

SERVED: March 28, 2013

NTSB Order No. EA-5657

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 27th day of March, 2013

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-19425
v.)	
)	
ANDREW K. DUSTMAN,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

1. Background

The Administrator appeals the oral initial decision of Administrative Law Judge William R. Mullins, issued February 26, 2013.¹ By that decision, the law judge determined the Administrator failed to meet his burden of proof to show respondent was not qualified to hold an

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

airman medical certificate under 14 C.F.R. §§ 67.107(a)(4), 67.207(a)(4), and 67.307(a)(4)² after being arrested for driving under the influence (DUI) with a blood alcohol level (BAC) of 0.239.

We grant the Administrator's appeal of this emergency order of revocation.³

A. Facts

Respondent, a 32-year-old pilot who holds air transport pilot (ATP) and flight instructor certificates, started flying when he was 21 years old. Over the course of his aviation career, respondent logged nearly 2,500 hours of flight time. For the past five years prior to this enforcement action, respondent flew a Learjet for Image Air, a charter company providing transportation for organ transplants. He currently is the principal owner of Synergy Flight Center, a limited fixed base operator at the Bloomington Airport in Illinois.

On September 25, 2008, September 14, 2009, and September 28, 2010, respondent applied for and was issued first-class airman medical certificates by two different Federal Aviation Administration (FAA) designated aviation medical examiners (AMEs).

On the evening of November 28, 2010, respondent attended a dinner in honor of his father. During a 4-hour period of time, respondent consumed between 10 to 19 alcoholic drinks—approximately 10 to 15 beers and 3 to 4 glasses of red wine. Despite consuming this much alcohol, he recognized many people in his group were unable to drive and called taxi cabs for them. However, as he lived less than a mile from the restaurant, he decided to drive to his

² Sections 67.107(a)(4), 67.207(a)(4), and 67.307(a)(4) require an airman not have a medical history or clinical diagnosis of substance dependence, defined as a condition in which a person is dependent on a substance as evidenced by increased tolerance, manifestation of withdrawal symptoms, impaired control of use, or continued use despite damage to physical health or impairment of social, personal, or occupational functioning.

³ This case proceeds pursuant to the Administrator's authority to issue immediately effective orders under 49 U.S.C. §§ 44709(e) and 46105(c), and in accordance with the Board's Rules of Practice governing emergency proceedings, codified at 49 C.F.R. §§ 821.52–821.57, as amended, 77 Federal Register 63252-53, October 16, 2012.

home. On the way home, he was in an accident and subsequently was arrested by the Bloomington Police Department under suspicion of DUI. A breathalyzer test showed respondent's BAC was 0.239. Respondent ultimately pleaded guilty to DUI resulting in suspension of his state driving privileges and mandatory DUI education.

On February 10, 2011, and April 1, 2011, the FAA Office of Security and Hazardous Materials Safety informed the FAA Civil Aerospace Medical Institute (CAMI) of respondent's alcohol-related motor vehicle actions for the driving privileges suspension and DUI conviction, respectively. On April 1, 2011, the FAA Aerospace Medical Certification Division (AMCD) requested respondent submit:

- complete copies of all court records associated with the offense, including records of any care, treatment or assessment for alcohol abuse or related disorders,
- a detailed statement of respondent's alcohol use and the circumstances surrounding the offense,
- a copy of his current driving record, and
- if his BAC was above 0.14999, a current evaluation from a certified substance abuse specialist or addictionologist to enable AMCD to determine his eligibility to continue to hold an airman medical certificate.

Respondent responded on April 21, 2011, providing a written statement, his driving record, aftercare reports, a December 9, 2010 substance abuse evaluation worksheet, and court records. On April 29, 2011, AMCD again requested a copy of the police investigative report which included the BAC level. AMCD also requested complete copies of a current evaluation from a certified substance abuse specialist or addictionologist to determine respondent's eligibility to continue to hold an airman medical certificate, because respondent admitted his BAC level was above 0.14999.

On May 27, 2011, AMCD received a substance abuse evaluation dated May 17, 2011, from Countermeasures, Inc., and three pages of a police report. After reviewing this information, on June 9, 2011, AMCD sent respondent a letter advising him that as a consequence of his

possible alcohol dependence evidenced by tolerance, AMCD determined respondent was not qualified to hold any class of medical certificate and requested respondent immediately voluntarily surrender any previously issued unexpired medical certificates.

On June 12, 2012, the FAA's chief psychiatrist, Dr. Charles Chesanow, reviewed respondent's FAA airman medical file. Dr. Chesanow determined respondent met the criteria for alcohol dependence evidenced by tolerance and impaired control of use. As a result of Dr. Chesanow's determination, on September 11, 2012, the Great Lakes Regional Flight Surgeon advised respondent, by letter that as a consequence of his alcohol dependence the FAA found he was not qualified to hold any class of medical certificate.

B. Procedural Background

The Administrator issued the emergency revocation order, which became the complaint in this case, on January 28, 2013, alleging respondent did not meet the qualification requirements of sections 67.107(a)(4), 67.207(a)(4), or 67.307(a)(4) to hold an airman medical certificate because respondent has an established medical history or clinical diagnosis of substance dependence, specifically alleging respondent has increased tolerance and impaired control of use. The case proceeded to hearing before the law judge on February 26, 2013.

C. Law Judge Oral Initial Decision

At the conclusion of the hearing, the law judge held the Administrator failed to show by a preponderance of the evidence that respondent did not meet the qualifications to hold an airman medical certificate. In his findings, the law judge acknowledged respondent admitted he drank up to 15 beers and 3 to 4 glasses of wine before getting in his car to drive home on the evening of November 28, 2010, and also acknowledged respondent had a BAC over 0.23 on that evening.⁴

⁴ Initial Decision at 232-33.

