

SERVED: December 30, 2009

NTSB Order No. EA-5495

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 28<sup>th</sup> day of December, 2009

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Petition of	)	
	)	
RICHARD E. SCHILLING	)	
	)	
for review of the denial by	)	Docket SM-4978
the Administrator of the	)	
Federal Aviation Administration	)	
of the issuance of an airman	)	
medical certificate.	)	
_____	)	

**OPINION AND ORDER**

Petitioner, proceeding pro se, appeals the oral initial decision of Administrative Law Judge William R. Mullins, issued in this proceeding on August 11, 2009.<sup>1</sup> By that decision, the law judge denied petitioner's appeal of the Administrator's denial of his application for a medical certificate, finding

<sup>1</sup> A copy of the law judge's decision, an excerpt from the hearing transcript, is attached.

that petitioner did not fulfill his burden of proving that he was qualified for a medical certificate. We affirm the law judge's decision.

The Administrator's March 19, 2009 denial of petitioner's application for a third-class medical certificate was predicated on petitioner's history of cerebrovascular disease, stroke, cognitive dysfunction, and defective hearing. The denial letter stated that, under 14 C.F.R. §§ 67.305(a),<sup>2</sup> 67.309(b),<sup>3</sup> and

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<sup>2</sup> Section 67.305(a) provides the ear, nose, throat, and equilibrium standards for third-class airman medical certification, and requires that applicants for such certification demonstrate acceptable hearing by at least one of three hearing tests. The Administrator's denial letter also included references to §§ 67.105(a) and 67.205(a), which contain similar language, and apply to first- and second-class medical certificate applications, respectively.

<sup>3</sup> Section 67.309(b) provides neurologic standards for third-class airman medical certification, and requires that an applicant have:

No ... seizure disorder, disturbance of consciousness, or neurologic 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.

The Administrator's denial letter also included references to §§ 67.109(b) and 67.209(b), which contain similar language, and apply to first- and second-class medical certificates, respectively.

67.313(b),<sup>4</sup> petitioner was not eligible for airman medical certification.

The law judge held a hearing concerning the Administrator's denial of medical certification for petitioner, at which petitioner did not call any witnesses, but provided two exhibits. Petitioner's exhibits included a January 29, 2009 laboratory report from Tulane University Hospital and Clinic and a letter from a doctor at Greater New Orleans Eye Physicians, stating that petitioner now has "excellent vision." Exh. P-2. Petitioner also testified on his own behalf, and stated that he had never had a heart attack, and believed he was eligible for a medical certificate. Petitioner acknowledged that he had undergone tests to assess his cognitive function, and found the

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<sup>4</sup> Section 67.313(b) states that applicants for third-class airman medical certification may not have:

[Any] organic, functional, or structural disease, defect, or limitation that the Federal Air Surgeon, based on the case history and appropriate, qualified medical judgment relating to the condition involved, finds—

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

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

The Administrator's denial letter also included references to §§ 67.113(b) and 67.213(b), which contain similar language, and apply to first- and second-class medical certificates, respectively.

tests confusing. Tr. at 18.

In rebuttal, the Administrator introduced a certified copy of petitioner's airman medical file, and called Dr. John Hastings, a physician who is board-certified in neurology and aerospace medicine and has a commercial pilot certificate with over 5,900 hours of flight time, to testify as an expert. Dr. Hastings identified portions of petitioner's airman medical file that indicate that petitioner had incorrectly listed his date of birth, and that a neurologist described petitioner as having a diminished recent memory and problems with his gait, balance, and cognitive function. Dr. Hastings also identified a brain scan report from April 2004 in petitioner's medical file, which showed that petitioner had suffered two small strokes. Dr. Hastings testified that the records established that petitioner takes Aggrenox, which is a medication to reduce his chances of having another stroke, and that petitioner's file showed that he had cerebrovascular disease, which indicates abnormalities in the blood vessels that supply the brain with blood. Dr. Hastings stated that strokes can cause sudden incapacitation manifested by vertigo, weakness, or compromises in a person's vision or speech. Dr. Hastings described cognitive skills that are critical for a pilot, and mentioned that a pilot must be able to exhibit sustained attention, which involves staying focused on one thing for a period of time, and

divided attention, which involves "multitasking." Tr. at 35. In petitioner's airman medical file, Dr. Hastings identified a report of neuropsychological testing that petitioner had undergone, and testified that at least three tests indicated that petitioner's cognitive function was impaired. Dr. Hastings opined that petitioner's cognitive impairments compromise his ability to operate an aircraft safely.

