is
16 a psychotropic medication, meaning it affects brain function. It
17 affects reliability of performance.

18 Because the affects of ADD or ADHD are judged to be a
19 threat to public safety in pilots, the Office of Aerospace
20 Medicine cannot issue medical certifications to individuals who
21 have symptoms of that condition or are taking medication to
22 control that condition.

23 The instructions to medical examiners say that use of
24 psychotropic drugs is disqualifying for aeromedical certification.
25 If an individual presents who has Attention Deficit Disorder, the

1 medical examiner must submit all pertinent medical information and
2 clinical status reports to the FAA for evaluation. The medical
3 examiner is not authorized to issue a medical certificate to a
4 person with ADD without authorization from the FAA.

5 The Petitioner should have notified the FAA in February
6 2004 when he developed symptoms that were diagnosed as depressive
7 symptoms for which he was prescribed Lexapro, an antidepressant
8 and a psychotropic medicine. He did not have the authority to
9 judge the situation for himself, nor necessarily the ability to
10 fairly judge his own condition. Subsequently between February and
11 April 2004, he was diagnosed with ADD or ADHD and was started on
12 Adderall. At that point he should not have been flying while
13 taking psychotropic medication, while having a diagnosis that
14 would have made him ineligible for certification.

15 In, Dr. Schwendeman's opinion the diagnosis of ADD or
16 ADHD alone without Adderall makes him unable to perform the duties
17 of an unrestricted airman medical certificate or may within the
18 next two years make him unable to safely perform those duties. He
19 is also disqualified by being treated with a medication that can
20 have unpredictable and very serious side effects that can affect
21 his mood and his judgment.

22 He said the FAA will consider for medical certification
23 individuals who no longer demonstrate any signs or symptoms of ADD
24 or ADHD and who demonstrate normal psychometric testing and no
25 longer require any medication to control their condition and who

1 otherwise meet medical standards. The condition itself is
2 disqualifying in isolation and the medication is disqualifying in
3 isolation, also. And the two of them together are disqualifying.

4 Dr. Schwendeman said that the FAA did not send the
5 Petitioner to see Dr. Bassin. The Petitioner was told that he
6 must have a psychiatric evaluation and psychometric testing, but
7 the individual or his physician chooses the doctor, not the FAA.

8 FINDINGS AND CONCLUSIONS

9 Board precedent is clear that the Board's only function
10 in medical qualification cases is to ascertain the existence of
11 the disqualifying conditions cited by the Administrator, Petition
12 of Gary A. Niehans, N-I-E-H-A-N-S, NTSB Order Number EA-5166
13 (2005). I find that the Petitioner's medical records and the
14 testimony of the Petitioner and that of medical experts show that
15 the Petitioner is disqualified from medical certification because
16 he has Attention Deficit Disorder or Attention Deficit
17 Hyperactivity Disorder and is being treated with the drug
18 Adderall, an amphetamine and a psychotropic drug.

19 The undisputed medical evidence and the Petitioner's own
20 testimony in this case establishes that the Petitioner, who is a
21 physician completing his second year of family practice residency,
22 is being treated for adult onset Attention Deficit Hyperactivity
23 Disorder for which he takes the medication Adderall, which is an
24 amphetamine.

25 The Administrator contends that ADHD or ADD alone is

1 disqualifying in isolation and the use of Adderall is also
2 disqualifying in isolation and the two of them together are
3 disqualifying. The Board must defer to the Administrator's
4 regulatory interpretation so long as such interpretations are not
5 unreasonable and are consistent with the wording of the
6 regulations, Petition of Gary A. Niehans, supra at page 7. Here
7 there does not appear to be a specific regulation dealing with
8 either ADD or ADHD or Adderall, so the question is whether the
9 Administrator's interpretation is reasonable, that both the
10 condition itself and the medication are disqualifying in the
11 context of aviation safety. I find that they are.

12 14 CFR section 67.307 provides that medical standards
13 for a third class medical certificate include (c) no other
14 personality disorder, neurosis or mental condition that the
15 Federal Air Surgeon, based on the case history and appropriate
16 qualified medical judgment relating to the condition involved
17 finds (1) makes the person unable to safely perform his duties or
18 exercise the privileges of the airman's certificate applied for or
19 held; or (2) may reasonably be expected for the maximum duration
20 of the airman's certificate applied for or held to make the person
21 unable to perform those duties or exercise those privileges.

