

SERVED: April 12, 2019

NTSB Order No. EA-5849

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 12th day of April, 2019

_____)	
DANIEL K. ELWELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	EMERGENCY
)	
v.)	Docket SE-30615
)	
CHRISTOPHER A. SMITH,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

1. Background

Respondent appeals the oral initial decision of Administrative Law Judge Stephen R. Woody, issued March 14, 2019.¹ By that decision, the law judge determined the Acting Administrator proved respondent violated 14 C.F.R. § 67.403(a)(1).² The law judge ordered revocation of respondent’s airline transport pilot (ATP) certificate, commercial pilot certificate, airman medical certificate, and any other airman certificates which respondent might hold based

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

² The pertinent portion of § 67.403(a)(1) prohibits a person from making a fraudulent or intentionally false statement on an application for a medical certificate.

upon the violation of § 67.403(a)(1) and in accordance with 14 C.F.R. § 67.403(b)³ and (c).⁴ Respondent timely appealed. We deny respondent's appeal and affirm the law judge's decision and revocation of respondent's certificates.

A. Facts

Respondent began working in aviation in 2003, which is also when he received his first airman medical certificate.⁵ He attained his private pilot certificate in 2006, and subsequently attained an Airline Transport Pilot certificate, a Commercial Pilot certificate and was type rated on four aircraft.⁶

Respondent was issued a second class FAA Medical Certificate on August 11, 2015. Dr. Frank Gogan, who had been respondent's physician and aeromedical examiner, signed the certificate as the examiner.⁷ On the August 11, 2015 medical certificate application, respondent answered "no" to items 17(a), which asks, "Do you currently use any medication (prescription or nonprescription)?" and 18(m), which asks whether respondent had ever in his life had a mental disorder or any sort, depression, etc.⁸ Also on this medical certificate application, respondent answered item 19, which requested his visits to health professionals in the previous three years, with: July 2015, Dr. Frank Gogan, flight physical; February 2014, Urgent Care, Atlanta

³ The pertinent portion of § 67.403(b) states that a violation of § 67.403(a)(1) is a basis for suspending or revoking all airman, ground instructor, and medical certificates and ratings held by that person.

⁴ The pertinent portion of § 67.403(c)(1) states that an incorrect statement, upon which the FAA relied, made in support of an application for a medical certificate may serve as the basis for suspending or revoking a medical certificate.

⁵ Tr. 342.

⁶ Tr. 341-342.

⁷ Exh. A-11, Tr. 23, 30-31.

⁸ Complaint ¶¶ 13 and 17, Exh. A-11, Tr.28-30.

Highway, Montgomery, Alabama, flu.⁹ Respondent attested that all of his answers were complete and true to the best of his knowledge.¹⁰

In September 2016, respondent returned to Dr. Gogan for his annual medical certificate exam. Dr. Gogan informed respondent that he became aware of medications respondent was taking after receiving a courtesy letter from a urologist who was treating respondent.¹¹ Dr. Gogan asked respondent to provide information about the medications before he could issue the medical certificate.¹² Respondent obtained a letter dated October 16, 2016 from David D. Schaffer, D.O., Ph.D., in which Dr. Schaffer identified respondent as a patient since October 2014. The letter stated that respondent's "presenting complaint was a moderate depression or a dysthymia and excessive fatigue," and described the medications he prescribed beginning in October 2014. These medications included Wellbutrin, dextroamphetamine, and Adderall.¹³ Dr. Gogan stated that he didn't receive Dr. Schaffer's letter on October 16, 2016.¹⁴ However, respondent stated that he gave the letter to Dr. Gogan before he issued his medical certificate on October 17, 2016.¹⁵ Although Dr. Gogan initially issued the medical certificate, by November 18, 2016, respondent voluntarily surrendered it to Dr. Gogan after he learned that respondent was using medications not approved under FAA guidelines.¹⁶

⁹ Exh. A-11, Tr. 31.

¹⁰ Complaint ¶ 21.

¹¹ Tr. 46.

¹² Tr. 413-415.

¹³ Exh. A-10, Tr. 40-43.

¹⁴ Tr. 40.

¹⁵ Exh. A-9, Tr. 38, 368-369, and 413.

¹⁶ Exh. A-9, Tr. 36-39 and 414.

After respondent surrendered his medical certificate, he wrote a letter to Dr Gogan. The letter is undated, but respondent testified that he wrote it after surrendering his medical certificate because “[he] felt like [he] had done something wrong and essentially it was if it wasn’t an approved medication and [he] felt that [he] needed to explain that to him.”¹⁷ In the letter, respondent states that “...[he] felt limited in [his] body’s natural abilities to combat this Fatigue (sic), now manifesting into depression.”¹⁸ The medications prescribed by Dr. Schaffer helped respondent, and he filled his last 90 day quantity prescription for Dexedrine in May 2016.¹⁹

In early 2017, respondent and his family moved from Alabama to Florida. Respondent was employed by Simcom International, who trains new and advancing pilots.²⁰ Although it is disputed how he obtained the records, in October 2017, respondent had possession of his original airman medical certificate file previously held by Dr. Gogan.²¹ Because of the distance back to Alabama, in January 2018, when respondent sought his medical certificate, he met with Dr. Shewmaker. He learned about Dr. Shewmaker from his employer.²²

On January 20, 2018, respondent applied for a medical certificate using MedXpress.²³ He stated that he did not use the MedXpress user guide, but if he needed help, he used the drop

¹⁷ Tr. 376, Exh. A-8.

¹⁸ *Id.*

¹⁹ Tr. 374 and 417.

²⁰ Tr. 379-380.

²¹ Tr. 57, 62-63.

²² Tr. 382.

²³ *Id.*

down menu, or information bullets, included in the program.²⁴ Respondent again answered “no” to items 18m and “yes” to item 19, but he did not include his visits with Dr. Schaffer in this list of health professionals visited during the previous three years. He also attested in item 20 that his answers were complete and true to the best of his knowledge.²⁵

Following a letter of inquiry from the FAA, respondent wrote to the Aerospace Medicine Division on June 8, 2018, and included a letter from Dr. Schaffer also dated June 8, 2018. In this letter, Dr. Schaffer writes that “[he] diagnosed [respondent] with an Adjustment Disorder With Depressed Mood (F43.21) and Insomnia Disorder (G47.00).”²⁶ Respondent testified that this letter was the first time he became aware of a diagnosis from Dr. Schaffer or any other medical professional.²⁷ He considered Dr. Schaffer to be a counselor, and did not equate his interaction with him to be medical treatment that is reportable on the medical certificate application.²⁸

In respondent’s Answer to the Complaint, he admits that on both his January 20, 2018 and August 11, 2015 medical certificate applications, he answered “yes” to item 19, which seeks the medical professionals visited during the previous three years, even though he failed to disclose any visits “to Dr. Schaffer, a psychiatrist, concerning [his] history of Adjustment Disorder With Depressed Mood, and Insomnia Disorder.”²⁹ Additionally, for the August 11,

²⁴ Tr. 404.

²⁵ Complaint ¶¶ 6, 10 and 11.

²⁶ Exh. A-5.

²⁷ Tr. 385-386.

²⁸ Tr. 365.

²⁹ Answer ¶¶ 10 and 20.

2015 medical certificate application, respondent admits that his response of “no” to item 17a “was not correct in that [he was] using Wellbutrin and/or dextroamphetamine (Dexedrine).”³⁰

1. Affidavit of Dr. Schaffer dated March 18, 2019

a. New Matter under 821.57(d)

Respondent asserts that new matter, as defined by 49 C.F.R. 821.57(d), should be admitted in this case. In an emergency action, a party must show that it has acquired information (“new matter”) that “could not have been discovered by the exercise of due diligence prior to the date on which the evidentiary record closed.”³¹ Due diligence requires a level of activity that would ordinarily be exercised by a reasonable and prudent person under the particular circumstances.³²

On February 26, 2019, the Acting Administrator sought subpoenas to compel testimony at the hearing, including a subpoena for Dr. Schaffer. The law judge issued the subpoenas on February 28, 2019, identifying the hearing dates as March 12-14, 2019. On March 1, 2019, respondent sought a subpoena *duces tecum* to be served on Dr. Schaffer for “[a]ny and all documents, records, and things, which relate to or otherwise concern the medical treatment of Respondent Christopher Smith.”³³ It was signed by the law judge and respondent sent it via FedEx to Dr. Schaffer on March 4, 2019. The FedEx tracking form indicates that the package

³⁰ Answer ¶ 18.

³¹ 49 C.F.R. Part 821.57(d).

³² Black’s Law Online Dictionary, <https://thelawdictionary.org/due-diligence/>, viewed on April 2, 2019.