At the conclusion of the hearing, the law judge determined that petitioner had not fulfilled his burden of proving that he was eligible for a third-class medical certificate. In particular, the law judge determined that petitioner's exhibits were not relevant and persuasive, and that Dr. Hastings's testimony concerning petitioner's cognitive impairments established that petitioner was medically disqualified from holding an airman medical certificate.

On appeal, petitioner appears to assert that the medical evidence presented at the hearing was incorrect. Petitioner attached a copy of a report from a magnetic resonance imaging (MRI) test from September 24, 2009, which lists the following findings:

1. Deep white matter microvascular ischemic changes.
2. Right maxillary sinus polyp versus mucous retention cyst.

Appeal Br. at Exh. 1. Petitioner's brief does not explain the relevance of the MRI report, and does not provide any statements

or evidence to dispute Dr. Hastings's testimony that petitioner suffers from certain cognitive impairments. Petitioner appears to argue that the Aviation Medical Examiner (AME) who examined him was biased and submitted incorrect reports. The Administrator opposes each of petitioner's arguments by further summarizing the evidence showing that petitioner is disqualified, and urges us to affirm the law judge's decision.

Given that petitioner has not provided any evidence to dispute that he suffers from cognitive impairments, such as memory problems and difficulties with both focusing and dividing his attention, we find that the law judge properly upheld the Administrator's denial of petitioner's petition. To the extent that petitioner may argue that he received an unfair report from the AME who examined him, we find that this contention is not supported by any evidence. Moreover, such an assertion does not provide a reason to grant petitioner's appeal, because it does not explain the results of the cognitive tests, nor does it resolve the other reports from other doctors who noted that petitioner had cognitive impairments and balance problems. We have long held that an applicant for a medical certificate has the burden of proving that he or she fulfills the eligibility standards for an aviation medical certificate.<sup>5</sup> In this case,

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<sup>5</sup> See, e.g., Petition of Witter, NTSB Order No. EA-4500 at 3 (1996) (citing 49 C.F.R. § 821.25); see also Administrator v.

petitioner has not fulfilled this burden of proof.

**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 is affirmed.

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

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(continued)

Hoover, NTSB Order No. EA-4094 (1994) (reversing law judge's decision and upholding revocation of renowned air show performer's medical certificate when Administrator established that airman suffered from cognitive deficit).

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

\* \* \* \* \*

Petition of: \*

RICHARD E. SCHILLING, \*

for review on the denial by the  
Administrator of the Federal  
Aviation Administration of the  
Issuance of an airman medical  
certificate. \*

Docket No.: SM-4978  
JUDGE MULLINS

\* \* \* \* \*

Hale Boggs Federal Courthouse  
Courtroom C-502  
Fifth Floor, 500 Poydras Street  
New Orleans, LA 70130

Tuesday,  
August 11, 2009

The above-entitled matter came on for hearing, pursuant  
to notice, at 8:55 a.m.

BEFORE: WILLIAM R. MULLINS,  
Administrative Law Judge

## APPEARANCES:

On behalf of the Administrator:

AMANDA BRUCHS, Esq.  
FAA/AGC-300  
800 Independence Avenue, SW  
Washington, DC 20591

On behalf of the Respondent:

RICHARD E. SCHILLING, Pro se  
3941 Clermont Drive  
New Orleans, LA 70122

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ORAL INITIAL DECISION

ADMINISTRATIVE LAW JUDGE MULLINS: This has been a proceeding before the National Transportation Safety Board, being held here in New Orleans. Today is the 11th day of August 2009 and the matter was on a hearing on the petition of Mr. Richard E. Schilling, for a review of the denial by the Administrator of the Federal Aviation Administration of the issuance of Airman Medical Certificate. The board docket is SM-4978.

The petition seeks to review that denial and the

1 Administrator denied Mr. Schilling's medical based on a medical  
2 deficit as set forth in FAR 67, 105(a), 205(a) and 305(a) which  
3 relates to his ability to hear also FAR 67, 109(b), 209(b) and  
4 309(b) which relates to neurological problems and also FAR 67,  
5 113(b), 213(b) and 313(b) which relate to the general medical  
6 condition of this Petitioner.

