

SERVED: December 2, 2009

NTSB Order No. EA-5491

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 30th day of November, 2009

_____)	
Petition of)	
)	
PAUL HAYDEN COOPER)	
)	
for review of the denial by)	Docket SM-5005
the Administrator of the)	
Federal Aviation Administration)	
of the issuance of an airman)	
medical certificate.)	
_____)	

OPINION AND ORDER

Petitioner has appealed from the written order that Chief Administrative Law Judge William E. Fowler, Jr., issued in this proceeding on July 30, 2009.¹ By that decision, the law judge dismissed petitioner's petition sua sponte and terminated the case, concluding that a hearing "would serve no useful purpose" because the Board did not have the discretion to reverse the

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

Administrator's denial of petitioner's certification. Order at 3. We affirm the law judge's order.

The Administrator's June 2, 2009 denial of petitioner's application for a medical certificate was predicated on petitioner's "history and clinical diagnosis of diabetes mellitus requiring oral hypoglycemic medication for control and bipolar disorder." Pet. for Review, Exh. 1. The denial letter stated that, under 14 C.F.R. §§ 67.113(a)(b)(c), 67.213(a)(b)(c), and 67.313(a)(b)(c),² petitioner was not

² The relevant portions of § 67.113, which applies to certification for a first-class medical certificate, provide as follows:

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

- (a) No established medical history or clinical diagnosis of diabetes mellitus that requires insulin or any other hypoglycemic drug for control.
- (b) No other organic, functional, or structural disease, defect, or limitation that the Federal Air Surgeon ... finds—
 - (1) Makes the person unable to safely perform the duties or exercise the privileges of the airman certificate applied for or held; or
 - (2) May reasonably be expected, for the maximum duration of the airman medical certificate applied for or held, to make the person unable to perform those duties or exercise those privileges.
- (c) No medication or other treatment that the Federal Air Surgeon ... finds—
 - (1) Makes the person unable to safely perform the duties or exercise the privileges of the airman certificate applied for or held; or

eligible for airman medical certification. The denial letter did not cite §§ 67.107, 67.207, nor 67.307,³ notwithstanding the reference to bipolar disorder in the letter.

In his petition for review of the Administrator's denial, petitioner argued that he is eligible for a first-class medical certificate because he fulfills the criteria of the FAA Guide for Aviation Medical Examiners entitled "Disease Protocols: Diabetes Mellitus - Type II, Medication Controlled." See Pet. for Review, Exh. 2. In particular, petitioner argued that an endocrinologist evaluated him and determined that his blood sugars were "well controlled," and that petitioner has had no complications or side effects from the hypoglycemic medication that he takes. With regard to the Administrator's reference to bipolar disorder, petitioner argued in his petition that he did not have bipolar disorder, because the diagnoses that he had received in 2003 and 2004 for the condition were mistaken;

(continued)

- (2) May reasonably be expected ... to make the person unable to perform those duties or exercise those privileges.

Sections 67.213 and 67.313 contain similar language, and apply to second- and third-class medical certificate applications, respectively.

³ Title 14 C.F.R. §§ 67.107(a)(3), 67.207(a)(3), and 67.307(a)(3) apply to first-, second-, and third-class medical certificates, respectively, and specify that the mental standards for certification include no established medical history or clinical diagnosis of bipolar disorder.

petitioner contends that he obtained opinions from medical professionals that his exposure to toxic metals had caused him to exhibit symptoms of bipolar disorder, and that he has not taken any medication for such a disorder since September 2004.