³³ The subpoena also states that “personal appearance for this subpoena is not required as long as the requested documents are turned over to Gregory S. Winton.... **Please note, however, that a previous subpoena does require your appearance at the hearing in this matter.**” (emphasis added.)

was left at the door of Dr. Schaffer's business, Park Place Psychiatry, LLC, on March 5, 2019.³⁴ The documents were due to respondents' counsel by March 6, 2019.

Respondent's counsel proffered on March 12, the second day of the hearing, that Dr. Schaffer's notes, at a minimum, were critical to demonstrate respondent's knowledge about a diagnosis of a mental condition. Although respondent sought and issued a subpoena *duces tecum* to Dr. Schaffer, he did not know if Dr. Schaffer was at the address where the FedEx package including the subpoena was delivered.³⁵ Dr. Schaffer did not produce documents, and there was no indication that he would appear to testify. Respondent proffered no evidence that he attempted any other contact with Dr. Schaffer prior to the hearing.

Then on the last day of the hearing, which was convened so the law judge could issue his oral decision, respondent's counsel stated that respondent received a telephone call from Dr. Schaffer the prior evening. Counsel made an offer of proof about what he believed Dr. Schaffer would say in testimony, but he did not request that the hearing be postponed so the actual evidence could be discovered.³⁶

Respondent attached to his Appeal Brief an affidavit from Dr. Schaffer dated March 18, 2019. In the affidavit, Dr. Schaffer states that, "I never received a summons to appear in court on Chris [sic] behave [sic]. I did not get the subpoena for records until the day after they were due."³⁷ The due date was March 6; thus Dr. Schaffer claims to have received the subpoena *duces tecum* on March 7, 2019.

³⁴ The letterhead on the cover sheet for Dr. Schaffer's March 18, 2019 Affidavit that was sent via facsimile to respondent's counsel is for Park Place Psychiatry, LLC, at the same address used for the subpoenas.

³⁵ Tr. 169.

³⁶ Tr. 453-456.

³⁷ See Addendum to R's Appeal Brief.

To determine if the proposed new matter should be considered, the Board does not look to the substance of the testimony, but rather whether the respondent could have obtained the testimony prior to the date on which the evidentiary record closed.³⁸ Here there is no basis to determine that Dr. Schaffer's testimony could not have been discovered by the close of the record. At the beginning of the hearing on March 12, 2019, respondent proffered that Dr. Schaffer's notes were critical to his defense. Similarly, when explaining to the law judge the late evening telephone call between respondent and Dr. Schaffer on March 13, 2019, respondent's counsel stated the doctor's testimony would support respondent's testimony. Yet respondent provides no evidence that at any time between the acknowledgement of the FedEx delivery of the subpoena *duces tecum* on March 5 and the hearing beginning a week later, that he attempted to contact Dr. Schaffer to obtain or verify this vital information. Under the circumstances, we find this is not the action of a reasonable and prudent person. Thus, respondent did not exercise due diligence prior to the closure of the evidentiary record. The Board finds that the new matter the respondent advances in support of his appeal, specifically, the post-hearing testimony of Dr. David D. Schaffer, does not meet regulatory standard and thus is not admissible in this case.

b. Dr. Schaffer's affidavit would not change the outcome

Although Dr. Schaffer's March 18, 2019 affidavit is properly excluded from this matter, the Board nonetheless reviewed its statements, and we find that the affidavit merely reiterates the testimony offered during the hearing. For example, in the first paragraph, Dr. Schaffer confirms that respondent presented on October 3, 2014, with complaints of "excessive fatigue, sleeping problems, and low energy."³⁹ Dr. Schaffer treated Mr. Smith with the antidepressant Wellbutrin,

³⁸ 49 C.F.R. § 821.57(d)(3).

³⁹ *Id.* at Addendum ¶ 1.

which respondent subsequently stopped taking at some point because it “failed to provide any appreciable improvement.”⁴⁰ Dr. Schaffer described seeing respondent, either alone or with his wife, on five occasions between August 10, 2015 and October 10, 2016 “for counseling” related to respondent’s “bouts of fatigue and lack of energy.”⁴¹ Similarly, respondent testified that following Dr. Gogan’s suggestion that counseling might help him with his response to the multiple stresses that he faced, he contacted Dr. Schaffer to address his worsening fatigue and mood fluctuations.⁴²

Dr. Schaffer stated that he prescribed respondent dextroamphetamine or Adderall (a combination of amphetamine and dextroamphetamine) as needed.⁴³ During the hearing, respondent offered Exhibit R-1, which includes a medication log for controlled substances prescribed between August 3, 2015 and August 3, 2016, and which included the medication prescribed by Dr. Schaffer.⁴⁴ He also stated that respondent had stopped flying during this time.⁴⁵ Interestingly, on direct examination and during the law judge’s questioning, respondent testified that he did not fly during the period that he was taking the medications prescribed by Dr. Schaffer.⁴⁶ Yet on cross examination, after reviewing the medical certificate application dated April 24, 2017 in which respondent reported flying 100 hours during the past six months, he testified that “...sporadically I could have flown.”⁴⁷

⁴⁰ *Id.*

⁴¹ *Id.* at Addendum ¶ 3.

⁴² Tr. 352-353.

⁴³ Addendum to R’s Appeal Brief at ¶ 4.

⁴⁴ Tr. 358-359, 417, 421-422.

⁴⁵ *Supra*, note 32.

⁴⁶ Tr. 359 and 417.

⁴⁷ Exh. A-7 at 52.

Last, Dr. Schaffer offered his belief that respondent “was unaware of my diagnosis of Adjustment Disorder with Depressed Mood (F43-21) or of Insomnia Disorder (G47.00) until I put the diagnosis in a June 8, 2018 letter.” He concluded that respondent “was not personally aware of any other formal diagnosis by me prior to the letter dated June 8, 2018.”⁴⁸ Both of these statements are conclusory. While they conform with testimony offered by respondent, we find their value to be minimal. Dr. Schaffer may testify whether respondent asked about any diagnosis or whether Dr. Schaffer told respondent about his diagnosis, but Dr. Schaffer cannot reasonably testify as to what respondent knew. Moreover, conspicuously absent from Dr. Schaffer’s affidavit is any discussion of his October 16, 2016 letter that he wrote to Dr. Gogan, which respondent obtained from Dr. Schaffer and hand-delivered to Dr. Gogan, in which Dr. Schaffer states that respondent sought his help for “moderate depression or a dysthymia and excessive fatigue.”⁴⁹

Therefore, Dr. Schaffer’s affidavit does not further the issue of respondent’s actual knowledge of a formal diagnosis or underlying condition which was reportable on the FAA medical certification applications.

B. Procedural History

On February 13, 2019, the Acting Administrator issued an emergency order, which became the complaint in this case, revoking respondent’s ATP, commercial pilot, airman medical certificates, and all other certificates respondent may have held.⁵⁰ The complaint alleged respondent violated 14 C.F.R. § 67.403(a)(1) by intentionally falsifying his answers to

⁴⁸ *Supra*, note 32 at ¶¶ 9 and 10.

⁴⁹ Exh. A-10 at 2.

⁵⁰ Tr. 5.

items 18(m), 19 and 20 on two airman medical applications, dated August 11, 2015 and January 20, 2018, as well as item 17(a) on the August 11, 2015 application.⁵¹ The complaint noted that, alternatively, 14 C.F.R. § 67.403(c) provides for suspension or revocation of respondent's airman medical certificate based on his incorrect statement in the medical certificate application upon which the FAA relied.⁵²

Respondent timely filed a notice of appeal on February 15, 2019, and timely filed his Answer on February 19, 2019. The law judge conducted a hearing on March 8 and 12-13, 2019, and issued an oral initial decision on March 14, 2019. Frank J. Gogan, MD, (respondent's former AME) testified on behalf of the Acting Administrator. Susan E. Northrup, MD (the FAA Regional Flight Surgeon for the Southern Region and Senior Regional Flight Surgeon) also testified on behalf of the Acting Administrator. Respondent testified on his own behalf.

Dr. Gogan is a priest as well as a doctor. He earned a Bachelor of Arts degree from St. Mary's University in Halifax, Nova Scotia, a theology licentiate from Laval University in Quebec City, and his medical degree from Dalhousie University also in Halifax.⁵³ He is a private practitioner as well as an airman medical examiner. He became an AME in 1987 and he completes approximately 50 exams each year.⁵⁴ Prior to the August 11, 2015 medical application, Dr. Gogan issued eight medical certificates to the respondent.⁵⁵ On November 3,

⁵¹ Complaint ¶¶ 6-11, 13-21. Item 20 on the airman medical application is not a question requiring an answer. Rather it is a certification which requires the applicant to sign the form, thereby certifying, in relevant part, that "all statements and answers provided by me on this application form are complete and true to the best of my knowledge, and I agree that they are to be considered part of the basis for issuance of any FAA certificate to me."