7 And, for the record, I would simply point out the three  
8 different regulations cited under each one 105, 205 and 305 all  
9 relate to the class of medical that might be sought, but they  
10 specifically relate to the same medical condition.

11 The Petitioner was present throughout these proceedings  
12 and represented himself and the Administrator was present  
13 throughout these proceedings and represented by counsel,  
14 Ms. Amanda Bruchs of the Chief Counsel's office in Washington,  
15 D.C. and Mr. Schilling is a resident of the New Orleans area.

16 The matter has been heard before me, William R. Mullins.  
17 I am an Administrative Law Judge for the National Transportation  
18 Safety Board and pursuant to the Board's rules I will issue a  
19 decision at this time.

20 The parties were afforded a full opportunity to  
21 offer evidence, to call, examine and cross-examine witnesses in  
22 addition the parties were afforded an opportunity to make argument  
23 in support of their respective positions.

24 DISCUSSION

25 First, let me say that Mr. Schilling has not met his

1 burden of proof here today and the petition will be denied.  
2 Mr. Schilling had two exhibits that were offered. One is a five  
3 page document from Tulane University Hospital and Clinic and the  
4 procedure dated was 1/29/09, but there was no medical opinion  
5 contained in that entire document, only some testing. The only  
6 thing I guess significant was a comment on the front was there was  
7 an abnormal ECG. I'm not even sure what that was. It wasn't made  
8 reference to in any of the testimony that I was aware of. The  
9 second exhibit Mr. Schilling offered was P-2 which was a letter to  
10 "To Whom It May Concern" from the Greater New Orleans Eye  
11 Physicians, specifically from a Dr. Cangelosi and Dr. Cangelosi's  
12 opinion and this doctor said Mr. Schilling had the sufficient  
13 vision to fly an airplane and that was not one of the reasons that  
14 his medical was denied.

15           The Administrator had his case in chief and called  
16 Dr. Hastings and Dr. Hastings was duly sworn and identified  
17 Exhibit A-2 which was his Curriculum Vitae. Dr. Hastings is board  
18 certified in both neurology and aerospace medicine. Also, there  
19 was admitted at the outset of the trial, Administrator's Exhibit  
20 A-1 which is a certified copy of all the medical entries  
21 maintained by the Federal Aviation Administration of Mr. Schilling  
22 or his blue ribbon copy of his medical record.

23           Dr. Hastings has testified based on his review of the  
24 medical record and I think the most critical one for me was the  
25 one contained on page 28, but in any event, Dr. Hastings' opinion

1 was after reviewing the medical file that Mr. Schilling was not  
2 medically qualified to hold an airman medical certificate and on  
3 page 28 there was a report. It was the last page, actually it was  
4 the third or four pages, I guess, it says three or four but it was  
5 from Dr. Kevin Greve who is a clinical psychologist and neuro-  
6 psychologist and I would just quote out of a couple of paragraphs.  
7 It said, and this is on the second full paragraph of page 28 of  
8 the medical records, "simple attention was intact but  
9 Mr. Schilling had more significant problems with complex  
10 attentional tasks and his ability to focus his attention for any  
11 length of time was compromised."

12           And he went on to say there was no evidence of psycho-  
13 pathology. "In short during this evaluation Mr. Schilling  
14 demonstrated difficulty in areas that would likely have  
15 implications for his safe functioning as a pilot, one apparently  
16 significantly reduced hearing ability. An audio logical  
17 examination is recommended to fully document his hearing ability  
18 and his compromise ability to shift and divide attention (multi-  
19 tasks) and to maintain normal simple attention over an extended  
20 period of time." And Dr. Hastings referred to that and spoke  
21 about that as being an element of his opinion.

22           Basically, as I said, Mr. Schilling has not met his  
23 burden of proof in this matter and I think Dr. Hasting's opinion  
24 has to prevail, particularly given some of these psychological  
25 findings.

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ORDER

IT IS THEREFORE ORDERED THAT safety in air commerce and safety in air transportation does not require that the petition of Mr. Schilling be affirmed and specifically, I find that Mr. Schilling did not meet his burden of proof by a preponderance of reliable and probative evidence and, more specifically, Mr. Schilling was medically disqualified as found in the medical record contained in record A-1. And, therefore, the petition will be denied.

EIDTED ON  
September 14, 2009

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WILLIAM R. MULLINS  
Administrative Law Judge