In the order dismissing the petition, the law judge first stated that petitioner indicated in his petition that his appeal concerns his application for a first-class medical certificate. The law judge cited petitioner's acknowledgment in the petition that he has diabetes and takes hypoglycemic medication. The law judge further cited 14 C.F.R. § 67.113(a), which proscribes the issuance of a medical certificate to any applicant who has an "established medical history or clinical diagnosis of diabetes mellitus that requires insulin or any other hypoglycemic drug for control." The law judge cited Schwartz v. Helms, 712 F.2d 633, 637 (D.C. Cir. 1983), for the proposition that the Board does not have discretion to reverse the Administrator's denial of a medical certificate when the denial is based on a specifically disqualifying condition, such as diabetes mellitus that requires hypoglycemic medication for control. As a result, the law judge dismissed the petition sua sponte because petitioner "indisputably has a specifically disqualifying medical condition." Order at 3. The law judge noted, however, that petitioner may pursue a special issuance of a medical

certificate under 14 C.F.R. § 67.401.⁴

On appeal, petitioner principally takes issue with the law judge's dismissal of his appeal based on diabetes, and argues that the law judge should not have determined that the Administrator's denial of his application based on bipolar disorder was "moot," given petitioner's diagnosis of and treatment for diabetes. In this regard, petitioner contends that whether he has bipolar disorder is a factual issue that the law judge must resolve after a hearing, and that bipolar disorder is the only condition that might disqualify him. Petitioner also argues that Schwartz v. Helms is not applicable to this case, because the facts are distinguishable.⁵ Petitioner contends that he is eligible for a medical certificate because he fulfills the criteria set forth in the FAA Guide for Aviation Medical Examiners concerning diabetes. For this reason, petitioner argues that it would be arbitrary and capricious for the Administrator to refuse him a special issuance because of

⁴ Section 67.401 provides, in general, that the Federal Air Surgeon may, at his or her discretion, allow an Authorization for Special Issuance of a Medical Certificate, valid for a specified period, for a person who does not meet the provisions of subparts B, C, or D of part 67 if the person shows to the satisfaction of the Federal Air Surgeon that the duties authorized by the class of medical certificate applied for can be performed without endangering public safety during the period in which the authorization would be in force.

⁵ Petitioner asserts that, in Schwartz, the Administrator sought to amend a disqualifying condition concerning coronary heart disease via rulemaking.

his diabetes.

Subsequent to filing his appeal brief, petitioner submitted a motion for leave to supplement his brief, to which he attached a September 15, 2009 letter from the manager of the FAA Aerospace Medical Certification Division stating that the additional correspondence that petitioner provided to the FAA concerning his diabetes did not cause the FAA to alter their opinion on his ineligibility for a certificate. Mot. to Supplement, Exh. 1. Petitioner also attached to the motion an October 6, 2009 letter from a doctor who opined that petitioner was eligible for a medical certificate, because his diabetes is well controlled. Motion to Supplement, Exh. 2. The Administrator contests each of petitioner's arguments in his appeal brief, and urges us to deny petitioner's motion to supplement.

Under our Rules of Practice, parties may not make supplemental submissions "except by leave of the Board, upon a showing of good cause." 49 C.F.R. § 821.48(d). We have previously implied that this standard is a narrow one.⁶ Under the circumstances of this case, however, it appears that

⁶ See generally Administrator v. Guy America Airways, Inc., 4 NTSB 888 n.2 (1983) (denying the respondent's motion to supplement the appeal brief, and stating that the documents the respondent sought to introduce were not "newly discovered evidence" simply because the respondent's counsel did not know of them at the time of the hearing).

petitioner has articulated good cause. The Administrator denied petitioner's petition on June 2, 2009, on the basis that petitioner takes hypoglycemic medication to control his diabetes. Petitioner argues that the FAA Guide requires a 60-day period to elapse prior to certification, so that the FAA can determine whether a petitioner's diabetes is well controlled. As a result, petitioner saw his endocrinologist on June 5, 2009, for the requisite laboratory tests, and made a follow-up appointment on August 5, 2009. Mot. to Supplement at 3. The law judge, however, issued his sua sponte decision in this case on July 30, 2009. Therefore, given these dates, we find that petitioner has established good cause for submitting supplemental information, and we have consequently considered the two letters that petitioner has attached to his motion for leave to supplement.