⁵² *Id.* at 4.

⁵³ Tr. 23.

⁵⁴ Tr. 63-64.

⁵⁵ Tr. 79-80.

2014, Dr. Gogan documented a primary care appointment with respondent in which he diagnosed respondent with situational depression because he lost his job, he also prescribed a 30-day regiment of Wellbutrin.⁵⁶ Dr. Gogan testified that he did not consider his diagnosis to hinder respondent's application for his medical certificate because the depression was situational and the prescription was not automatically disqualifying and was prescribed when respondent was not flying.⁵⁷ Nonetheless, he testified that "there would be a verbal discussion and I would never prescribe a medication like Wellbutrin to a patient without him being – with him being unaware of why I was prescribing it."⁵⁸ He also testified that respondent surrendered his medical certificate to him in 2016 because he was taking prescription medications that "are not in accordance with the FAA regulations."⁵⁹

Susan E. Northrup, M.D. testified both as a fact and expert witness.⁶⁰ She has two positions with the FAA. Beginning in April 2007, she is the southern regional flight surgeon; and for the past two years, she is the senior regional flight surgeon. Part of her duties for the southern region are to oversee the airman medical certification program, including managing the AMEs. As the senior regional flight surgeon, she ensures that nine regions operate consistently, and she promulgates and implements policy.⁶¹ Dr. Northrup received her undergraduate and medical degrees from Ohio State University and completed a family practice internship there. She spent a year at the University of Texas Health Science Center and completed her residencies

⁵⁶ Tr. 121-123.

⁵⁷ Tr. 121-123.

⁵⁸ Tr. 123.

⁵⁹ Tr. 46-47.

⁶⁰ Tr. 185-186.

⁶¹ Tr. 179-180.

at Brooks Air Force Base.⁶² She explained the electronic medical certification process, known as MedXpress, which became mandatory in 2012. Prior to 2012, airmen could apply for their medical certificates either on paper forms or online.⁶³ Dr. Northrup testified that airmen must be truthful on these applications because the AMEs must determine if the airmen are suitable to fly.⁶⁴ She stated that airmen may see psychiatrists for counseling, but once medication is prescribed, the airmen are then receiving treatment.⁶⁵ Additionally, any routine use of medication must be reported so the AME may determine its “affect [sic] in flight on the individual’s alertness and ability to fly.”⁶⁶ Dr. Northrup testified that when an airman receives a prescription for amphetamines, and the next day has his flight physical, and the next day fills the prescription, the airmen should have reported the doctor’s visit that resulted in the prescription and reported the prescription to the AME.⁶⁷ She also testified that sporadic appointments with a psychiatrist for situational depression should be reported on the medical certificate application.⁶⁸ After exchanges of correspondence between respondent and the FAA, Dr. Northrup testified that she does not have adequate information to determine if respondent is qualified for his airman medical certificate.⁶⁹ She does state, however, that after reviewing the revocation order and respondent’s medical file, she believes he falsified both his August 11, 2015 and January 20,

⁶² Tr. 183.

⁶³ Tr. 192-193.

⁶⁴ Tr. 201, 208.

⁶⁵ Tr. 205.

⁶⁶ Tr. 206.

⁶⁷ Tr. 207.

⁶⁸ Tr. 217.

⁶⁹ Tr. 251.

2018 medical applications.⁷⁰

Respondent testified that he completed his medical certificate applications based upon the information he knew. None of his answers were knowingly false when submitted. He believed Dr. Schaffer was providing counseling, thus, he did not have to include Dr. Schaffer in his answer to item 19, which sought a list of medical professionals seen during the previous three years. He asserted that he was not taking any of the disqualifying medications at the time that he completed his medical certificate applications; therefore, his answer to item 17(a) was accurate. And finally, he was not aware of a diagnosis for mental disorder of any sort until June 8, 2018, so his answers to item 18(m) were accurate. During this time, he faced many stress-inducing obligations, including his spouse having numerous surgeries requiring respondent to care for her and their young children while working a demanding job that necessitated that he be away from home.⁷¹ He began suffering from debilitating fatigue.⁷² Dr. Gogan, as his primary care physician, recommended several treatments, including testosterone injections and diet and exercise changes.⁷³ Dr. Richardson, a urologist, administered the testosterone treatments, which helped for a period of time but had difficult side effects.⁷⁴ Respondent testified that Dr. Gogan also recommended counseling to help cope with the stress of his home and work responsibilities. In late 2014, respondent contacted Dr. Schaffer, a psychiatrist, based upon his mother's recommendation.⁷⁵ Respondent testified that Dr. Schaffer was counseling him for his fatigue,

⁷⁰ *Id.*

⁷¹ Tr. 346-348.

⁷² Tr. 349.

⁷³ Tr. 349-350.

⁷⁴ Tr. 349-352.

⁷⁵ Tr. 352-353.

and during that counseling, he prescribed several medications, including Wellbutrin, Ambien and Dexedrine. The Dexedrine, in particular, helped to regulate his mood and energy level.⁷⁶ Respondent filled his prescription on August 12, 2015, and last filled his 90-dose prescription for Dexedrine in May 2016.⁷⁷ Throughout his counseling with Dr. Schaffer, respondent states that he never told respondent he had diagnosed him with a mental disorder.⁷⁸

C. Law Judge's Oral Initial Decision

The law judge issued an Oral Initial Decision (OID) on March 14, 2019. The law judge's OID determined that the Acting Administrator proved the regulatory violation of 14 C.F.R. § 67.403(a)(1) as alleged by a preponderance of reliable and probative evidence.⁷⁹ In making this determination, the law judge summarized the regulatory violation alleged in the complaint; noted respondent's admissions, denials, and affirmative defenses in his Answer; noted the admitted exhibits; summarized witness testimony and relevant exhibits; assessed the credibility of the witnesses; and explained his assessment of the evidence in terms of the three prongs of the Hart v. McLucas intentional falsification standard.

With respect to the third prong of the Hart v. McLucas standard, the law judge determined the Acting Administrator established by a preponderance of the evidence that respondent's false representations concerning his history of mental conditions and reportable visits to healthcare providers were made with knowledge of their falsity.⁸⁰ The law judge's determination was based on his explicit credibility determinations, which were unfavorable to

⁷⁶ Tr. 357-359.

⁷⁷ Tr. 358, Exh. R-1.

⁷⁸ Tr. 361.

⁷⁹ Tr. 502.

⁸⁰ Tr. 492-495.

respondent, and documentary evidence.⁸¹ In this regard, the law judge found not credible respondent's testimony that he did not understand or believe that he had a diagnosis of a mental condition, nor that the visits to his psychiatrist were reportable on the airman medical application.⁸²

Finally, the law judge also found that respondent's answer to item 17(a) on his August 11, 2015 application was made with knowledge of its falsity. He found respondent's testimony about his use of medications lacked credibility in light of the documentary evidence. While there is no evidence that respondent was taking medication on August 11, 2015, there is documentary evidence of past and then-current prescriptions that respondent received for disqualifying medications, as well as his letter to Dr. Gogan in which he expresses his frustration with the latitude military pilots are given related to medications, but civilian pilots are not. He also includes in his letter that he does not take the disqualifying medication within eight hours of flying.⁸³

D. Issues on Appeal

The thrust of respondent's argument on appeal is whether the record contains sufficient evidence to find that respondent knowingly made false or fraudulent statements on the airman medical applications he certified on August 11, 2015 and January 20, 2018, and generally that the law judge's decisions in each instance were not supported by reliable, probative and substantial evidence.

⁸¹ Tr. 493.

⁸² *Id.*

⁸³ Tr. 496-498.

Specifically, respondent questions the basis for the law judge's determinations as to respondent's personal knowledge of a history of mental disorder resulting from his diagnosis of adjustment disorder with depressed mood, item 18(m), and whether respondent made intentionally false statements as to items 17(a) (use of medication, prescription or non-prescription) and 19 (list of visits to medical professionals during previous three years).

The Acting Administrator argues the law judge committed no error and opposes respondent's arguments for reversal.

2. *Decision*

While we give deference to our law judge's rulings on certain issues, such as credibility determinations,⁸⁴ we review the law judge's decision *de novo*.⁸⁵

A. *Intentional Falsification*

We apply the three-prong standard articulated in Hart v. McLucas in intentional falsification cases. The Acting Administrator must prove an airman: (1) made a false representation, (2) in reference to a material fact, and (3) with knowledge of the falsity of the fact.⁸⁶

The allegations in the complaint regarding airman medical application items 17(a), 18(m) and 19 are appropriate for analysis under the Hart v. McLucas standard. Item 20 required that respondent certify the veracity of his answers.

