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NTSB Order No. EA-5663

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 10th day of June, 2013

_____)	
Petition of)	
)	
JAGDIP SINGH)	
)	
for review of the denial by)	Docket SM-5264
the Administrator of the)	
Federal Aviation Administration)	
of the issuance of an airman)	
medical certificate.)	
_____)	

OPINION AND ORDER

1. Background

The Administrator appeals a portion of the oral initial decision of Administrative Law Judge William R. Mullins, issued November 8, 2012.¹ By that decision, the law judge determined petitioner met his burden of proving he was qualified to hold an airman medical certificate under 14 C.F.R. §§ 67.107(a)(4), 67.207(a)(4), and 67.307(a)(4) as he did not exhibit

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

substance dependence issues.² However, the law judge affirmed the denial of petitioner's application for a medical certificate because petitioner had "cognitive deficits" under 14 C.F.R. §§ 67.107(c), 67.207(c), and 67.307(c).³ The Administrator denied petitioner's application for a medical certificate, based on petitioner's arrest for driving under the influence (DUI) with a blood alcohol level (BAC) of 0.29 percent. We grant the Administrator's appeal of the law judge's decision as it pertains to the law judge's finding regarding substance dependence.

A. *Facts*

On March 25, 2009, petitioner hit two cars while driving at 5:45 pm in Amherst, New York.⁴ Petitioner initially did not stop his car after colliding with the first car, but stopped on the side of the road after colliding with the second car. One person was reported injured from the collisions. Witnesses chased petitioner to stop him from leaving the scene while other witnesses waited on officers from the Amherst Police Department. Petitioner failed all portions of the field sobriety test the officers administered, and a breathalyzer test indicated his BAC was

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 Paragraph (c) of the aforementioned sections also requires fulfillment of the following "mental standard," concerning the absence of cognitive deficits:

- (c) No other personality disorder, neurosis, or other mental 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.

⁴ Exh. A-3.

0.29 percent. Police arrested petitioner, who was later convicted of an “aggravated” DUI, because his BAC was above 0.18 percent at the time of the collisions.

From September 2008 until August 2010, petitioner was enrolled at Spartan College of Aeronautics and Technology in Tulsa, Oklahoma. Petitioner completed some classes at Spartan College because he was interested in obtaining certificates to operate aircraft. On May 16, 2011, petitioner applied for a second-class medical certificate,⁵ which the Federal Air Surgeon denied, as described below.

1. *Evaluation for Alcohol Dependence*

Before the Federal Air Surgeon determined petitioner was ineligible for a medical certificate, petitioner visited specialists and underwent psychological testing. Petitioner first visited Joseph Schwartz, Ph.D., who noted petitioner’s DUI occurred over two years prior to his visit with petitioner, and petitioner informed Dr. Schwartz he abstained from alcohol since his March 2009 arrest. Dr. Schwartz opined petitioner did not have “a current alcohol/substance abuse concern,” but stated, “[n]evertheless, I am totally aware of the FAA’s ‘higher bar’ so to speak on this issue because of public safety concerns.”⁶ Petitioner then visited George Glass, M.D., for a psychiatric evaluation. Dr. Glass’s initial impression noted “there was situational alcohol use and no significant alcohol problem.”⁷ Petitioner informed Dr. Glass he had a BAC of 0.18 at the time of his arrest. Dr. Glass did not apply the standards for alcohol dependence

⁵ On his application, petitioner checked “no” to the question of whether he had ever been arrested or convicted. Petitioner also did not report his arrest and conviction to the FAA in accordance with 14 C.F.R. § 61.15. The Administrator issued an emergency order of revocation in 2010, on falsification and failure-to-report charges against petitioner, and the parties settled. Petitioner then submitted a new application, which is the subject of the case at issue.

⁶ Id. at 14.

⁷ Id.

established in the Federal Aviation Regulations (FAR). Neither Dr. Glass nor Dr. Schwartz testified at the hearing.

William A. McDonald, Ph.D., who did not examine or meet petitioner, provided expert testimony at the hearing. Dr. McDonald opined, based on petitioner's medical file, petitioner was not eligible for a medical certificate due to alcohol dependence. Dr. McDonald stated petitioner "clearly meets the criterion of increased [alcohol] tolerance," under the FAR.⁸

Dr. McDonald testified the fact petitioner was driving when his BAC was 0.29 percent "is objective evidence that his body was not responding in a normal way" to alcohol.⁹

Dr. McDonald also opined petitioner had an impaired control of use, which is another criterion of the FAR standard for increased tolerance, because petitioner drank even though his religion required abstention from alcohol. Dr. McDonald explained the differences between the clinical standards Dr. Glass and Dr. Schwartz utilized in determining petitioner did not have a substance abuse problem, and the FAR standards; in this regard, Dr. McDonald stated the FAR contains a more conservative diagnostic system because "it is driven by a different goal."¹⁰

Dr. McDonald stated neither the fact he did not examine petitioner, nor the fact petitioner claimed he had not consumed alcohol since March 2009, would alter Dr. McDonald's conclusion that petitioner was ineligible for a medical certificate based on his "prodigiously increased tolerance."¹¹ Dr. McDonald opined petitioner's operation of a motor vehicle with a BAC of

⁸ Tr. 117.