Notwithstanding our consideration of the additional evidence, we agree with the law judge that a hearing in this case would accomplish nothing. As stated above, § 67.113 specifically states that an applicant may not receive a first-class medical certificate if he or she has "[an] established medical history or clinical diagnosis of diabetes mellitus that requires insulin or any other hypoglycemic drug for control." Here, petitioner does not dispute that he takes metformin and glipizide to correct his glucose intolerance problem, nor does

he dispute that these are hypoglycemic medications. As a result, under § 67.113, petitioner has a specifically disqualifying condition that renders him ineligible for a first-class medical certificate.⁷

Petitioner has not persuaded us that the law judge erred in concluding that he need not rule on the issue of whether petitioner has bipolar disorder. We recognize that petitioner has ostensibly engaged considerable time and expense in obtaining opinions from medical professionals concerning his exposure to toxic metals, and we note that our opinion that petitioner is ineligible for a first-class medical certificate is based solely on petitioner's diagnosis of, and treatment for, diabetes. In this regard, petitioner's diagnosis of diabetes and acknowledgement that he takes hypoglycemic medication is sufficient to deny his application for a first-class medical certificate.

The fact that petitioner may fulfill the criteria concerning well-controlled diabetes in the FAA Guide for

⁷ See generally Administrator v. Poole, 3 NTSB 3775, 3776 (1981); see also 61 Fed. Reg. 11,238, 11,250–251 (Mar. 19, 1996) (stating that, “[m]any individuals who are not insulin-treated diabetics can, with appropriate monitoring and other conditions, receive a *special issuance* of their medical certificates to perform the duties authorized by their class of medical certificate without endangering public safety”) (emphasis added).

Aviation Medical Examiners⁸ is relevant to petitioner's eligibility for a special issuance. In this regard, we note that petitioner's brief in this case concerns only his application for a first-class medical certificate, and does not address whether he is eligible for a special issuance under § 67.401.

ACCORDINGLY, IT IS ORDERED THAT:

1. Petitioner's appeal is denied;
2. The order of the law judge dismissing petitioner's petition is affirmed; and
3. The denial of petitioner's application for a medical certificate under §§ 67.113(a)(b)(c), 67.213(a)(b)(c), and 67.313(a)(b)(c) is affirmed.

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

⁸ Pet. for Review, Exh. 2. The Guide states that applicants who have been diagnosed with diabetes may be eligible for a special issuance under certain circumstances.

Served: July 30, 2009

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

Petition of

PAUL HAYDEN COOPER

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

Docket SM-5005

**ORDER SUA SPONTE DISMISSING
PETITION AND TERMINATING PROCEEDING**

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(BY FAX)

(BY FAX AND CERTIFIED MAIL)

On July 27, 2009, petitioner, through counsel, filed with this office a petition for review of a denial of airman medical certification, issued by the Manager of the Aerospace Medical Certification Division of the Federal Aviation Administration ("FAA") on June 2, 2009. The basis for that certificate denial was that petitioner "do[es] not meet the medical standards prescribed in Title 14 of the Code of Federal Aviation Regulations (CFR), [the Federal Aviation Regulations, hereinafter "FAR"] Specifically, under paragraph(s) or section(s) 67.113(a)(b)(c), 67.213(a)(b)(c), 67.313(a)(b)(c), because of [his] history of diabetes mellitus requiring oral hypoglycemic medication for control and bipolar disorder."¹

¹ The aforesaid FARs contain similar language, but apply to first-, second- and third-class medical certificates, respectively. As petitioner has indicated in his petition (at 1) that the certificate denial in this matter relates to an application for a first-class medical certificate, the applicable provision is FAR § 67.113, which reads as follows:

"§ 67.313 General medical condition.

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

Associated with petitioner's petition is a copy of an April 5, 2007 letter from John Parks Trowbridge, M.D., in which he notes (at 3) that petitioner "has been found to have a mild glucose intolerance problem, exceptionally well controlled with metoformin 500mg 3 daily and glipizide 5mg 2 daily." Petitioner acknowledges in his petition (at 2) that he was initially found to have elevated glucose levels "[o]ver a decade ago;" that he had blood work in August 2005 which "first indicated that [he] may need oral hypoglycemic medication to control his slightly elevated blood sugars;" that he subsequently saw Brian R. Tulloch, M.D., an endocrinologist, for evaluation and treatment in October 2005; that, in June 2009, Dr. Tulloch "evaluated [him] in accordance with the . . . FAA Guide for Aviation Medical Examiners Decision Considerations . . . related to Diabetes Mellitus – Type II, Medication Controlled;" that Dr. Tulloch "determined that [his] blood sugars were 'well controlled;'" and that he has, since, "had proper and stable blood sugar levels . . . and has had no complications or side effects from the hypoglycemic medication he is taking."