⁸⁴ Administrator v. Porco, NTSB Order No. EA-5591 at 13 (2011), *aff'd sub nom.*, Porco v. Huerta, 472 Fed.Appx. 2 (D.C. Cir. 2012) (*per curiam*).

⁸⁵ 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).

⁸⁶ *Supra* n. 8.

1. *False Representation*

In the Initial Oral Decision, the law judge reviewed the specific allegations in the complaint and concluded that respondent admitted his answers were false to items 18(m) and 19 on both his August 11, 2015 and January 20, 2018 airman medical applications, and that his answer was false to item 17(a) on the August 11, 2015 application.⁸⁷ On appeal, respondent has not challenged the law judge's finding in this regard. Therefore, the issue of falsity of the respondent's responses to those items is not before us, and we find the Acting Administrator has met his burden of proof with respect to the first prong of the Hart v. McLucas standard as to items 18(m) and 19 on both his August 11, 2015 and January 20, 2018 airman medical applications, and as to item 17(a) on the August 11, 2015 application.

2. *Materiality*

As stated above, the law judge reviewed the specific allegations in the complaint and concluded that respondent had admitted his answers were material to items 18(m) on both his August 11, 2015 and January 20, 2018 airman medical applications.⁸⁸ On appeal, respondent has not challenged the law judge's finding in this regard. Therefore, the issue of materiality of the respondent's responses to those items is not before us, and we find the Acting Administrator has met his burden of proof with respect to the second prong of the Hart v. McLucas standard as to item 18(m) on both applications.

⁸⁷ Initial Oral Decision at 459. At the conclusion of the Acting Administrator's case in chief, respondent attempted to amend his Answer to deny allegation 18, which read "Your response to Item 17(a) was not correct in that you were using Wellbutrin and/or dextroamphetamine (Dexedrine)." The law judge considered arguments from both parties and denied respondent's request. Oral Initial Decision at 337. We find no error in the law judge's decision on this issue.

⁸⁸ *Id.*

With regard to items 17(a) and 19, respondent has not challenged the materiality of these items on appeal. Dr. Northrup testified that the FAA necessarily relies on the information provided by airmen on the application and “depend[s] on the truthfulness of [an airman’s] responses to determine whether they are suitable for flight.”⁸⁹ Further, the text of the certification on both airman medical applications signed by respondent states that the answers provided on the form “are to be considered part of the basis for issuance of any FAA certificate.”⁹⁰ Therefore, the expert testimony, as well as the signed certifications, support the conclusion that respondent’s answers to items 17(a) and 19 on both applications were material to the FAA’s determination of his suitability to hold a medical certificate. Accordingly, we find the Acting Administrator has met his burden of proof with respect to the second prong of the Hart v. McLucas standard as to items 17(a) and 19 on both applications.

3. *Knowledge of Falsity*

In intentional falsification cases, the Board has found the law judge’s findings regarding credibility of the witnesses are essential to the case. In Administrator v. Dillmon, the Board explicitly instructed law judges to make specific factual findings—especially with regard to credibility—when a respondent asserts, as a defense, he or she believed the answer or information provided on a document was correct.⁹¹ The District of Columbia Circuit’s opinion remanding Dillmon stated the Board must complete such an analysis, in light of the three-part Hart v. McLucas test.⁹² As a result, and as the Board emphasized in Dillmon post-remand, credibility findings from the law judges are essential in intentional falsification cases.

⁸⁹ Tr. at 201.

⁹⁰ Exh. A-7 at 19 and 59.

⁹¹ NTSB Order No. EA-5528 (2010).

⁹² See, Dillmon v. NTSB, 588 F.3d 1085, 1094 (D.C. Cir. 2009).

Additionally, in appropriate cases, a law judge may rely on circumstantial evidence in making a finding regarding an airman's knowledge of the falsity of a statement.⁹³

The law judge recognized the importance of respondent's credibility when considering respondent's knowledge of the falsity of his responses on his medical certificate applications. "[The] question of the knowledge of the falsity of the information provided turns largely on the credibility of Respondent's explanations regarding his failure to [provide accurate information] in response to [items on the airman medical application] ... I find that the inconsistencies between Respondent's testimony and the explanation provided to his then primary care provider and AME undermines the credibility of that testimony."⁹⁴

a. Item 17(a) (use of medication, prescription or non-prescription)

Respondent argues that the law judge's decision that he knowingly made a false statement in his answer to item 17(a) on his medical certificate is not supported by a preponderance of the evidence. The law judge made specific credibility findings in accordance with Administrator v. Porco and evaluated the probative evidence.⁹⁵ Specifically, in finding respondent's testimony not credible with regard to his knowledge of prescription medication he was taking at the time of his August 11, 2015 airman medical application, the law judge focused on evidence which established "an individual with a strong motive not to disclose his use of Dexedrine, whose words and actions are indicative of an individual trying to conceal his use of an unapproved medication. Thus, knowing that he had been prescribed the medication and

⁹³ See, Singleton v. Babbitt, 588 F.3d 1078, 1083 (D.C. Cir. 2009) ("That a pilot had the requisite subjective understanding will often be apparent from circumstantial evidence."); Dillmon II, NTSB Order No. EA-5528 at 14.

⁹⁴ Oral Initial Decision at 490-491.

⁹⁵ NTSB Order No. EA-5591 (2011).

intending to fill the prescription and begin using it the next day, nonetheless answered no to question 17(a). Such actions are deceptive and designed to circumvent the purpose of the medical application process in question 17(a) specifically, which is to identify medications that may impact an individual's medical fitness to fly.”⁹⁶

Respondent admitted in his Answer that he was taking Wellbutrin and/or dextroamphetamine (Dexedrine) at the time he completed his airman medical application on August 11, 2015. No exhibits were presented which would have shown prescriptions written or filled prior to August 2015.⁹⁷ Thus, while the record is silent as to when respondent may have been previously prescribed one or both of those medications, he admitted in his Answer to the Complaint that he was taking prescription medication at the time he completed the August 11, 2015 airman medical application. In his testimony, respondent denied that he was taking any medication on that date, and no other testimony confirmed respondent’s use of any medication on that date. However, the law judge considered the documentary evidence, respondent’s admission and all testimony regarding respondent’s use of medication on August 11, 2015, and concluded that the evidence undermines respondent’s credibility.

As the Ninth Circuit found in Hart v. McLucas, 14 C.F.R. § 67.403(a)(1) prohibits a person from making a fraudulent or intentionally false statement on an application for a medical certificate. This regulation proscribes “two overlapping, but nevertheless separate offenses, one involving fraud, the other involving ‘intentional’ falsity.”⁹⁸ Here, at a minimum, respondent was prescribed medication the day before his August 11, 2015 airman medical application. His

⁹⁶ Oral Initial Decision at 498.

⁹⁷ Exhibit R-1 does not show any prescriptions written or filled prior to August 12, 2015. The search criteria to create Exh. R-1 was from “08/03/15 to 08/03/16.”

⁹⁸ 535 F. 2d 516, 519 (9th Cir. 1976).

own words in a letter to his AME demonstrate that respondent was aware that the medication he was prescribed was considered disqualifying by the FAA.⁹⁹ He did not fill the prescription until the day after he completed the medical application.¹⁰⁰ The Board has considered “the incentive an airman...would have for not disclosing information that presumptively would be significant to the certification decision.”¹⁰¹

If we disregard respondent’s admission with regard to the falsity of his response to item 17(a), and instead credit his argument on appeal that he was not taking any medication at the time he completed the application, the documentary evidence belies that conclusion. Respondent received a prescription the day before for a disqualifying medication, and indeed he filled the prescription the day after he completed the application. He had been taking this medication, or one similar, for months prior to August 2015.¹⁰² We agree with the law judge that such actions are “deceptive and designed to circumvent the purpose of the medical application process in question 17(a).”¹⁰³ As we previously held in Boardman, “[t]he very act of submitting a medical certificate application invites reliance by the FAA on the responses it contains, and the nature of the responses, every airman can be fairly presumed to appreciate, dictates whether the certificate will be issued.” Here, respondent knew the prescription he had received, had he disclosed it, would have been disqualifying.¹⁰⁴ Yet, he chose not to disclose it. “We think that such an airman, having acted in a manner that could be viewed as evincing a willful disregard of the truth

⁹⁹ Exh. A-8.

¹⁰⁰ Exh. R-1.

¹⁰¹ Daschle v. Boardman, SE-14668 (1996).

¹⁰² Tr. 358-359.

¹⁰³ Oral Initial Decision at 498.