However, he noted the substance abuse evaluation performed by Countermeasures, Inc., stated respondent's alcohol abuse issues were "resolved" under the Diagnostic and Statistical Manual, Fourth Edition (DSM-IV) criteria:⁵

And I find that based on the evaluation of Dr. Lambrou, Dr. Thompson and Nurse Campbell who made an evaluation based on the FARs, that—and even Dr. Dumstorf here didn't have an opinion, or certainly he asked for an opinion from the chief psychiatrist, and I find that based on those evaluations, and even the evaluation that the Administrator asked for from Countermeasures, which was a DSM-IV evaluation, all of those folks opined that he did not meet this standard, he didn't meet the standard under the DSM-IV, he didn't meet the standard under the FAR for substance abuse, and therefore I find that the Administrator has failed to establish this; the evidence has failed to establish that he meets these standards by a preponderance of reliable and probative evidence, and I'm going to find for [r]espondent in this case.⁶

After a discussion of the exhibits and witness testimony, the law judge concluded the Administrator failed to show by a preponderance of reliable and probative evidence that respondent was alcohol dependent as defined by the Federal Aviation Regulations (FAR).

D. Issues on Appeal

The Administrator appeals the law judge's decision.⁷ The Administrator argues he did prove that respondent meets the criteria of alcohol dependence under 14 C.F.R. §§ 67.107(a)(4), 67.207(a)(4), and 67.307(a)(4) by a preponderance of the evidence. Also, the Administrator argues, if the Board finds the law judge erred in holding for respondent, the Administrator's sanction deserves deference from the Board.

⁵ Id. at 233.

⁶ Id. at 239-40.

⁷ Respondent has filed a motion requesting oral argument. We conclude oral argument is not necessary in this case. See 49 C.F.R. § 821.48(e).

2. *Decision*

On appeal, we review the law judge's decision *de novo*, as our precedent requires.⁸

A. *Medical Qualifications*

Contrary to the law judge's findings, under our *de novo* review of the evidence in this case, we find a preponderance of reliable, probative, and substantial evidence supports the Administrator's complaint. In this regard, respondent, in his brief, asserts we must defer to the law judge's ultimate decision in this case under an arbitrary and capricious standard of review. We disagree. While we give deference to our law judge's rulings on certain issues, such as credibility determinations⁹ or evidentiary rulings,¹⁰ we review the case, as a whole, under *de novo* review.¹¹

1. *Medical Record and Expert Opinions*

This case turns on the medical evidence introduced by both parties. At the hearing, the Administrator presented testimony from Dr. Matthew Dumstrof, a medical officer with AMCD, as well as Dr. Chesanow, the FAA's chief psychiatrist. The Administrator also offered into evidence respondent's FAA medical record containing reports on respondent's medical history relating to alcohol use written by Dr. Peter Lambrou, a senior AME, Dr. Kenneth Thompson, a

⁸ Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013), Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991); Administrator v. Schneider, 1 N.T.S.B. 1550 (1972) (in making factual findings, the Board is not bound by the law judge's findings).

⁹ See Administrator v. Porco, NTSB Order No. EA-5591 (2011), aff'd Porco v. FAA, 472 Fed. Appx. 2 (D.C. Cir. 2012) (per curiam) (reviewing a law judge's credibility findings under an arbitrary and capricious standard of review).

¹⁰ See Administrator v. Ledwell, NTSB Order No. EA-5582 (2011) (reviewing a law judge's evidentiary rulings under an abuse of discretion standard of review).

¹¹ See also Singer v. Garvey, 208 F.3d 555, 558 (6th Cir. 2000) (the NTSB has plenary review over an Administrative Law Judge's decision).

Human Intervention Motivational Study (HIMS) psychiatrist, and Fran Campbell, a certified addictions registered nurse. The medical record also contained a substance abuse evaluation of respondent conducted by Countermeasures, Inc., under the DSM-IV standards. Dr. Stephen Dinwiddie, a forensic psychiatrist specializing in alcohol abuse and dependency, testified for respondent.

a. *FAR versus DSM-IV definition of alcohol dependence*

To begin, we note the standard for defining alcohol dependence by a clinical diagnosis under the DSM-IV differs from that under the FAR. The FAR requires airmen have no medical history or clinical diagnosis of substance dependence as evidenced by any of the following four factors: (a) increased tolerance, (b) manifestation of withdrawal symptoms, (c) impaired control of use, or (d) continued use despite damage to physical health or impairment of social, personal, or occupational functioning. To meet the definition under the FAR for alcohol dependence, an airman must simply manifest a medical history or clinical diagnosis of one of the enumerated factors in his or her lifetime.¹² Furthermore, the plain language of sections 67.107(a)(4), 67.207(a)(4), and 67.307(a)(4) of the FAR only requires a finding of a medical history *or* a clinical diagnosis of alcohol dependence.

For a clinical diagnosis of alcohol dependence under the DSM-IV, an individual must “have a maladaptive pattern of alcohol use, leading to clinically significant impairment or distress, as manifested by three (or more) of the following [factors], occurring at any time in the same 12-month period.”¹³ The DSM-IV lists seven factors for consideration:

(1) tolerance, as defined by either of the following:

¹² Tr. at 12, 87.

¹³ Exh. R-2.

- (a) a need for markedly increased amounts of alcohol to achieve intoxication or desired effect
 - (b) markedly diminished effect with continued use of the same amount of alcohol
- (2) Withdrawal, as manifested by either of the following:
- (a) the characteristic withdrawal syndrome for alcohol (refer to Criteria A and B of the criteria sets for Withdrawal from alcohol)
 - (b) alcohol (or a closely related drug such as valium) is used to relieve or avoid withdrawal symptoms
- (3) alcohol is often used in larger amounts or over a longer period than was intended
- (4) there is a persistent desire or unsuccessful efforts to cut down or control alcohol use
- (5) a great deal of time is spent in activities necessary to obtain alcohol, use alcohol, or recover from its effects
- (6) important social, occupational, or recreational activities are given up or reduced because of alcohol use
- (7) alcohol use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by alcohol (e.g. continued drinking despite recognition that an ulcer was made worse by alcohol consumption).¹⁴

Thus, the four FAR factors generally overlap with factors 1, 2, 3, and 7 of the DSM-IV.

The standard for a clinical diagnosis under the DSM-IV requires an individual manifest three of more of the factors in a 12-month period of time. Whereas, the standard set forth under the FAR is stricter because of the heightened aviation safety implications involved in the medical certification process in that it is designed to identify airman who may only exhibit a single factor indicating alcohol dependence problems. The Administrator has a legitimate safety interest in holding airmen to a high medical standard when it comes to the issues of alcohol dependence and abuse.