22 14 CFR section 67.313 provides that the general medical
23 standards for a third class airman medical certificate are (a) no
24 established medical history or clinical diagnosis of diabetes
25 mellitus that requires insulin or any another hypoglycemic drug

1 for control; (b) no other organic, functional or structural
2 disease, defect or limitation that the Air Surgeon, based on the
3 case history and appropriate qualifying medical judgment relating
4 to the condition finds (1) makes the person unable to safely
5 perform the duties or exercise the privileges of the airman
6 certificate applied or held; or (2) may reasonably be expected for
7 the duration to the maximum duration airman medical certificate
8 applied for or held, to make the person unable to perform those
9 duties or exercise those privileges; (c) no medication or other
10 treatment that the Federal Air Surgeon based upon the case history
11 and appropriate qualifying medical judgment relating to the
12 medication or other treatment involved finds (1) makes the person
13 unable to safely perform the duties or exercise the privileges of
14 the airman certificate applied for or held; or (2) may reasonably
15 be expected for the maximum duration of the airman medical
16 certificate applied for or held to make the person unable to
17 perform those duties or exercise those privileges.

18 The general medical standard for first and second-class
19 medical certificates 14 CFR section 67.113 and 67.213 are the
20 same.

21 The Administrator's position was stated by Dr. Steven
22 Schwendeman, a medical officer in the Aeromedical Certification
23 Division of the FAA's Civil Aerospace Medical Institute, who
24 testified that because of the effects of ADD or ADHD they are
25 judged to be a threat to public safety and pilots and the Office

1 of Aerospace Medicine cannot issue medical certifications to
2 individuals who have symptoms of that condition or are taking
3 medication to control that condition. He also said that Adderall
4 can affect judgment and that rising levels of amphetamines are
5 associated with sensations of well being, perhaps elation and in
6 some cases euphoria and decreasing concentrations of Adderall can
7 be associated with decreased mood sensation, of worry or concern
8 or helplessness. Severe withdrawal symptoms can be suicidal. He
9 said that Adderall is a psychotropic drug that affects brain
10 function and reliability of performance. He said the drug's
11 effect changes very rapidly and cannot be monitored.

12 Dr. Jerry D. Blaylock, M.D. a psychiatrist reported his
13 diagnosis in a psychiatric evaluation dated June 11, 2007, that
14 the Petitioner has Attention Deficit Hyperactivity Disorder and
15 recommended that he continue taking Adderall indefinitely.
16 Administrator's Exhibit A-1.

17 Dr. Christopher R. Bassin, Doctor of Psychology, a
18 psychologist administered neuropsychological tests to the
19 Petitioner and in his neuropsych consult dated January 5th, 2007,
20 reported that the Petitioner demonstrated variable weakness with
21 respect to attention and concentration abilities. Administrator's
22 Exhibit A-1 at page 15.

23 Dr. Elin Berg, M.D., a psychiatrist retained by the
24 Administrator, rather than a psychiatrist retained by the
25 Petitioner, reviewed the Petitioner's medical file and was present

1 for his testimony in this matter. Citing the Diagnostic and
2 Statistical Manual for Mental Disorders, she said that Attention
3 Deficit Hyperactivity Disorder is classified as a mental illness
4 and has three main categories of symptoms, inattention, difficulty
5 paying attention and focusing, impulsivity and that is acting
6 before thinking, and hyperactivity as manifested by hyperactivity
7 and restlessness.

8 She said that the symptoms that affect aviation are
9 problems with inattention and impulsivity as far as acting before
10 you have thought a situation completely through. She said that
11 the psychometric testing by Dr. Bassin showed that the
12 Petitioner's verbal abilities were below normal because of
13 problems with inattention. He interpreted the test results as
14 showing the Petitioner has a problem with multitasking or paying
15 attention to various bits of information simultaneously, which
16 made him score weakly on his language test. He said that the
17 Petitioner has a low ability in the skill of cognitive
18 flexibility.

19 Dr. Berg said that Adderall XR is reported in the
20 Physician's Desk Reference as having a high potential for abuse
21 and may lead to drug dependence and misuse of amphetamines may
22 cause sudden death and serious cardiovascular events. It says
23 that physicians should periodically reevaluate patients for the
24 long-term usefulness of the drug because of the possibility of
25 serious cardiovascular events, adverse psychiatric events,

1 including emergence of new psychotic or manic symptoms and visual
2 disturbances. The range of possible adverse reactions were
3 listed, including weakness, headache, agitation, anxiety,
4 dizziness, insomnia and less frequently inability to control mood,
5 irritability and testiness, inability to speak clearly, twitching
6 of muscles and shortness of breath, all of which she said can be
7 of concern or create problems for a pilot.