¹⁰⁴ Exh. A-8.

or falsity of the information officially submitted and, therefore, in a way reflecting contempt for the airman medical certification process, should be determined to have intended that whatever answer he gave be utilized in the review of his qualifications.”¹⁰⁵

Based on the evidence of record, we see no reason to overturn the law judge’s credibility determinations on this issue. We agree with the law judge’s determinations on credibility and find that respondent had knowledge that he was taking medication at the time he completed the airman medical application on August 11, 2015. We therefore conclude that respondent’s response to item 17(a) was willfully fraudulent because it was designed to conceal the prescription for disqualifying medication that he received the day before he completed the airman medical application and conceal his intent to begin taking the disqualifying medications the day after he completed the airman medical application.

b. Item 18(m) (diagnosed with, had, or currently have a mental disorder)

Regarding item 18(m) on the airman medical applications, respondent argues that he did not have personal knowledge that he had been diagnosed with a mental disorder because his doctors had never shared their formal diagnosis with him.¹⁰⁶

The law judge reviewed the testimony offered by respondent at the hearing and found “less than credible” his assertions that he did not know he had a mental disorder.¹⁰⁷ The law judge noted specifically that at least as early as October 2016, respondent had seen the letter from the psychiatrist Dr. Schaffer, which included respondent’s presenting conditions of “moderate depression or a dysthymia and excessive fatigue.”¹⁰⁸

¹⁰⁵ *Id.*

¹⁰⁶ Tr. 361 and 383.

¹⁰⁷ Oral Initial Decision at 488.

¹⁰⁸ Exh. A-10 at 2.

Respondent's undated letter to Dr. Gogan written soon after he surrendered his medical certificate in November of 2016 stated that he knew at the time of writing the letter that he had been receiving treatment from the psychiatrist, Dr. Schaffer, for situational depression secondary to chronic fatigue, that his fatigue was "now manifesting into depression," and he had previously been diagnosed by Dr. Schaffer with ADHD.¹⁰⁹ Respondent acknowledged that he had purposely not informed Dr. Gogan of visits to Dr. Schaffer to seek psychological treatment, stating, "I apologize for not trusting you to aid me in an informative decision...you would have...realized the need for us to possibly navigate a special issuance."¹¹⁰ Respondent further complained that civilian pilots are "limited on truly being able to receive pharmaceutical maintenance after all other avenues have been explored and exhausted."¹¹¹ Respondent indicated that he knew the pharmaceuticals he was taking were not approved by the FAA, but because they were approved for military pilots, he determined on his own that he could take them. He acknowledged that he chose to "ask for forgiveness instead of permission."¹¹²

Respondent's argument focuses almost exclusively on his purported lack of knowledge of a formal diagnosis. This argument improperly narrows the scope of the preamble to item 18 and the text of item 18(m) specifically, which asks the applicant "have you ever in your life been diagnosed with, had, or do you presently have... mental disorders of any sort; depression, anxiety, etc."¹¹³ The preamble also instructs the applicant answer "yes" or "no" for every

¹⁰⁹ Exh. A-8.

¹¹⁰ Exh. A-8 at 1.

¹¹¹ *Id.* at 2.

¹¹² *Id.*

¹¹³ Exh. A-7 at 19 and 59.

“condition” listed.¹¹⁴ The 2015 version of the instructions for item 18 requires the applicant to “provide an explanation for all medical history items” where the applicant answered “yes.”¹¹⁵ The 2017 version of the instructions for item 18 specify the applicant must “answer ‘yes’ for every condition you have ever been diagnosed with, had, or presently have and describe the condition and approximate date.”¹¹⁶

It is clear from the text of the form and both versions of the accompanying instructions, that item 18(m) is not limited to a formal diagnosis. Rather, any medical “condition” is to be reported. The existence of an underlying condition is not dependent on respondent being told the formal diagnosis or condition. He knew he had experienced chronic fatigue, which was “manifesting into depression.”¹¹⁷ He knew he had been repeatedly prescribed medication prohibited by the FAA.¹¹⁸ If we believe he was never told of any formal diagnosis, he was nonetheless aware of an underlying condition for which he sought treatment from Dr. Gogan and Dr. Schaffer.

We also consider respondent’s years of experience as a commercial pilot and ATP. The two airman medical applications at issue were not the first such applications respondent completed. He had previously encountered items 17(a), 18(m), 19, and 20 numerous times in his aviation career. If respondent genuinely did not understand that he had been diagnosed with a reportable condition, and genuinely did not believe that he suffered from an underlying condition, he nonetheless knew he had been prescribed medication at least as early as October

¹¹⁴ *Id.*

¹¹⁵ Exh. A-2.

¹¹⁶ Exh A-1.

¹¹⁷ Exh. A-8.

¹¹⁸ *Id.* And Exh. R-1.

2014, and had conducted research on what medications were permitted for military pilots. The fact that he was repeatedly issued prescriptions by his psychiatrist should have alerted respondent that his experience with Dr. Schaffer was not merely counseling but was indeed treatment for a medical condition. Dr. Northrup testified that while psychiatrists can see patients for counseling, when the psychiatrist prescribes medication, that is no longer counseling, but is instead “treatment,” which would be required to be reported on the airman medical application.¹¹⁹

We find it highly unlikely that a pilot of respondent’s experience and intelligence, knowing that he would be required to complete airman medical applications in the future, would not have inquired of any of his doctors the diagnosis that necessitated taking medication, or whether he had some reportable underlying condition. Indeed, he saw Dr. Schaffer and received a prescription for disqualifying medication one day before completing his August 11, 2015 application. Yet there is no evidence respondent thought to inquire about the reason he was being prescribed medication. Such an intentional failure to obtain the simplest understanding of his medical status to ensure he provided correct information on his airman medical application would amount to willful disregard for truth or falsity. *See, Cooper v. NTSB*, 660 F.3d 476, 483-484 (D.C. Cir. 2011) (“The finder of fact may infer that a defendant acted knowingly if he deliberately closed his eyes to what otherwise would have been obvious to him and did not act through ignorance, mistake, or accident.”); *See also, Moore v. Hartman*, 102 F. Supp 3d 34 (D. DC 2015) (“a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts” (internal citations omitted)); *Taylor v. Huerta*, 723 F.3d. 210 (D.C. Cir. 2013).

¹¹⁹ Tr. at 205.

Therefore, we find the record contains sufficient evidence to support the law judge's credibility determinations regarding respondent's knowledge that his responses to item 18(m) on both applications were false. Because the law judge's credibility determination in this regard was not arbitrary or capricious, we find no basis to reverse that determination. Accordingly, we conclude the Acting Administrator has met his burden with respect to the third prong of the Hart v. McLucas standard as to item 18(m) on both applications.

c. Item 19 (visits to health professionals within previous three years)

Regarding item 19 on the airman medical application, respondent argues he did not report visits to his psychiatrist because he believed those visits were only for counseling, either alone or with his wife, and therefore not reportable.¹²⁰ Respondent's argument in this regard is based upon an exception found in the 2018 version of the MedXpress user guide. In that version, applicants were instructed that they need disclose visits to medical professionals for counseling "only if related to a personal substance abuse or psychiatric condition."¹²¹ It is notable, that such an exception did not exist in the 2015 version of the MedXpress user guide which was in effect when respondent completed his August 11, 2015 airman medical application, and thus his explanation does not justify the omission of his visits to Dr. Schaffer on the 2015 application. Additionally, respondent admitted that he did not use the MedXpress user guide when completing either application, and was not familiar with their contents at the time.¹²² We therefore find respondent's explanation that he did not report visits to his psychiatrist because he believed they were "counseling" to be inconsistent with the evidence.

¹²⁰ Tr. at 362.

¹²¹ Exh. A-1 at 25.

¹²² Tr. 363, 404.

Moreover, as noted above, the fact that respondent was repeatedly issued prescriptions by his psychiatrist should have alerted him that his experience with Dr. Schaffer was not merely counseling but was indeed treatment for a medical condition. Again, we find it incredulous that an airman of respondent's experience did not ask the prescribing doctor the purpose for his medications so he could better assess whether his counseling was reportable, and that he failed to inform his long-time personal physician and AME that he was taking medication that was prescribed by another doctor. His AME could have guided respondent whether he must disclose visits to a psychiatrist for the treatment he was receiving.

The law judge found respondent's testimony in this regard was not credible because it was contradicted by other evidence in the record. Specifically, in respondent's letter to Dr. Gogan, he never mentions counseling, but instead indicates that he was receiving treatment for situational depression and chronic fatigue and describes his research into use of unapproved medication.¹²³ Additionally, the instructions for the MedXpress form specifically identify psychiatrists as health professionals that must be included in response to item 19.¹²⁴

We agree with the law judge. The evidence in the record demonstrates that the repeated visits to Dr. Schaffer cannot accurately be described as mere counseling. Respondent included a visit to urgent care for the flu but did not mention visits to his psychiatrist for over a year, during which he was repeatedly prescribed medication. Notably, Dr. Schaffer's letter of October 16, 2016 did not describe his contact with respondent as "counseling" and made no mention of seeing respondent's wife.