¹⁴ Id.

b. *De novo review of the facts of the case*

Under the Administrator's more restrictive regulatory definition for determining alcohol dependence, we examined *de novo* the evidence in this case and determined a preponderance of the evidence shows respondent meets the definition of alcohol dependence under the FAR.

At the hearing, Dr. Chesanow opined respondent met the FAR definition of alcohol dependence for increased tolerance and impaired control of use. In formulating his opinion, Dr. Chesanow noted his FAA predecessor had used a BAC level greater than 0.20 as indicative of increased tolerance.¹⁵ Since his predecessor's departure, Dr. Chesanow has looked at BAC as one factor in determining an increased tolerance but also examines other factors including how much alcohol the individual consumed and the level of functionability after consumption.¹⁶ In reaching his conclusion that respondent had increased tolerance, Dr. Chesanow noted respondent's BAC of 0.239 exceeded the FAA level of 0.20.¹⁷ Additionally, he opined respondent's admitted consumption of between 10 to 19 drinks in a 4-hour period constituted a pathological amount of alcohol.¹⁸ Finally, he testified respondent's purposeful functioning on the evening of his DUI evidenced by calling taxi cabs for other individuals at the party, finding his own car keys and car, and operating his vehicle despite this exceedingly high BAC indicated an increased level of tolerance.¹⁹

¹⁵ Tr. at 74.

¹⁶ Id.

¹⁷ Tr. at 95.

¹⁸ Tr. at 95-6.

¹⁹ Tr. at 96-7.

Likewise, Dr. Chesanow opined respondent's medical history of binge drinking since age 19 and blackouts showed an impaired control of use. Had respondent's binge drinking and blackouts been limited to his college years, Dr. Chesanow believed that those two issues might not have raised concerns with the FAA. However, because respondent continued to binge drink while employed in a safety-sensitive industry, Dr. Chesanow felt this showed an episodic pattern of behavior.²⁰ Dr. Chesanow also clarified that his review of the medical history was to make a regulatory determination as to whether respondent was eligible to hold a medical certificate not to make a clinical diagnosis.²¹

The law judge rejected Dr. Chesanow's expert testimony in this regard. Instead he relied upon the testimony of Dr. Dinwiddie and the statements of Dr. Lambrou, Dr. Thompson and Nurse Campbell contained in respondent's FAA medical record, and he concluded respondent was not alcohol dependent. Under our *de novo* review of the evidence, we disagree with the law judge's findings and find the record is replete with evidence to support by a preponderance of reliable, substantial, and probative evidence that respondent is alcohol dependent as defined by the FAR.

Although Dr. Lambrou, Dr. Thompson and Nurse Campbell do not conclude respondent is alcohol dependent, we find the following undisputed facts contained in the record support the FAA's finding of alcohol dependence, in any event. While in college, from age 19 to 23, respondent admitted to binge drinking (5-7 drinks in one sitting) once per week.²² While a

²⁰ Tr. at 98-9.

²¹ Tr. at 121.

²² Exh. A-1 at 36 (Nurse Campbell's report); Exh. A-1 at 50 (Countermeasures's report); but see Exh. A-1 at 30 (Dr. Thompson's report notes a pattern of binge drinking 2-3 times per week without a specific duration but does indicate "[t]his was his pattern prior to the DUI").

professional golfer, from age 23 to 26, respondent admitted to binge drinking twice per week.²³ While a professional pilot, from age 26 until his DUI at age 30, respondent admitted he continued to binge drink once per week.²⁴ Following his arrest, respondent continued to drink two drinks every two weeks. Respondent acknowledged experiencing alcohol-related blackouts.²⁵ He admitted he could not recall the events occurring on the evening of his DUI.²⁶ Respondent also admitted he developed a pattern of driving after drinking which developed in the few years leading up to his DUI.²⁷ In his initial interview with Countermeasures, Inc., on December 9, 2010, respondent admitted to consuming 15 beers and 3 to 4 glasses of wine over a 4-hour period of time on the evening of his DUI.²⁸ On the evening of his DUI, respondent's BAC was 0.239—nearly three times the legal limit. We find respondent's factual medical record shows a history of binge drinking spanning over a decade and a recent history of driving after drinking. Most troubling from an aviation safety standpoint is this binge drinking and driving occurred while respondent held an ATP certificate. We have long held that ATP certificate holders are held to the highest standard of conduct.²⁹

²³ Exh. A-1 at 50 (Countermeasures's report).

²⁴ Exh. A-1 at 36 (Nurse Campbell's report); Exh. A-1 at 50 (Countermeasures's report).

²⁵ Exh. A-1 at 37 (Nurse Campbell's report).

²⁶ Exh. A-1 at 30 (Dr. Thompson's report).

²⁷ Exh. A-1 at 30 (Dr. Thompson's report states, "He does admit that in the past few years he began driving after drinking"). At the hearing, respondent asserted he was never intoxicated when he drove after drinking except on the one occasion of his arrest. Tr. at 206.

²⁸ Exh. A-1 at 77 (Countermeasures's report), but see Exh. R-2 (In his initial interview with Dr. Dinwiddie, respondent admitted to consuming 10-12 drinks total on the evening of the DUI.)

²⁹ See, e.g., Administrator v. Simmons, NTSB Order No. EA-5535 (2010); Administrator v. Stewart, NTSB Order No. EA-4479 (1996).

In addition to this factual evidence in respondent's medical history, we find the medical conclusions in respondent's medical record also support Dr. Chesanow's expert opinion that respondent has alcohol dependence. On May 17, 2011, Michelle Matury, the director of the DUI program at Countermeasures, Inc., found respondent had "recurring substance use in situations in which it was physically hazardous."³⁰ As for the DSM-IV factors for alcohol dependency, she found respondent met two of the seven factors, including increased tolerance and that the substance is taken in large amounts over longer periods than was indicated.³¹ She did not find respondent had alcohol dependency as the DSM-IV clinical diagnosis requires the presence of three or more of the factors in a 12-month period of time.³² However, as both of these factors are also enumerated in the FAR, these findings suffice to show a medical history of alcohol dependency under the FAR.