⁹ Tr. 121.

¹⁰ Tr. 125.

¹¹ Tr. 150.

0.29 percent was “indicative of somebody who’s been drinking heavily over a period of time,” and is a “certain” indication of alcohol dependence.¹²

2. *Testing for Cognitive Deficits*

On July 18, 2011, petitioner underwent cognitive testing at the Federal Aviation Administration’s (FAA’s) request, administered by Arthur Tarbox, Ph.D., and submitted the raw data of the test results to the FAA. At the hearing, the Administrator’s attorney provided expert testimony from Daniel DaSilva, Ph.D., who conducts independent reviews of cognitive test results for the FAA. Dr. DaSilva stated the raw data from the tests presented several concerns, including low scores with deductive reasoning, “speed working memory,” perceptual reasoning, and verbal comprehension.¹³ Dr. DaSilva stated petitioner’s test results were “suggestive of significant concern.”¹⁴ Dr. DaSilva reviewed the report from Dr. Schwartz, but stated the evaluations Dr. Schwartz performed did not make “a single conclusion” concerning petitioner’s cognitive functioning.¹⁵

B. *Procedural Background*

On January 13, 2012, the Administrator’s Federal Air Surgeon issued a denial of the medical certificate application, based on petitioner’s history of alcohol dependence and cognitive deficits, under 14 C.F.R. §§ 67.107(a)(4) and (c), 67.207(a)(4) and (c), and 67.307(a)(4) and

¹² Tr. 150, 155.

¹³ Tr. 165, 180.

¹⁴ Tr. 177.

¹⁵ Tr. 202.

(c).¹⁶ Petitioner appealed the denial, and the case proceeded to hearing before the law judge on November 8, 2012.

C. Law Judge Oral Initial Decision

At the conclusion of the hearing, the law judge held petitioner proved he was eligible to obtain a medical certificate on the basis he did not have an alcohol dependence. However, the law judge ultimately concluded petitioner failed to prove he was eligible for a certificate because the evidence established petitioner had cognitive deficits disqualifying him from obtaining a certificate. The law judge only granted petitioner's appeal *in part*; therefore, petitioner did not receive a medical certificate. Concerning the determination that petitioner proved he did not have a history of alcohol dependence, the law judge stated he was not compelled to consider petitioner's BAC of 0.29 percent to be "etched in stone."¹⁷ Although he did not specifically identify which records he believed incorrect, the law judge stated he disregarded the medical records because portions of them were wrong; in this regard, the law judge stated the reports from Dr. Glass and Dr. Schwartz indicated the doctors did not believe petitioner had a substance dependence problem. The law judge also stated he considered petitioner's girlfriend, who testified at the hearing, to be "extremely credible," and therefore believed her statements—and petitioner's statements—that petitioner had not consumed alcohol since his March 2009 DUI.¹⁸

Instead of discussing and analyzing the cognitive deficit issue, the law judge described a previous case in which the Board reversed the law judge concerning a petitioner's alleged

¹⁶ Exh. A-1 at 12.

¹⁷ Initial Decision at 229.

¹⁸ Initial Decision at 225, 231.

cognitive deficit.¹⁹ The law judge resolved the issue in the case *sub judice*, stating “[petitioner] had no evidence on the issue of the cognitive deficit, and therefore, the petition to review the denial would be denied as to the cognitive screen, and I find that there just hasn’t been any evidence that the CogScreen was invalid.”²⁰

D. *Issues on Appeal*

Despite the fact that the law judge denied the petition, the Administrator nevertheless appeals the law judge’s decision on the basis the law judge determined petitioner proved he did not have an alcohol dependence under the FAR.²¹ The Administrator seeks validation of the FAA’s position concerning alcohol dependence “to preclude any argument based on *res judicata* if [p]etitioner applies for an airman medical certificate in the future and is denied based on a history of alcohol dependence.”²²

The Administrator argues petitioner failed to establish he did not meet any criteria for 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. In addition, the Administrator contends petitioner did not present evidence of recovery satisfactory to the Federal Air Surgeon, which would include “sustained total abstinence from alcohol for not less than the two preceding years.”²³ Lastly, the Administrator argues the law judge erred in disregarding some or all of the records in petitioner’s

¹⁹ *Id.* at 227-28 (referring to Administrator v. Hoover, NTSB Order No. EA-4094 (1994)).