¹²³ Oral Initial Decision at 490-491.

¹²⁴ Exh. A-1 at 16.

For the foregoing reasons, we find the law judge did not act arbitrarily or capriciously in determining respondent's testimony with regard to knowledge of the falsity of his responses to items 17(a), 18(m) and 19 was not credible. We therefore find the Acting Administrator has met his burden with respect to the third prong of the Hart v. McLucas standard as to items 18(m) and 19 on both applications and item 17(a) on the August 11, 2015 application.

d. Item 20 (certification)

The Acting Administrator alleged that respondent signed the certification in item 20 of the airman medical applications knowing that the "certification was fraudulent or intentionally false."¹²⁵ Item 20 on both applications is a certification that states, in relevant part, "all statements and answers provided by me on this application form are complete and true to the best of my knowledge, and I agree that they are to be considered part of the basis for issuance of any FAA certificate to me."

Unlike other items on the airman medical application, the certification does not pose a question. Therefore, the Hart v. McLucas standard does not apply to item 20 in the same manner as it does for other items on the application. The truth or falsity of the signed certification in item 20 depends not only on the truth or falsity of the answers provided to the other items, but also to respondent's knowledge of any falsity. Therefore, we dispense with the traditional analysis under Hart v. McLucas as to item 20. However, using that standard, we have determined that respondent has provided fraudulent or intentionally false information on his medical certifications. Because the Board affirms that respondent provided intentionally false information on his applications, he thereby also provided an intentionally false certification in item 20.

¹²⁵ Complaint, ¶¶ 11 and 21.

B. *Conclusion*

The law judge made detailed credibility findings in accordance with relevant precedent and rejected respondent's testimony that he had not intentionally falsified his answers. In discussing his evaluation of respondent's credibility, the law judge repeatedly discussed respondent's testimony and its lack of consistency with other evidence in the record, and in each instance, found the lack of consistency undermined respondent's credibility.¹²⁶

In view of the specificity and detail of the law judge's credibility findings, with factual support in the record, we find no basis to disturb those findings. Beyond respondent's uncorroborated testimony, which the law judge found not credible, respondent offered no further evidence with respect to his belief that he did not have reportable medical conditions, visits to health professionals, and was not using reportable medications. Instead, the law judge's findings that respondent intentionally falsified his answer to items 17(a), 18(m), 19 and 20 are supported by sufficient record evidence.¹²⁷ Therefore, we find respondent intentionally falsified items 18(m), 19 and 20 on two airman medical applications, dated August 11, 2015 and January 20, 2018, as well as item 17(a) on the August 11, 2015 application because he failed to disclose his mental disorders, prescription medications, visits to health professionals within the preceding three years, and certified that the answers he provided were complete and true to the best of his knowledge.

¹²⁶ Oral Initial Decision at 491, 495, 498. ("I find that the inconsistencies between Respondent's testimony and the explanation provided to his then primary care provider and AME undermines the credibility of that testimony."); ("I find the inconsistencies between Respondent's testimony and the explanation provided to his then primary care provider and AME undermines the credibility of his testimony.") ("Those inconsistencies between his testimony and documentary evidence undermine the credibility of his testimony.")

¹²⁷ See Singleton, 588 F.3d at 1083 ("That a pilot had the requisite subjective understanding will often be apparent from circumstantial evidence.").

C. *Sanction*

The Board's jurisprudence establishes revocation is the appropriate sanction for intentional falsification cases.¹²⁸ Given such jurisprudence combined with the overall importance of ensuring airmen provide truthful and accurate answers, we find revocation is the appropriate sanction. We further find the law judge did not err in affirming the sanction of revocation.

ACCORDINGLY, IT IS ORDER THAT:

1. Respondent's appeal is denied;
2. The law judge's oral initial decision is affirmed; and
3. The Acting Administrator's emergency revocation of respondent's airman certificates and airman medical certificate is affirmed.

SUMWALT, Chairman, LANDSBERG, Vice Chairman, AND WEENER and HOMENDY, Members of the Board, concurred in the above opinion and order.

¹²⁸ See, e.g., Acting Administrator v. Byrd, NTSB Order No. EA-5782 (2016); Acting Administrator v. Tseng, NTSB Order No. EA-5817 (2017).

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

* * * * *

In the matter of: *

DANIEL K. ELWELL, *
ACTING ADMINISTRATOR, *
FEDERAL AVIATION ADMINISTRATION, *

Complainant, *

v. *

Docket No.: SE-30615

CHRISTOPHER A. SMITH, *

Respondent. *

* * * * *

U.S. Bankruptcy Court
George C. Young Federal Courthouse
400 W. Washington Street
Courtroom C, 6th Floor
Orlando, Florida

Thursday,
March 14, 2019

The above-entitled matter came on for hearing,
pursuant to notice at 11:05 a.m.

BEFORE: STEPHEN R. WOODY
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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ORAL INITIAL DECISION AND ORDER

JUDGE WOODY: This has been a proceeding under the provisions of 49 United States Code Section 44709 and the provisions of the Rules of Practice in Air Safety Proceedings of the National Transportation Safety Board.

Pursuant to notice, this matter came on for hearing on March 8th and March 12th through 14th, 2019. And as required by the Board's Rules in emergency cases, I am issuing an oral initial decision.

The Acting Administrator is represented by Attorney Jeanine Gotimer of the FAA Enforcement Division, Northeast Team. Respondent was present throughout the proceedings and represented by Attorney Gregory Winton.

Parties were afforded a full opportunity to offer evidence, to call, examine and cross-examine witnesses, and make arguments in support of their respective positions. I will not discuss all

1 the evidence in detail. I have, however, considered all the
2 evidence, both oral and documentary. That which I do not
3 specifically mention is viewed by me as being corroborative or not
4 materially affecting the outcome of the decision.

5 Respondent Christopher A. Smith has appealed the
6 Administrator's Emergency Order of Revocation which was dated
7 February 13th, 2019. Pursuant to the Board's Rules, the
8 Administrator filed a copy of that order on February 19, 2019,
9 which serves as the complaint in this case.

10 The Acting Administrator ordered the emergency revocation of
11 Respondent's airline transport pilot certificate, or ATP,
12 commercial pilot certificate, and medical certificates dated
13 January 24, 2018, and August 11, 2015, as well as any other airman
14 or medical certificates held by Respondent, based on Respondent's
15 alleged violation of Federal Aviation Regulations codified at 14
16 CFR Section 67.403(a)(1).

17 The complaint alleges that Respondent:

18 (1) Made or caused to be made intentionally false statements
19 on an application for medical certificate dated January 20th,
20 2018; more specifically, that he answered no in response to
21 question 18(m) of the application, which asks whether he'd ever in
22 his life had a history of mental disorders of any sort, when he
23 should have answered yes because he had a history of adjustment
24 disorder with depressed mood and insomnia disorder. And in
25 response to question 19 of the application, which asks about

1 visits to health professionals within the past 3 years, he failed
2 to disclose any visits to Dr. Schaffer, a psychiatrist, concerning
3 his history of adjustment disorder with depressed mood and
4 insomnia disorder.

5 (2) The Respondent made or caused to be made intentionally
6 false statements on an application for a medical certificate dated
7 August 11, 2015; more specifically, that he answered no in
8 response to question 18(m) of the application which asks whether
9 he had ever in his life had a history of mental disorder of any
10 sort, when he should have answered yes because he had a history of
11 adjustment disorder with depressed mood and insomnia disorder;
12 that he answered no in response to question 17(a) of the
13 application which asks do you currently use any medications
14 (prescription or nonprescription), when he should have answered
15 yes because he was using Wellbutrin and/or dextroamphetamine, also
16 referred to as Dexedrine; and in response to question 19 of the
17 application which asks about visits to health professionals within
18 the past 3 years, he failed to disclose any visits to
19 Dr. Schaffer, a psychiatrist, concerning his history of adjustment
20 disorder with depressed mood and insomnia disorder.

21 (3) Even if statements provided on the application for
22 medical certificate are determined not to be intentionally false
23 or fraudulent, the information provided was nonetheless incorrect
24 and thereby provides a basis for revocation of Respondent's
25 medical certificates under Federal Aviation Regulation Section

1 67.403(c)(1).

2 In his answer to the complaint, Respondent admitted to
3 paragraphs 1 through 6, 10, 12, 13, 17, 18, and 20. In addition,
4 during closing argument, Respondent's Counsel admitted paragraphs
5 7, 9, 14, and 16. As Respondent has admitted those allegations,
6 they are deemed established for purposes of this decision.