2. Recommendations for Further Assessments

The evidence at the hearing also indicated respondent would benefit from follow-up assessments. In his HIMS Psychiatric Evaluation Report dated September 21, 2011, Dr. Thompson stated,

[respondent] presents with a recent DUI in the context of several years of alcohol abuse—binge drinking and driving...in order to reinforce the gravity of what occurred, I would be most comfortable if [respondent] was required to have quarterly assessments over the next two years. I would not require abstinence but would want to monitor his drinking pattern in the context of his evolving occupational and social life.³³

³⁰ Exh. A-1 at 51 (Countermeasures's report).

³¹ Exh. A-1 at 52, 79 (Countermeasures's report).

³² Exh. A-1 at 53 (Countermeasures's report)

³³ Exh. A-1 at 31.

Dr. Chesanow also recommended respondent be assigned a HIMS sponsor for further evaluation.

In his evaluations on December 20, 2011 and February 20, 2013, Dr. Dinwiddie opined respondent did not show signs of alcohol dependence under DSM-IV or the FAR.³⁴ At the hearing, Dr. Dinwiddie testified respondent “at no time in his life had ever developed tolerance in the *clinical* meaning of the term.”³⁵ However, he ultimately “concurred with Dr. Thompson that abstinence, based on the history, was not needed in [respondent’s] case...and also agree[d]... stepping up evaluations, given the history, would be appropriate to ensure that if any problems developed in the future that they could be promptly identified and rectified.”³⁶

We find these recommendations for continuing assessments and evaluations from Dr. Thompson, Dr. Chesanow, and respondent’s own expert, Dr. Dinwiddie, of significance in our decision to reverse the law judge. In this regard, we long have held if an airman requires monitoring for a medical condition, that airman is not necessarily qualified for an unrestricted medical certificate under 14 C.F.R. part 67.³⁷ As the Board noted in Petition of Taylor, we do not believe every airman who undergoes some medical monitoring is automatically disqualified, but will address each case in the light of the medical evidence presented.³⁸

³⁴ Exh. R-2 at 7 and Exh. R-3 at 7. We note while Dr. Dinwiddie is an alcohol abuse specialist, he is not an FAA AME, independent medical sponsor, or medical review officer.

³⁵ Tr. at 160 (emphasis added).

³⁶ Tr. at 172.

³⁷ See Petition of Ritter, 7 N.T.S.B. 426, 429 (1990); Petition of Dant, 4 N.T.S.B. 1152, 1157-58 (1983).

³⁸ 4 N.T.S.B. 1429, 1431 (1984).

Under the facts of this case, we find respondent is not qualified for an unrestricted medical certificate because of his continuing need for follow-up assessments. Sections 67.107(a)(4), 67.207(a)(4), and 67.307(a)(4) of the FAR prohibit an airman with substance dependence to hold a medical certificate “except where there is established clinical evidence, satisfactory to the Federal Air Surgeon, of recovery, including sustained total abstinence from the substance(s) for not less than the preceding 2 years.” In respondent’s case, neither Dr. Thompson nor Dr. Dinwiddie recommend respondent completely abstain from consuming alcohol but both doctors agree because of respondent’s age, occupational history, and social history, he would benefit from follow-up assessments to ensure he does not return to his pattern of binge drinking. Given respondent’s extensive medical history at a relatively young age—including over 10 years of binge drinking, several blackouts, and a DUI with a BAC level of 0.239 while he held an ATP certificate—and the recommendations from Drs. Thompson, Dinwiddie, and Chesnow that respondent undergo further follow-up alcohol assessments, we find respondent ineligible to hold an unrestricted airman medical certificate at this time.

3. *Credibility issues*

Respondent asserts we must defer to the law judge’s credibility determinations in this case and affirm his decision.³⁹ The cases which respondent cites to support his argument—Administrator v. Dillmon⁴⁰ and Administrator v. Porco⁴¹—involved intentional falsification cases. In Dillmon, we expressly instructed law judges to make specific factual findings,

³⁹ Appeal Br. at 2.

⁴⁰ NTSB Order No. EA-5528 (2010).

⁴¹ Supra note 9.

especially with regard to credibility, when a respondent's subjective understanding as to the meaning of questions on the medical certificate application is at issue.

Contrary to respondent's assertions, the law judge made no express credibility findings in this case.⁴² However, we find such determinations were not necessary here. This case does not turn on the credibility of witnesses but rather turns on the facts in evidence. Neither party disputes the facts contained in respondent's FAA medical record. Rather the parties dispute whether those facts show respondent has alcohol dependence by a preponderance of the evidence. As discussed at length above, we find the weight of substantial, reliable, and probative evidence shows the Administrator met his burden of proofing respondent's alcohol dependence as defined by the FAR.

B. *Sanction*

Having held respondent is not eligible to hold an unrestricted airman medical certificate, at this time, due to his medical history of alcohol dependence, we find revocation is the appropriate sanction. Aviation safety demands pilots, especially airmen like respondent who hold ATP certificates, be medically qualified to operate an aircraft. In this case, a preponderance of the evidence, based upon respondent's medical history, lack of abstinence, and recommendations for medical follow-up assessments, shows respondent is not qualified to hold an unrestricted medical certificate.

The Board lacks jurisdiction to grant or review a determination as to whether respondent should receive a special issuance medical certificate from the Administrator.⁴³ While the Board

⁴² In Porco, supra note 9, we expressly rejected the notation of a law judge making "implied" credibility findings and instructed our law judges to make express credibility findings in cases where those findings were necessary for resolution of the issues.

⁴³ We have long held that determinations as to whether a special issuance medical certificate is appropriate is outside the scope of our review. See Petition of Bartel, NTSB Order No. EA-5622

is empowered under 49 U.S.C. §§ 44703 and 44709 to review a denial or revocation of an airman certificate, the decision whether to grant a special issuance medical certificate under 14 C.F.R. § 67.401 is completely within the Administrator's discretion and, thus, not subject to Board review.⁴⁴

Given that we lack jurisdiction to review the issue of a special issuance medical certificate and we find respondent is not, by a preponderance of the evidence, eligible to hold an unrestricted medical certificate, revocation of his airman medical certificates is the appropriate sanction in this case.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The law judge's decision is reversed; and
3. The Administrator's emergency revocation of respondent's medical certificates is affirmed.

