

SERVED: January 26, 2011

NTSB Order No. EA-5570

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of January, 2011

_____)	
Petition of)	
)	
CHARLES S. THOMPSON III)	
)	
for review of the denial by)	Docket SM-5076
the Administrator of the)	
Federal Aviation Administration)	
of the issuance of an airman)	
medical certificate.)	
)	
_____)	

OPINION AND ORDER

Petitioner, who proceeds pro se, appeals the September 20, 2010 order of Chief Administrative Law Judge William E. Fowler, Jr., in which he granted the Administrator's motion to dismiss.¹ By that decision, the law judge terminated the case, based on petitioner's untimely appeal. We affirm the law judge's order.

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

In a June 1, 2009 letter, the FAA federal air surgeon denied petitioner's application for a third-class medical certificate, based on petitioner's "history of ... colorectal adenocarcinoma with local recurrence and pulmonary metastasis treated by surgery, radiation and chemotherapy." The federal air surgeon further stated that petitioner had "Barrett's esophagus," which he declared a medical condition with possible adverse health consequences.² The letter provided that the federal air surgeon would reconsider petitioner's request for medical certification after 3 years of disease-free observation.

Petitioner appealed the federal air surgeon's decision on June 29, 2009, and the NTSB Office of Administrative Law Judges docketed the case as an appeal and assigned Administrative Law Judge William R. Mullins to preside over the case. Docket No. SM-4994. The Administrator filed a timely answer to petitioner's petition for review, and made a discovery request of petitioner. After petitioner did not respond, the Administrator's attorney filed a motion to compel on October 28, 2009. Judge Mullins granted the motion to compel in an order, in which he warned petitioner that if he did not comply with

² The federal air surgeon's letter cited 14 C.F.R. §§ 67.113(b), 67.213(b), and 67.313(b), all of which provide general medical standards for holders of first-, second-, and third-class medical certificates, respectively. These sections require the denial of a medical certificate if the applicant is unable to safely perform the duties or exercise the privileges of the airman certificate applied for or held.

discovery, "[he] should withdraw his petition or be subject to appropriate sanctions." On November 18, 2009, petitioner submitted a letter requesting from Judge Mullins permission to withdraw his petition. Judge Mullins issued an order on November 23, 2009, terminating the proceedings without prejudice. On July 8, 2010, petitioner filed another petition for review of the federal air surgeon's June 1, 2009 decision. The Administrator responded with a motion to dismiss the petition on August 3, 2010, arguing that it was untimely under our Rules of Practice. As stated above, Chief Judge Fowler granted this motion, which is at issue here.

With regard to appeals of medical certificate denials, our Rules of Practice provide as follows:

Where the Administrator has denied an application for the issuance or renewal of an airman certificate, the applicant may file with the Board a petition for review of the Administrator's denial. The petition must be filed with the Board within 60 days after the date on which notice of the Administrator's denial was served on the petitioner.

49 C.F.R. § 821.24(a). In the case at issue, petitioner's appeal of the June 1, 2009 denial was due no later than July 31, 2009. Petitioner voluntarily withdrew his first petition for review on November 18, 2009, but now seeks to reopen the matter by filing a new petition for review. Our rules do not provide such an avenue of repeated appeal.

Petitioner's appeal of Chief Judge Fowler's order granting the Administrator's motion to dismiss is very concise, and appears to contend that petitioner had good cause for his November 18, 2009 withdrawal of his petition. In particular, petitioner's appeal asserts that he was acting as his dying mother's medical power of attorney at the commencement of his first appeal, and therefore could not comply with the demands of pursuing his petition for review. While we are mindful of the grim circumstances under which petitioner felt compelled to withdraw his petition, we nevertheless agree with Chief Judge Fowler's reasoning. Petitioner cannot now reopen his petition for review of the federal air surgeon's denial, but instead must complete a new medical certificate application.³ If the federal air surgeon again denies his application, petitioner may file (within 60 days) a new petition for review of that decision. Petitioner's good cause argument concerning his mother's failing health is inapposite in this regard, as it is applicable to the withdrawal of his original petition, rather than petitioner's filing an appeal after the deadline.