8 Dr. Berg stated that in her opinion the Petitioner has a
9 psychiatric disorder, ADHD combined typed and a condition of
10 severity that indicates the need for a continued medication in the
11 foreseeable future and will likely remain unchanged for the next
12 two years. She said that would cause him to be unable to operate
13 an aircraft safely. She said that she disagreed with the contrary
14 conclusions of Dr. Blaylock and Dr. Bassin, because their
15 conclusions that the Petitioner was a safe pilot are not supported
16 by their diagnosis and findings.

17 The Petitioner's testimony suggests that while taking
18 Adderall he is able to function normally and does not experience
19 the difficulties with inattention and lack of concentration and
20 comprehension that he experienced before taking Adderall.
21 Further, the testimony of Dr. Stallings, who is his supervisor in
22 the family practice residency in which he is presently
23 participating, confirms that he is mentally up to performing those
24 duties, which include multitasking while he is taking Adderall.
25 However, notwithstanding that, he is a physician himself and

1 presumably should know better, the Petitioner admitted that from
2 time to time, primarily on weekends, he does not take Adderall as
3 prescribed and his symptoms return. His wife confirms this.
4 Those symptoms include difficulty retaining and understanding
5 things he reads, poor concentration, difficulty in multitasking
6 and irritability, all of which are incompatible with aviation
7 safety.

8 In Administrator v. Prius, P-r-i-u-s, NTSB Order Number
9 EA-5222 (2006) at page 5, the Board said that although the
10 Petitioner might want it so, the FARs do not provide for an
11 exception to the rule where medication is controlling an
12 individual's symptoms. The FAA cannot monitor and cannot be
13 expected to monitor individuals to ensure that they stay on their
14 medication, that they are having no adverse side effects from it
15 and/or that the medication is continuing to be effective.

16 I find from the medical evidence that the Petitioner's
17 testimony concerning his symptoms before taking Adderall and his
18 testimony that his symptoms return, when of his own volition he
19 stops taking Adderall from time to time, show that the Petitioner
20 has ADHD or ADD, which is a mental illness manifested by symptoms
21 of difficulty paying attention and focusing, impulsivity and
22 hyperactivity, all of which are inconsistent with safe operation
23 of an aircraft. While the Petitioner appears to respond well to
24 treatment by taking Adderall, he has demonstrated in the past that
25 he cannot be trusted to faithfully take the dose of Adderall

1 prescribed for him daily. And when he does not take his
2 prescribed dose of Adderall he reverts to his untreated symptoms
3 as confirmed by his wife. Further, there is no practical way for
4 the Administrator to effectively monitor whether the Petitioner
5 is, at any particular time, taking his prescribed dose of Adderall
6 or if the prescribed dosage of Adderall is continuing to be
7 effective as a treatment for his condition or whether he is
8 experiencing regression to his untreated condition or has
9 developed an adverse reaction to Adderall.

10 I further find that while the Petitioner at this time
11 appears to be suffering no adverse reaction to Adderall other than
12 occasional insomnia, the potential adverse reactions from this
13 drug are severe, perhaps life threatening, and are inconsistent
14 with safe operation of an aircraft. Whether or not the Petitioner
15 will in the future suffer an adverse reaction to Adderall cannot
16 be predicted nor can it be monitored. The fact remains that is a
17 possibility and it can happen without warning and without the
18 Administrator's knowledge. Because Adderall is a mind altering
19 psychotropic drug, I find that it's reasonable for the
20 Administrator not to issue medical certification to persons who
21 are taking the drug.

22 I find, therefore, that the Petitioner has not
23 demonstrated by a preponderance of the evidence that the Federal
24 Air Surgeon was not reasonable in concluding based on the case
25 history, qualified medical judgment related to the condition

1 involved that sections 67.307(c) and 67.313(c) prevented issuing
2 an unrestricted medical certificate to the Petitioner.

3 ORDER

4 Accordingly, it is hereby ordered and adjudged that the
5 Petitioner's Petition for Review of the Denial by the
6 Administrator of the Federal Aviation Administration of an airman
7 medical certificate is denied. The Administrator's denial of an
8 airman medical certificate to the Petitioner is affirmed.

9

10

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12 EDITED & DATED ON

13 NOVEMBER 6, 2007

WILLIAM A. POPE

Administrative Law Judge