7 Respondent denied the remaining paragraphs 8, 11, 15, 19, and
8 21.

9 Administrator's Exhibits A-1 through A-5; A-7 (pages 16 to
10 21, 48 to 54, 57 to 61, and 67 through 72, only); A-8 through A-
11 11, A-13, A-14, A-17 through A-23, and A-27 were admitted into
12 evidence. Respondent's Exhibits R-1 and R-2 were admitted into
13 evidence. Administrator's Exhibit A-12 was offered but not
14 admitted into evidence.

15 The Administrator presented the testimony of Dr. Frank Gogan
16 and Dr. Susan Northrup.

17 Dr. Frank Gogan testified that he's a senior aviation medical
18 examiner, or AME, in Montgomery, Alabama, where he has been in
19 practice for 12 to 13 years. He is also a primary care physician,
20 seeing patients privately as well as performing duties as an AME.
21 He noted he's been a doctor since 1979, and an AME since 1987. He
22 indicated that prior to becoming a medical doctor he was an
23 ordained Catholic priest. He said he left the priesthood after
24 asking his bishop for permission to attend medical school. Before
25 the priesthood he also spent time in the Peace Corps.

1 Dr. Gogan testified he is familiar with Respondent, who he
2 began seeing as a private patient he believes in 2009. Dr. Gogan
3 said he believed he had begun as Respondent's AME about 9 or 10
4 years ago. He identified Exhibit A-11 as Respondent's medical
5 certificate application dated August 11, 2015, on which Dr. Gogan
6 acted as the AME.

7 Dr. Gogan noted that Respondent answered no, as to whether he
8 was using any medications (prescription or nonprescription), in
9 response to question 17(a).

10 With respect to question 18, which addresses medical history,
11 Dr. Gogan indicated an applicant must answer yes, even if there
12 has been no formal clinical diagnosis. For example, if an
13 applicant has experienced dizziness he must report it even if
14 there has been no associated formal diagnosis. He also said an
15 applicant must report a condition if he has had it in the past but
16 doesn't presently have it. Dr. Gogan noted that Respondent
17 answered no in response to question 18(m) which asked about mental
18 disorders of any sort such as depression.

19 With respect to question 19, which asks about visits to
20 health professionals in the past 3 years, Dr. Gogan said
21 Respondent was required to identify each health care professional
22 visited or consulted within 3 years of the application. Dr. Gogan
23 noted Respondent answered yes to question 19 but failed to list
24 any visits to Dr. David Schaffer, a psychiatrist. Dr. Gogan said
25 he issued a medical certificate to Respondent based on this

1 application.

2 The doctor identified Exhibit A-9 as his November 18, 2016
3 letter to the FAA regarding Respondent's surrender of his October
4 17, 2016 second class medical certificate, which Dr. Gogan had
5 issued to Respondent with an examination date of October 17, 2016.

6 The doctor identified Exhibit A-10 as a letter he sent to the
7 Southern Region Regional Flight Surgeon, Dr. Susan Northrup, in
8 April 2018, regarding Respondent. He testified he sent the letter
9 because he received information from Dr. Schaffer regarding his
10 treatment of Respondent. He noted the letter from Dr. Schaffer
11 was dated October 16, 2016, which he said he received sometime
12 later but couldn't recall precisely when he received it.

13 Dr. Gogan observed that the letter said Respondent had been a
14 patient of Dr. Schaffer's, a board-certified psychiatrist, since
15 October 2014. He said he was not aware Respondent was seeing
16 Dr. Schaffer before he received the letter. He noted the letter
17 said Respondent complained of moderate depression or dysthymia,
18 and had been initially prescribed Wellbutrin, which he noted is
19 not compatible with flying.

20 The letter also noted Respondent was then prescribed a low
21 dose of dextroamphetamine which Dr. Gogan noted is also not
22 compatible with flying or medical certification. He said the
23 letter indicated that Respondent then switched to Adderall, which
24 is similarly not compatible with flying or medical certification.

25 The doctor said Respondent's August 11, 2015 medical

1 application, Exhibit A-11, did not list use of Wellbutrin,
2 dextroamphetamine, or Adderall. He said if he had been told
3 Respondent was using any of those medications, he could not have
4 issued a medical certificate.

5 Dr. Gogan testified that Respondent also did not indicate he
6 had depression, dysthymia, or excessive fatigue, and he did not
7 disclose that he was seeing Dr. Schaffer. The doctor indicated he
8 was not aware Respondent was seeing Dr. Schaffer and he did not
9 refer Respondent to Dr. Schaffer. He said the letter from
10 Dr. Schaffer, Exhibit A-10, did not indicate Respondent was seeing
11 him due to a loss of employment.

12 With respect to Exhibit A-9, Dr. Gogan stated Respondent
13 voluntarily surrendered his October 2016 medical certificate
14 because Dr. Gogan had become aware he was using the medications
15 when he received the letter from Dr. Schaffer.

16 Dr. Gogan said he also received correspondence from a
17 urologist who listed medications Respondent was taking. Dr. Gogan
18 believed Respondent came to his office to surrender his
19 certificate. He also believe he had seen the Respondent once in
20 2017. The doctor could not remember exactly when he had become
21 aware of the letter from Respondent to him, but it was fairly
22 recently. He said the letter was brought to his attention by his
23 secretary who found it in files related to Respondent.

24 The doctor said he issued Respondent's medical certificate on
25 October 17, 2016, because he did not have the information about

1 medications or Dr. Schaffer visits that would have disqualified
2 Respondent.

3 With respect to Exhibit A-11, Dr. Gogan opined that
4 Respondent did not answer question 17(a), question 18(m), or
5 question 19, correctly or truthfully. The doctor concluded
6 Respondent had been untruthful on his August 11, 2015,
7 application. Dr. Gogan also stated Respondent had taken his
8 aviation medical records from the doctor's office in 2017 without
9 his knowledge or permission.

10 On cross-examination, the doctor testified he believed the
11 Respondent took his records from Dr. Gogan's office in 2017, and
12 he did not recall that being in 2016 before Respondent moved to
13 Florida. He said he recalled Respondent calling, speaking with
14 the doctor's secretary and asking for copies of his medical
15 records, but that he was not aware Respondent asked for his airman
16 medical records. Dr. Gogan said he had no authority to release
17 Respondent's airman medical record and would have deferred to the
18 FAA, if asked. He noted he could not recall any airman asking for
19 copies of their airman medical records. Dr. Gogan reiterated that
20 Respondent took his airman medical records without permission from
21 a desk in an examination room but agreed that Respondent did not
22 break into the office to get the records.

23 The doctor did not recall Respondent receiving any treatment
24 during this last visit to the doctor's office, but had no reason
25 to dispute that Respondent paid for an office visit during his

1 last visit. Dr. Gogan said his AME practice was not enough to
2 sustain his overall practice, that he performed perhaps 50 airman
3 examinations annually.

4 The doctor could not recall if Respondent discussed his wife
5 being ill but did remember him saying he lost his job. Nor could
6 he recall if Respondent discussed fatigue during his primary care
7 visits. Dr. Gogan agreed that once an airman is medically
8 qualified, if he becomes medically unqualified, that he does not
9 necessarily have to surrender his certificate; he could simply not
10 exercise the privilege of the certificate.

11 The doctor agreed that he is aware of no evidence Respondent
12 ever flew while taking Wellbutrin. He stated that as Respondent's
13 primary care physician, he did not show his treatment notes to
14 Respondent and had no reason to. He indicated that he did not
15 personally diagnosis Respondent with mental disorder. He said
16 that he did prescribe Wellbutrin for him at one time but
17 understood he was not flying at that point.

18 With respect to the redacted urology treatment records from
19 Jackson Clinic that are Exhibit R-1, Dr. Gogan agreed those are
20 part of the records provided by his office pursuant to subpoena.
21 He confirmed that the prescription records at page 1 of that
22 exhibit, which span the period August 3rd, 2015 to August 3rd,
23 2016, indicated that the first prescription of dextroamphetamine
24 in that period was filled on August 12, 2015. With respect to
25 pages 5 to 8, of that exhibit, Dr. Gogan stated he had no basis to

1 question the urology notes that indicate Respondent reported no
2 depression, and he had no independent recollection whether
3 Respondent's mental state matched the urologist's treatment notes.

4 With respect to Dr. Schaffer's October 2016 letter in Exhibit
5 A-10, he did not know whether Respondent hand delivered the letter
6 to his office. Dr. Gogan said after he received the letter from
7 Dr. Schaffer, Respondent voluntarily surrendered his medical
8 certificate in November 2016. The doctor said he had no
9 independent evidence that Respondent was taking disqualifying
10 medications when he surrendered his certificate.