ACCORDINGLY, IT IS ORDERED THAT:

1. Petitioner's petition is denied;

³ We note that Judge Mullins's order dismissing the previous case *without prejudice* allows for this possibility.

2. The order of the law judge granting the Administrator's motion to dismiss is affirmed; and

3. The denial of petitioner's application for a medical certificate under 14 C.F.R. §§ 67.113(b), 67.213(b), and 67.313(b) is affirmed.

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

Served: September 20, 2010

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

Petition of

CHARLES S. THOMPSON, III

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

Docket SM-5076

**ORDER GRANTING ADMINISTRATOR'S
MOTION TO DISMISS PETITION**

Served: Charles S. Thompson, III
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(BY CERTIFIED MAIL)

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(BY FAX)

This proceeding stems from a petition that petitioner, who is acting *pro se*, filed on July 8, 2010, for review of a denial of third-class airman medical certification by the Federal Aviation Administration ("FAA"). Attached to that petition is a copy of a June 1, 2009 letter, by which the Federal Air Surgeon informed petitioner that he is ineligible for such certification under §§ 67.113–, 67.213– and 67.313(b) of the Federal Aviation Regulations ("FAR," codified at 14 C.F.R.)¹ on the basis that "[t]he available medical evidence reveals

¹ FAR §§ 67.113, 67.213 and 67.313(b) contain precisely the same language, but apply to first, second and third-class medical certificates, respectively. Because petitioner here was denied a third-class medical certificate, the applicable regulation is § 67.313(b), which provides:

§ 67.313 General medical condition.

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

* * * * *

(b) No other organic, functional, or structural disease, defect, or limitation [(than diabetes mellitus requiring insulin or any other hypoglycemic drug for control, which is disqualifying by history under § 67.313(a))] that the Federal Air Surgeon, based on the case history and appropriate, qualified medical judgment relating to the condition involved finds —

a history of: colorectal adenocarcinoma with local recurrence and pulmonary metastasis treated by surgery, radiation and chemotherapy. This finding is incompatible with aviation safety. . . . You also have the following medical conditions with possible adverse health consequences . . . : Barrett's esophagus.” In that letter, the Federal Air Surgeon also related to petitioner that he would be “willing to reconsider your request for airman medical certification following three (3) years of disease-free observation from the date of last treatment for your adenocarcinoma, which will be after April 2012 with the submission of [certain] minimum required information” (emphasis original) that he then enumerated.

Thereafter, on August 3, 2010, counsel for the Administrator submitted a motion to dismiss said petition, on the basis that it was not timely filed under Rule 24(a) of the Board's Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. § 821.24(a)). Rule 24(a) provides as follows:

Where the Administrator has denied an application for the issuance or renewal of an airman certificate, the applicant may file with the Board a petition for review of the Administrator's denial. The petition must be filed with the Board within 60 days after the date on which notice of the Administrator's denial was served on the petitioner.

The Administrator's motion and exhibits attached thereto disclose that petitioner previously filed a petition for review of the Federal Air Surgeon's June 1, 2009 medical certificate denial on June 29, 2009, which gave rise to a proceeding docketed as SM-4994 upon this office's receipt of that petition on July 6, 2009; that petitioner later withdrew the petition on November 18, 2009; and that Judge William R. Mullins, who presided over said proceeding, then issued an order terminating the proceeding without prejudice on November 23, 2009.² The Administrator argues that, while petitioner is not foreclosed from making a new application for medical certification, he cannot now initiate a second proceeding seeking review of the June 1, 2009 certificate denial action, because his 60-day period for doing so expired long before the petition herein was filed.

In a reply to the Administrator's motion to dismiss, petitioner asserts that a “double travesty” has been perpetrated on him by the FAA,³ and, in this regard, avers that, “[o]n April 16, 2009, I applied for and was **granted** a Third Class Airman Medical [C]ertificate by

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- (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.”