Based on the aforesaid evidence, petitioner clearly has a medical history of diabetes mellitus requiring hypoglycemic medication for control, which is a specifically disqualifying condition under FAR § 67.113(a).

The validity of the regulations that disqualify applicants having an established medical history of a specifically disqualifying medical condition from unrestricted airman certification has previously been sustained by the United States Court of Appeals for the District of Columbia Circuit in *Schwartz v. Helms*,² upon a challenge that such restrictions limit the scope of the Board's inquiry on review and, thus, do not permit consideration of evidence as to the degree of future medical risk presented by the specifically disqualifying condition's symptomatology. Under *Schwartz*, once it is established that an applicant for a medical certificate has a specifically disqualifying medical condition, the Board is powerless to reverse the denial of certification by the

(a) No established medical history or clinical diagnosis of diabetes mellitus that requires insulin or any other hypoglycemic drug for control.

(b) No other organic, functional, or structural disease, defect, or limitation that the Federal Air Surgeon, based on the case history and appropriate, qualified medical judgment relating to the condition involved finds—

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

(2) May reasonably be expected, for the maximum duration of the airman certificate applied for or held, to make the person unable to perform those duties or exercise those privileges."

The Aerospace Medical Certification Division manager's June 2, 2009 denial letter failed to cite FAR § 67.107(a)(3), which specifies that the mental standards for first-class medical certification include no established medical history or clinical diagnosis of a bipolar disorder. Thus, the denial letter was technically deficient, in that it failed to cite the correct regulation upon which a medical certificate denial stemming from a medical history or clinical diagnosis of a bipolar disorder is to be based. However, that technical deficiency is not prejudicial to petitioner here in light of the finding, *infra*, that he cannot qualify for medical certification because of his history of diabetes mellitus which requires hypoglycemic medication for control.

² 712 F.2d 633 (1983).

FAA.³ Thus, a hearing in this matter would serve no useful purpose.⁴ The undersigned will, therefore, *sua sponte*, dismiss the petition herein and terminate this proceeding on the basis that petitioner indisputably has a specifically disqualifying medical condition — *i.e.*, diabetes mellitus requiring hypoglycemic medication for control.

While petitioner may, nevertheless, pursue special issuance (restricted) medical certification under FAR § 67.401, he should be aware that the grant or denial of special issuance status is *wholly within the FAA's discretion*, and the Board has no jurisdiction whatsoever to review such a determination by the FAA.⁵

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

Entered this 30th day of July, 2009, at Washington, D.C.

William E. Fowler, Jr.
Chief Judge

³ 712 F.2d at 637. See also *Petition of Hukari*, 2 NTSB 597, 598-99 (1977); *Petition of Berry*, 4 NTSB 589, 590 (1983). Thus, without regard to the merits of the Aerospace Medical Certification Division manager's assessment that petitioner also has a history of a bipolar disorder, which he appears to dispute in his petition, it is inescapable that he is unqualified for unrestricted medical certification by virtue of his diabetic history. The issue of whether he *also* has a disqualifying mental condition is therefore moot, and does not need to be addressed herein.

⁴ See *Petition of Dale*, 4 NTSB 338 (1982), reconsideration denied 4 NTSB 340 (1982) (the existence of a specifically disqualifying condition leaves "no real issue before the Board," and, thus, renders unnecessary a hearing on review of a denial of medical certification by the FAA).

⁵ In this regard, see also *Petition of Doe*, 5 NTSB 41, 43 (1985); *Petition of Sleeter*, 5 NTSB 686, 688-89 (1985); *Petition of Reder*, NTSB Order EA-4438 (1996).