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

(..continued)

(2012); Petition of Reder, NTSB Order No. EA-4438 (1996); Petition of Peterson, NTSB Order No. EA-4216 at 5 (1994); Petition of Doe, 5 NTSB 41, 43 (1985).

⁴⁴ Petition of Reder, NTSB Order No. EA-4438 at 4.

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

* * * * *

In the Matter of: *

MICHAEL P. HUERTA, *

ADMINISTRATOR, *

Federal Aviation Administration, *

Complainant, * Docket No.: SE-19425

v. * JUDGE MULLINS

ANDREW K. DUSTMAN, *

Respondent. *

* * * * *

U.S. District Court
Hearing Room 1944D
219 South Dearborn Street
Chicago, Illinois 60604

Tuesday,
February 26, 2013

The above-entitled matter came on for hearing,
pursuant to notice, at 9:00 a.m.

BEFORE: WILLIAM R. MULLINS
Administrative Law Judge

APPEARANCES:

On behalf of the Complainant:

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ORAL INITIAL DECISION AND ORDER

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ADMINISTRATIVE LAW JUDGE MULLINS: This has been a proceeding before the National Transportation Safety Board held under the provisions of Section 44709 of the Federal Aviation Act, as amended, on the appeal of Andrew Dustman, who I'll refer to as Respondent, from an Emergency Order of Revocation that has revoked his airman medical certificate. The Order of Revocation serves as a complaint in these proceedings and was filed on behalf of the Administrator of the Federal Aviation Administration through regional counsel of the Great Lakes Region.

The matter has been heard before me, William R. Mullins.

1 I'm an Administrative Law Judge for the National Transportation
2 Safety Board, and as required by the Board's Rules I will issue a
3 bench decision at this time.

4 The matter came on for hearing pursuant to notice to the
5 parties and was called for trial this 26th day of February 2013.
6 The Administrator was present throughout these proceedings and
7 represented by counsel, Ms. Briana Martino, Esquire, of the
8 Regional Counsel's Office, Great Lakes Region; and Respondent was
9 present throughout these proceedings, represented by Mr. Charles
10 Barnett and Mr. Paul Borth, Esquire, also of the Chicago area.

11 DISCUSSION

12 The Emergency Order of Suspension provides as follows,
13 in paragraph 1. On September 25th, 2008 you applied for and were
14 issued a first class airman medical certificate by David J.
15 Fletcher, M.D., a designated aviation medical examiner, and that
16 was admitted.

17 Paragraph 2. On September 14th, 2009 you applied for
18 and were issued a first class medical certificate by Gregory J.
19 Delost, M.D., a designated Aviation Medical Examiner, that was
20 admitted by Respondent.

21 Paragraph 3. On September 28th, 2010 you applied for
22 and were issued a first class airman medical certificate by David
23 J. Fletcher, MD, a designated aviation medical examiner, and that
24 was admitted.

25 Paragraph 4. By a memorandum dated February 10th, 2011,

1 the Security and Hazardous Material Organization informed the
2 Civil Aerospace Medical Institute that you had an alcohol-related
3 motor vehicle offense (suspension) on January 13th, 2011, by, in
4 paragraph 5, and that was admitted.

5 Paragraph 5. By a memorandum dated April 1st, 2011, the
6 Security and Hazardous Material Organization informed the Civil
7 Aerospace Medical Institute that you had an alcohol-related motor
8 vehicle offense conviction (conviction) on March 3rd, 2011 in
9 Illinois, and that was admitted by Respondent.

10 Paragraph 6. By a letter dated April 1st, 2011, the
11 Aerospace Medical Certification Division (AMCD) requested, due to
12 your history of alcohol-related offense, that you submit complete
13 copies of all court records associated with the offense, including
14 records of any care, treatment or assessment for alcohol abuse or
15 related disorders, a detailed statement of your alcohol use and
16 the circumstances surrounding the offense, a copy of your current
17 driving record, and if you refused a blood alcohol test or your
18 blood alcohol was above .14999, a current evaluation from a
19 certified substance abuse specialist or addictionologist to enable
20 AMCD to determine your eligibility to continue to hold an airman
21 medical certificate. Respondent admitted that.

22 Paragraph 7. By a letter dated April 21st, 2011, you
23 provided a statement, driving record, aftercare reports, a
24 December 9th, 2010 substance abuse evaluation worksheet, and court
25 records, and that was admitted by Respondent.

1 Paragraph 8. By a letter dated April 29th, 2011, AMCD
2 again requested due to your incomplete response that you provide,
3 (1), a copy of the police investigative report which includes the
4 BAC level; and (2), as your BAC level was above .14999, complete
5 copies of current evaluation from certified substance abuse
6 specialist or addictionologist in accordance with the prescribed
7 guidelines to enable AMCD to determine your eligibility to
8 continue to hold an airman medical certificate, and paragraph 8
9 was admitted.

10 Paragraph 9. On or about May 27th, 2011, AMCD received
11 a substance abuse evaluation dated May 17th, 2011 from
12 Countermeasures, Inc., and three pages of a police report. That
13 was neither admitted nor denied because Respondent indicated he
14 didn't know what documentation had been received by AMCD.

15 Paragraph 10. By a letter dated June 9th, 2011, AMCD
16 advised you that as a consequence of your possible alcohol
17 dependence evidenced by tolerance, it was determined that you were
18 not qualified for any class of medical certificate, and Respondent
19 denied that.

20 Paragraph 11. That June 9, 2011 letter requested that
21 you immediately voluntarily surrender any previously issued
22 unexpired medical certificates. That was admitted.

23 Paragraph 12 states, certified mail receipt shows
24 delivery of that June 9th, 2011 letter to your address of record
25 on June 14th, 2011. That was neither admitted nor denied.