² The Administrator's motion and exhibits also reveal that the Administrator propounded a request for discovery and production of documents upon petitioner in that prior proceeding on September 2, 2009 and later filed a motion to compel, based upon petitioner's lack of a response to that request, on October 28, 2009, and that Judge Mullins issued an order on November 10, 2009, which directed him to provide the information and documentation sought in that request to the Administrator within 30 days, or either withdraw his petition or be subject to appropriate sanctions.

³ Petitioner's Reply at 1.

Richard M. Conway, M.D.,”⁴ but that the Federal Air Surgeon later “sent a final denial” on June 1, 2009 “even though he had indisputable proof that I had no lung cancer whatsoever,”⁵ and that “[o]n June 29, 2009, I filed a petition for review and even though they had the same proof that I was not only NED (no evidence of disease), but I also had no lung cancer of any kind, denied me reinstatement again. Now, the FAA is attempting to cover up their double error by using an irrelevant 60-day rule as a basis for this motion of bad faith. I was advised by [Judge] Mullins that I could withdraw without prejudice and file on another [sic] with additional proof of this travesty. I have the proof and am 100% confident that I can and will be successful in presentation of my burden of proof.”⁶

Such arguments are largely misguided. In the first place, while: (1) Judge Mullins’ November 10, 2009 Order sustaining the Administrator’s motion to compel discovery in SM-4994 gave petitioner the option of withdrawing his petition in that matter if he did not want to either provide the material sought or face sanctions for his failure to do so; (2) he subsequently withdrew his petition in that matter; (3) and Judge Mullins then terminated the proceeding without prejudice, Judge Mullins neither “advised” him to withdraw his petition nor indicated that he could, at some future time, initiate another action seeking review of the June 1, 2009 certificate denial despite the fact that the 60-day period for doing so had already expired on July 30, 2009. The impact of the termination of SM-4994 “without prejudice” is that Judge Mullins did not, in that proceeding, render a substantive decision on the merits of petitioner’s medical qualifications, which would, under the legal doctrine of *res judicata*, bar consideration by the Board of any future petition he might file for review of a subsequent FAA medical certificate denial. Thus, if petitioner makes a *new* application for a medical certificate and an administratively final denial of that application is issued by the FAA, petitioner can seek Board review of *that* denial, so long as he files a timely petition for such review.

Insofar as petitioner’s claim that he was granted a third-class medical certificate by Dr. Conway less than two months before the Federal Air Surgeon’s June 1, 2009 denial action is concerned, he should be aware that the Federal Air Surgeon has the authority, under FAR §67.407(c), to reconsider the issuance of any medical certificate by an aviation medical examiner, which is apparently what happened with respect to his April 2009 medical certificate application.

Since the petition in the instant proceeding, for review of an FAA June 1, 2009 medical certificate denial action, was not submitted until July 8, 2010, it must be deemed belatedly-filed under Rule 24(a). Further, because the only permissible basis for the Board to accept a late-filed petition for review of an FAA certificate denial is good cause,⁷ and no

⁴ *Id.* (emphasis original).

⁵ *Id.*

⁶ *Id.* at 1-2.

⁷ In this regard, see Rule 11(a) of the Board’s Rules (codified at 49 C.F.R. § 821.11(a)), and *Administrator v. Hooper*, 6 NTSB 559, 560 (1988), on remand from *Hooper v. Nat’l Transp. Safety Bd.*, 841 F.2d 1150 (D.C. Cir. 1988). The undersigned is of the view that good cause generally requires a showing that circumstances beyond the control of the individual who is required to perform an act by

good cause has been shown here, dismissal of that petition is required. Petitioner is hereby advised that, if he wishes to continue his pursuit of airman medical certification, he must file a new application for a medical certificate.

THEREFORE, IT IS ORDERED that the Administrator's motion to dismiss the petition in this matter is GRANTED, and that this proceeding is hereby TERMINATED.

Entered this 20th day of September, 2010, at Washington, D.C.

William E. Fowler, Jr.
Chief Administrative Law Judge

a certain time prevented that person from either knowing of the action that triggered the time limit in question or of acting upon it within the prescribed time limit, despite the exercise of due diligence.