²⁰ *Id.* at 231.

²¹ Petitioner has not appealed the law judge’s affirmation of the Administrator’s denial based on cognitive deficit.

²² Appeal Br. at 8.

²³ *Id.* at 11-12.

airman medical file, which questioned whether petitioner had a history of alcohol dependence and/or lacked sufficient recovery from alcohol dependence.

2. *Decision*

On appeal, we review the law judge's decision *de novo*, as our precedent requires.²⁴ In medical certificate applications under 49 C.F.R. part 821, subpart C of the Board's Rules of Practice, the petitioner has the burden of proving the Administrator's denial was erroneous.²⁵

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 Federal Air Surgeon's determination that petitioner was ineligible to receive a medical certificate under 14 C.F.R. §§ 67.107(a)(4), 67.207(a)(4), and 67.307(a)(4) due to substance dependence. Petitioner does not dispute the records in his airman medical file indicate he fulfilled two of the four criteria for substance dependence under the FAR. Title 14 C.F.R. §§ 67.107(a)(4)(ii)(A)-(D), 67.207(a)(4)(ii)(A)-(D), and 67.307(a)(4)(ii)(A)-(D) provide the following criteria as the standard for determining whether an applicant is ineligible for a medical certificate due to substance dependence:

- (ii) "Substance dependence" means a condition in which a person is dependent on a substance, other than tobacco or ordinary xanthine-containing (e.g., caffeine) beverages, as evidenced by--
 - (A) Increased tolerance;
 - (B) Manifestation of withdrawal symptoms;
 - (C) Impaired control of use; or

²⁴ 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).

²⁵ 49 C.F.R. § 821.25.

(D) Continued use despite damage to physical health or impairment of social, personal, or occupational functioning.

1. *Medical Record and Expert Opinions*

The Administrator's evidence consisted of a police report and conviction records establishing petitioner had a BAC of 0.29 percent while driving in March 2009. Dr. McDonald provided persuasive testimony indicating a person's ability to drive with such a high BAC unequivocally establishes increased tolerance.

Concerning the petitioner's evidence, neither the opinion of Dr. Glass nor Dr. Schwartz establishes petitioner's eligibility for a medical certificate. In addition to issuing their opinions based on clinical evidence rather than the FAR standards quoted above, both Dr. Glass and Dr. Schwartz believed petitioner's BAC was 0.18 percent while driving. In addition, Dr. Schwartz noted petitioner "recognized that he had drunk more than he should as his religion prohibits alcohol."²⁶ As Dr. McDonald noted, petitioner's apparent inability to abstain from consuming alcohol, despite his professed adherence to his religion, indicates an impaired control of use.

2. *De Novo Review of the Law Judge's Decision*

As described above, the law judge disregarded the vast majority of petitioner's airman medical file, ostensibly because Dr. Glass and Dr. Schwartz believed petitioner did not have an alcohol dependence problem. We find the law judge's rejection of petitioner's airman medical file on this basis was error. The law judge considered some information in the file—such as the police report and the reports from Dr. Glass and Dr. Schwartz—but rejected other portions of the file, such as a report from Charles Chesnow, D.O., who is the FAA's Chief Psychiatrist, and evidence clearly establishing petitioner's BAC while driving in March 2009 was 0.29 percent.

²⁶ Id.

We find erroneous the law judge's rejection of evidence plainly showing petitioner had an increased tolerance; principally, petitioner's ability to operate a motor vehicle while his BAC was over 3.6 times the legal limit.

At the hearing, the law judge credited the testimony of petitioner and petitioner's girlfriend. While petitioner's girlfriend may have been credible, she was not qualified to discuss the FAR standards for alcohol dependence under §§ 67.107(a)(4)(ii)(A)-(D), 67.207(a)(4)(ii)(A)-(D), and 67.307(a)(4)(ii)(A)-(D), nor did she attempt to discuss them. The law judge's broad acceptance of her and petitioner's testimonies that petitioner had not consumed alcohol in two years does nothing to obviate the fact that petitioner had a BAC of 0.29 percent while driving. Therefore, we do not find the law judge's credibility determinations to be dispositive of this issue. According to the FAR, in addition to abstaining from alcohol or any other substance on which one is dependent for a period of at least two years, an applicant must also present evidence acceptable to the Federal Air Surgeon indicating he or she is no longer dependent. The record in the case at issue lacks any such evidence.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted; and
2. The law judge's decision is reversed, in part.

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