1 Respondent says he doesn't know what they received.

2 Paragraph 13. On June 12, 2012, the Federal Aviation
3 Administration's chief psychiatrist reviewed your airman medical
4 file. The chief psychiatrist determined that you meet the
5 criteria for alcohol dependence evidenced by tolerance and
6 impaired control of use. That was denied.

7 Paragraph 14. By a letter dated September 11th, 2012,
8 the Great Lakes Regional Flight Surgeon advised you that as a
9 consequence of alcohol dependence it was determined that you were
10 not qualified for any class of medical certificate. Respondent
11 admitted that.

12 Paragraph 15. That September 11th, 2012 letter
13 requested that you immediately voluntarily surrender any
14 previously issued unexpired medical certificates. That was
15 admitted by Respondent.

16 Paragraph 16. Certified mail receipt shows delivery of
17 this September 11th, 2012 letter to your address of record on
18 September 20th, 2012, and that was neither admitted nor denied.

19 Paragraph 17. To date you have failed or refused to
20 surrender your unexpired airman medical certificate issued
21 September 25th, 2008; September 14th, 2009 or September 28th,
22 2010. Respondent denied, and that was the last paragraph of the
23 allegations, and Respondent denied that and I assume that the
24 certificate has been surrendered because there was no issues about
25 that in the course of this trial.

1 And as a result of the allegations, the Administrator
2 alleges that the Respondent did not meet the qualification
3 requirements of Federal Aviation Regulations section 67.107(a)(4),
4 or the same subparagraphs under 67.207 or 67.307. And it further
5 states that those subparagraphs require that an airman not have an
6 established medical history or clinical diagnosis of substance
7 dependence, defined as a condition in which a person is dependent
8 on a substance, as evidenced by: (a) increased tolerance;
9 (b) manifestation of withdrawal symptoms; (c) impaired control of
10 use; or (d) continued use despite damage to physical health or
11 impairment of social impairment or occupational functioning. And,
12 of course, the Administrator's order states that the criteria that
13 was not met was the alcohol dependence evidenced by tolerance and
14 impaired use.

15 All right, that's the Order of Revocation, Emergency
16 Order of Revocation that was issued, and the response of the
17 Respondent.

18 The exhibits admitted today were, the Administrator had
19 Exhibit A-1, which is the medical file of the Respondent, the blue
20 ribbon copy, and in a little bit I'll review the portions of it
21 that were highlighted in the testimony today, and more important
22 for my decision. A-3 is the curriculum vitae of Dr. Dumstorf.
23 A-4 is the curriculum vitae of Dr. Chesanow. A-5, which I took
24 judicial notice of but wasn't admitted was the 2150.3B, sanction
25 guidance table. The, A-7 is the AME guide, and I think that was

1 contained -- no, no, no, that wasn't contained, but it's the guide
2 for airman medical examiners. And A-8 was the FAR. That wasn't
3 admitted, but it's the FAR that's been alleged here today, 67.107,
4 which is the same as 207 and 307.

5 Respondent had exhibits, first exhibit for Respondent
6 was the curriculum vitae for Dr. Dinwiddie. R-2 was the report of
7 12/20/2011 of Dr. Dinwiddie. R-3 is the report of Dr. Dinwiddie,
8 which is dated February 20th of this year.

9 And the first report, Dr. Dinwiddie testified, if I
10 don't cover this when I talk about his testimony, that he took 4
11 to 5 hours to conduct -- or maybe it was 3 to 4 hours, some
12 lengthy time, to conduct his interview and examination and develop
13 this report, and he did a one-on-one with the Respondent.

14 His report of February 20th of this year, last week,
15 was, spent 45 minutes on the phone, he did testify that he had the
16 reports of the other medical professionals that are contained in
17 the Exhibit A-1, the Respondent's medical file, but he did not
18 have those reports when he did his report back in 2011.

19 And then R-9 was the document on the blood test which
20 shows the different levels. I think that was part of the
21 Administrator's record, but page two was left out, so R-9 is --
22 page one is in the A-1 but page two is not, and it just shows
23 these blood tests.

24 The key parts for my consideration of Exhibit A-1 was
25 first the report of the Illinois Department of Human Services, the

1 alcohol and drug evaluation report, and that's found at page 76,
2 and at page 77 of A-1. It says that Respondent had consumed 15
3 beers and 3 to 4 glasses of wine, and he had a blood alcohol
4 content of .23.

5 The second part that I want to highlight of A-1 was the
6 Illinois Department of Human Resources, the DUI Risk Evaluation on
7 page 70, of A-1, is the completion certificate of that DUI Risk
8 Evaluation.

9 The third thing that I'll highlight for the record was
10 found at page 50, was the Countermeasures Substance Abuse
11 Evaluation, and at page 53 the Countermeasures people who did this
12 evaluation, and apparently it was a lengthy evaluation, but it
13 said that any alcohol abuse problem that Respondent had, had been
14 resolved using the DSM IV criteria.

15 I want to make a comment about this now. I may make it
16 later, but it's interesting that the letters that go out from the
17 FAA to these folks who test more than .14999 requires that they go
18 to a substance abuse specialist for an evaluation. And the
19 evaluation, in my experience, always comes in based on a DSM IV
20 criteria, which Dr. Chesanow just immediately throws out and says,
21 that's no good because that's not what we do. And I wish that the
22 FAA, through the federal flight surgeon, would send out a letter
23 and say go get a substance abuse evaluation based on FAR standards
24 and not DSM IV, and they don't delineate that.

25 The respondents typically in these cases spend a lot of

1 money to go out and have health care professionals give them this
2 evaluation, and the first thing that we hear from the FAA medical
3 is that's no good because that's not what we measure these things
4 on. And it's just ridiculous that they send out this letter, and
5 I know it's a standard form letter, and it requires these
6 respondents to spend a lot of money to get these evaluations. I
7 don't know how much was spent at Countermeasures but I'm sure the
8 FAA didn't pay for it, and he gets an evaluation which they
9 immediately just dismiss offhand as being a DSM IV evaluation, and
10 they don't say up front that they're not going to accept it. But
11 anyway, the Countermeasures folks did a DSM IV evaluation and said
12 there wasn't a substance abuse problem.

13 The next part of A-1 that I'd highlight was a report of
14 Fran Campbell, who's a nurse, Registered Nurse, a certified
15 addictionologist, and does say that she has had some HIMS
16 training, and HIMS is an acronym which as I understand from the
17 testimony stands for Human Interventional Motivational Studies,
18 which was started by Dr. Pakull who is Dr. Chesanow's predecessor
19 in title. But she says that she has HIMS training and her report
20 shows that she's a HIMS something, which again, Dr. Chesanow
21 discounted. But she says she has that training, and Dr. Chesanow
22 discounted because he'd never seen her at one of these meetings,
23 and I don't know what that means. I know HIMS has been in
24 existence for a long time, and maybe she has had the training, but
25 it would indicate that Dr. Chesanow, as he discounted and

1 attempted to discount all of these reports, used that as somehow
2 degrading her report. But she says that he does not meet any of
3 those standards as set forth in the FARs for substance abuse. And
4 her report was at page 35, and her opinion was at page 37 of A-1.

5 The next part of the report of A-1 was at page 30, which
6 is the report of Kenneth Thompson, MD, Center for Aviation
7 Medicine, and he says in his assessment that the Respondent did
8 not meet any of those standards for substance abuse. But he did
9 say in his report that he'd like to see him do some continued
10 monitoring. And I understand in this report, and I've been
11 hearing these cases for a long time, 24 years now, and it's not at
12 all unusual and it's probably the standard for any M.D. or D.O. or
13 medical professional to always wish that there was a little more
14 testing. In other words, the medical people do not like to take a
15 position on anything; they like to say, well, this looks like (A),
16 but we'd like to have a little more testing to confirm that I
17 think it's (A). Well, that's not why we're here today. It has to
18 be black or white today. It can't be with additional testing.

19 But Dr. Thompson, Nurse Campbell and then the next
20 doctor was Dr. Lambrou, and they're all part of this organization
21 called Center for Aviation Medicine. And they do, much, I guess,
22 to Dr. Chesanow's dismay, but they do evaluations based on the FAR
23 standard and not the DSM IV standard. And then the report of
24 Dr. Lambrou, which was at page 33, and he is the president and CEO
25 of this Center for Aviation Medicine. He's a senior airman

1 medical examiner, and he is also an HIMS Independent Medical
2 Sponsor, and Dr. Lambrou's report was that the Respondent here was
3 good to go.

4 Now, a very troubling part of this trial has been during
5 some questioning by Respondent's counsel, the Administrator
6 objected because they said that was part of the special issuance
7 protocol that the FAA goes through in determining, I guess,
8 whether someone's entitled to special issuance. And certainly the
9 Board has taken a position over the years many times that the
10 issuance of a special issuance is strictly up to FAA medical, it
11 is not something that the Board can be concerned with.

12 But there is in this A-1, which was admitted, offered by
13 the Administrator, some comments that relate between this
14 Dr. Lambrou and Dr. Mills about this special issuance, and the
15 Administrator's counsel tries to diminish Dr. Lambrou's opinion by
16 saying, well, yeah, he said here in this consideration for special
17 issuance that he'd like to see a few more of these tests. Well, I
18 go back to what I said, doctors always like to have further
19 medical time, tests, whatever, but that portion of A-1 is not
20 something that the Board could consider because special issuance
21 is out of our bailiwick, and any comment, I'm satisfied, by
22 Dr. Lambrou that was made and reported in A-1 that had to do with
23 this discussion of special issuance should not and will not be for
24 my consideration here today.

25 The next report, there is the memo on page 23 from

1 Dr. Dumstorf where he outlines all of this and sends it up to
2 Dr. Chesanow for his opinion. Now, as I understand, and I'll talk
3 about Dr. Dumstorf's testimony here in a little bit, but as I
4 understand, as the deputy regional counsel, regional counsel,
5 Dr. Dumstorf could have gone to his boss, I guess, at that time,
6 and he was deputy regional counsel for the Great Lakes Region, and
7 I assume there are several people below the level of Dr. Chesanow
8 in the FAA, including Dr. Silberman, who was head of Aeromedical
9 Certification at that time in Oklahoma City, and regional flight
10 surgeons could have issued this letter, but Dr. Dumstorf didn't
11 feel like he could do that; apparently he wanted to go to
12 Dr. Chesanow. So this was his memo up to Dr. Chesanow asking for
13 Dr. Chesanow's opinion, and Dr. Chesanow then, at page 21, states
14 in his opinion that came down, in his last paragraph he says that:

15 "I believe purposeful functioning after drinking what
16 appears to be in excess of 10 drinks clearly reflects tolerance.
17 Furthermore, his pattern of what appears to be regular binge
18 drinking, in my opinion, meets the standards of impaired control
19 of use. Additionally, he has a past history of blackouts.
20 Despite treatment, Mr. Dustman continues to use alcohol, although
21 allegedly, to a more moderate degree. I believe he does meet our
22 criteria for alcohol dependence, and therefore should engage with
23 HIMS sponsor who should help him with an appropriate treatment,
24 intervention, aftercare, recovery activity and monitoring."

25 So even Dr. Chesanow makes reference to a HIMS sponsor.

1 But the Respondent had already gone to a HIMS evaluator, senior
2 airman medical examiner, and that would have been Dr. Lambrou.

3 And page 12 of A-1 is that page that has these comments
4 that counsel for Administrator attempted to draw to my attention
5 as somehow discrediting Dr. Lambrou's evaluation that he had made,
6 denying that there was any substance abuse issues for this
7 Respondent.

8 Okay, that's Exhibit A-1. Those are the exhibits.

9 The first witness was Dr. Dumstorf, who at the time was
10 deputy regional flight surgeon for the Great Lakes Region. He's
11 now a medical certification officer at the Medical Certification
12 Division of Oklahoma City, although he works in Oklahoma City --

13 And are you a deputy medical, or are you just a medical
14 certification officer?

15 MR. DUMSTORF: Just medical officer.

16 ADMINISTRATIVE LAW JUDGE MULLINS: Or just a medical
17 officer, okay. So Dr. Dumstorf is now -- well, he works for the
18 folks in Oklahoma City Medical Certification. He talked about the
19 time between this first letter, where they sent that first one
20 out, and then the ongoing discussions, which went on I guess for a
21 year or so, and attempts to arrive at some decision on special
22 issuance. But in any event, then later when there wasn't one, he
23 sent his memo up to Dr. Chesanow for his opinion in this case.

24 Then the second witness for the Administrator was
25 Dr. Chesanow, and he talked about receiving this, reviewing all

1 these medical files. Counsel for Respondent, characterized his
2 testimony as cherry picking. But he did, for the first time that
3 I can recall in hearing these cases over the years, Dr. Chesanow
4 had reports from people who were evaluating the Respondent based
5 on the FAR standards rather than DSM IV standards, and yet
6 Dr. Chesanow took issue with each one of those reports, arrived at
7 his own conclusion, and said that we should be here today for a
8 revocation of the medical certificate.

9 The first and only medical witness that the Respondent
10 had, live witness -- there were all of these other people
11 testified for Respondent, Nurse Campbell, Dr. Thompson,
12 Dr. Lambrou -- was Dr. Dinwiddie. He's a local psychiatrist and
13 he testified, obviously, and he is a -- he characterized himself
14 as an academic, and he teaches psychiatry at Northwestern
15 University, and has a very impressive curriculum vitae. But he
16 testified that he felt like that Mr. Dustman met the standards,
17 was qualified under the evaluation, and he didn't meet any of
18 those standards required for substance abuse evaluation under the
19 FAR.

20 Two friends of Respondent were called, Mr. Richard
21 Anderson who works for Respondent, has known him for 5½ years, and
22 Mr. Stephen Gildner who'd known Respondent since grade school,
23 some 26 years, and they indicated that in those years that they'd
24 never seen any kind of radical activities by Respondent while he
25 was drinking.

1 And then Mr. Dustman was called to testify and he talked
2 about this one instance of DUI that he was involved in. It was
3 some party involving an honor that was being bestowed on his
4 father, and he said he drank too much, he had a wreck, and it was
5 that one instance of alcohol abuse as indicated here by the
6 suspension of his driver's license and the conviction for DUI that
7 gave rise to this case.

8 Those are the witnesses that I've had. I've talked
9 about the exhibits, in particular Exhibit A-1. There was a couple
10 of cases that were argued by counsel about deference, and they
11 were older cases that came down from the appellate courts well
12 before the congressional enactment of the Pilot's Bill of Rights,
13 which suggests that the Board is not bound to give deference to
14 any sanctions recommended by the Administrator. However, I don't
15 -- and I mention that only as saying that I guess I have to get to
16 that, but I've -- that's not an element of my decision today.

17 What is the key element today is that this case, unlike
18 a typical medical case where the Petitioner is the airman, and in
19 those cases the Petitioner has the burden of proof by a
20 preponderance of the evidence that he's qualified for a medical.
21 This case is not a Petitioner medical case. This is a FAA is the
22 prosecutor in this case and the FAA in this case has the burden of
23 proof by a preponderance of the reliable and probative evidence.

24 And I find that based on the evaluation of Dr. Lambrou,
25 Dr. Thompson and Nurse Campbell who made an evaluation based on

1 the FARs, that -- and even Dr. Dumstorf here didn't have an
2 opinion, or certainly he asked for an opinion from the chief
3 psychiatrist, and I find that based on those evaluations, and even
4 the evaluation that the Administrator asked for from
5 Countermeasures, which was a DSM IV evaluation, all of those folks
6 opined that he did not meet this standard, he didn't meet the
7 standard under the DSM IV, he didn't meet the standard under the
8 FAR for substance abuse, and therefore I find that the
9 Administrator has failed to establish this; the evidence has
10 failed to establish that he meets these standards by a
11 preponderance of reliable and probative evidence, and I'm going to
12 find for the Respondent in this case.

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ORDER

IT IS THEREFORE ORDERED that safety in air commerce and safety in air transportation does not require an affirmation of the Administrator's Order of Revocation as issued. And specifically I find based on the health care professionals who evaluated this Respondent, and particularly the Certified Nurse, Addictionologist Nurse, Nurse Campbell, Dr. Thompson and Dr. Lambrou, who made their evaluations based on the FAR, that the Administrator has not disproven by a preponderance of the evidence their evaluation, and therefore I find in favor of the Respondent.

EDITED ON

MARCH 4, 2013

WILLIAM R. MULLINS

Administrative Law Judge

APPEAL

ADMINISTRATIVE LAW JUDGE MULLINS: Ms. Martino, the Administrator may appeal this Order of the Court today, and you may do so by filing your Notice of Appeal within 2 days of this date, and then you have 5 days after that to file your brief if you file a Notice of Appeal. I have, obviously I -- well, I hope obviously that you're aware that those times are critical, and if you file it 3 days from today then the Board will summarily reject it, and I have a copy of those times.

The Notice of Appeal needs to go to our office, the

1 Office of Administrative Law Judges, at Room 4704 at 490 L'Enfant
2 Plaza East, S.W., in Washington, D.C. 20594. And then within 5
3 days after the date on which the Notice of Appeal was filed, you
4 file your brief with the Office of General Counsel at Room 6401,
5 but that same street address in Washington, D.C. And I have a
6 copy of those rights if you'd like one, and counsel for
7 Respondent, I have a copy for you. I assume the Administrator
8 will appeal, and you'll need to respond at those same street
9 addresses and in that same time frame.

10 Ms. Martino, do you have any question about the Order?

11 MS. MARTINO: No, Your Honor.

12 ADMINISTRATIVE LAW JUDGE MULLINS: Any questions from
13 Respondent?

14 MR. BORTH: No, Your Honor.

15 ADMINISTRATIVE LAW JUDGE MULLINS: All right. Thank you
16 folks, we're in recess.

17 (Whereupon, at 5:45 p.m., the hearing in the above-
18 entitled matter was adjourned.)

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CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Andrew K. Dustman

DOCKET NUMBER: SE-19425

PLACE: Chicago, Illinois

DATE: February 26, 2013

was held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the recording accomplished at the hearing.

John Allen
Official Reporter