11 With respect to his November 18th, 2016 letter, Exhibit A-9,
12 Dr. Gogan said he believed he sent it to Dr. Northrup although
13 it's not addressed to her because he wasn't sure if she would be
14 the person to act upon it. The doctor said he learned of
15 Respondent's use of Wellbutrin, dextroamphetamine, and Adderall
16 from Dr. Schaffer's letter and incidentally from the urologist's
17 treatment notes. He agreed he had no evidence Respondent ever
18 flew with those medications in his system. Dr. Gogan agreed that
19 his November 2016 letter to the FAA did not mention failure to
20 report a diagnosis of a mental disorder, only use of medications.

21 The doctor said he had no evidence Respondent had personal
22 knowledge of his diagnosis of depression when he filled out the
23 August 11th, 2015, medical application. He noted Dr. Schaffer's
24 letter says he had been treating Respondent for depression since
25 October 2014. The doctor agreed that question 17(a) asked whether

1 or not he was currently using any prescription or nonprescription
2 medications and that he has no evidence Respondent was taking
3 prescription medications on August 11th.

4 With respect to question 19, regarding visits to physicians,
5 the doctor stated he did not know how often or what type of
6 treatment Respondent received from Dr. Schaffer nor did he know
7 whether Dr. Schaffer ever discussed with Respondent whether he had
8 been diagnosed with a mental disorder. Dr. Gogan said that when
9 he issued the medical certificate to Respondent on August 11th,
10 2015, he did not know that Respondent had ever been diagnosed with
11 a mental disorder.

12 Similarly, when he issued Respondent's medical certificate in
13 2016, he was not aware of any such diagnosis or that he had used
14 medications not approved within FAA guidelines.

15 After reviewing Exhibit R-2, Dr. Gogan confirmed that he had
16 prescribed Wellbutrin to Respondent in November 2014, when he
17 still had a medical certificate. He also confirmed that his
18 encounter notes indicate he diagnosed Respondent with situational
19 depression after he lost his job. He testified he did not show
20 the notes to Respondent, although he stated that he never
21 prescribes medications like Wellbutrin without discussing why he
22 is prescribing the medication. He again stated that he understood
23 Respondent was not flying at the time. The doctor confirmed that
24 he issued a medical certificate to Respondent on August 11th,
25 2015, even though he checked no to question 18(m) and Dr. Gogan

1 knew he had diagnosed Respondent with depression. He then
2 conceded he did not believe situational depression had to be
3 reported.

4 On redirect examination, Dr. Gogan offered that he believed
5 he last saw Respondent in 2017, when he came to get his medical
6 records and took his airman medical records without permission.
7 He observed that the notation of no depression in the urology
8 notes was not his assessment and that he did no separate
9 assessment of Respondent.

10 The doctor reviewed Exhibit R-1, and indicated Respondent
11 filled the prescription for Ambien and dextroamphetamine on August
12 12, 2015. He observed that the prescription was written on August
13 10, 2015, the day prior to Respondent's medical application and
14 filled the day after the medical application was complete. He
15 said it appeared Respondent was withholding information about
16 prescription medications that Dr. Gogan was not aware of.

17 With regard to the Wellbutrin prescription that he wrote for
18 Respondent in 2014, Dr. Gogan noted it was a one-time prescription
19 for a 30-day supply with no refills, and that he does not know if
20 Respondent filled the prescription. He noted dextroamphetamine is
21 different than Wellbutrin and has amphetamine like qualities. He
22 stated Ambien is a sleep medication. He indicated it would be
23 important to know that Respondent was prescribed dextroamphetamine
24 and Ambien the day before his medical application; however, he
25 conceded that he did not know if Respondent was actually taking

1 any medication when he applied on August 11, 2015, and had no
2 evidence he was taking the medications when he operated aircraft.

3 On questions from me, Dr. Gogan reiterated that he had only
4 prescribed Wellbutrin one time, for 30 days, in response to
5 situational depression he experienced from losing his job. He
6 said he did not recall ever discussing his condition further after
7 that, did not recall discussing any other treatment he received
8 for depression, and said he may not have remembered that he
9 prescribed Wellbutrin at the time Respondent completed his August
10 11th, 2015, medical application.

11 Dr. Susan Northrup testified that she is the FAA Senior
12 Regional Flight Surgeon as well as the Regional Flight Surgeon for
13 the FAA Southern Region. As the Senior Regional Flight Surgeon
14 she provides oversight and input on policy matters for all
15 regional flight surgeons. As the Southern Region Regional Flight
16 Surgeon she has a variety of responsibilities including for airman
17 medical certification.

18 She noted she's been the Southern Region Regional Flight
19 Surgeon since April of 2007 and the Senior Regional Flight Surgeon
20 since January 2017. In addition to her employment with the FAA,
21 she has held various aerospace medicine positions with the United
22 States Air Force and Air Force Reserve, National Pilot's
23 Association, and Delta Airlines. She has more than 27 years'
24 experience in aviation medicine and is Board certified in both
25 aerospace medicine and occupational medicine.

1 Her education, experience, certifications, professional
2 associations, and awards are more fully set forth in her
3 curriculum vitae which is at Exhibit A-13. She was recognized as
4 an expert in aviation medicine.

5 Dr. Northrup said she reviewed a number of documents in
6 preparation for her testimony including the revocation order, the
7 EIR, Respondent's medical file, pertinent AME guidelines, and the
8 MedXpress User Guides. She explained that MedXpress is the FAA's
9 online system used by applicants to complete their medical history
10 and submit an application for medical certificate. That
11 application is then imported into the AMCS system by the AME, who
12 then interviews the applicant, completes the physical examination,
13 and transmits the completed application to the FAA.

14 She identified Exhibit A-2 as the MedXpress User Guide which
15 was in effect when Respondent completed his August 11th, 2015,
16 application.

17 Dr. Northrup reviewed Respondent's airman medical file in
18 Exhibit A-7, and noted that pages 57 to 61 of that exhibit are his
19 medical application dated August 11th, 2015. She observed that
20 question 18 pertains to an applicant's medical history and asks
21 whether an applicant has ever in his life been diagnosed with,
22 had, or presently has any of the following. She testified that
23 the question 18(m) specifically asks about mental disorders of any
24 sort which she indicated would include depression, anxiety,
25 dysthymia, situational depression, and adjustment disorder with

1 depressed mood.

2 She emphasized the importance of having accurate responses to
3 question 18(m) since the system depends completely on the honesty
4 of the applicant and the AME relies on the completeness and
5 accuracy of the information provided to make a decision about
6 medical suitability for flight and whether to issue a medical
7 certificate.

8 In reviewing the MedXpress User Guide in Exhibit A-2, Dr.
9 Northrup noted that an applicant is required to answer yes or no
10 to items 18 and 19, and if yes, to provide an accurate
11 explanation. With respect to question 18(m) she testified that if
12 an applicant has ever had depression that he must check yes and
13 provide an explanation. Similarly the guide directs that an
14 applicant -- if an applicant has seen a health professional in the
15 last 3 years, then he should select yes in response to question 19
16 and provide the details of the visit, including the date of the
17 visit and reason for seeing the physician.

18 She stated that a visit to a psychiatrist must be reported,
19 particularly when the psychiatrist prescribes medications. With
20 respect to question 17(a) she observed that any medication
21 currently being used, prescription or nonprescription, must be
22 reported. She noted that some medications are disqualifying,
23 including dextroamphetamine and Wellbutrin, and that medications
24 may also indicate an underlying condition that's problematic.

25 Dr. Northrup testified that an applicant must report a visit

1 where a prescription is provided and should report the
2 prescription to the AME. She opined that if an applicant receives
3 a prescription one day and completes his application the next,
4 without reporting the prescription, and then fills the
5 prescription the following day, at minimum that applicant is being
6 less than forthcoming on his application and should have reported
7 the medication on his application and to the AME. She offered
8 that such an applicant at least falsified his visit to the
9 physician if he also fails to report the visit.

10 Dr. Northrup identified Exhibit A-7, pages 16 to 21, as
11 documentation regarding Respondents medical application and
12 examination from January 2018. She noted Exhibit A-1 was the
13 MedXpress User Guide in effect at the time of the application. She
14 noted that the instructions for item 18 on page 14 of the exhibit
15 require an applicant to select yes for any condition he ever had
16 or has been diagnosed with. The instructions also speak in terms
17 of a diagnosis or occurrence.

18 She noted that the directions for item 19 require an
19 applicant to report all visits to any health professional within
20 the past 3 years, and specifically includes psychiatrists and
21 psychologists as health professionals. The doctor stated that the
22 AME guidelines at Exhibits A-3 and A-4 discuss obtaining
23 supplementary reports from an applicant's treating physician to
24 clarify the significance of an item of medical history. She noted
25 that if an applicant incorrectly answers no to item 18(m) or other

1 medical history questions then the AME is not required to do
2 anything further and has no way to gather additional information,
3 further evaluate the condition and make an informed decision about
4 medical qualification of the applicant.

5 Dr. Northrup identified Exhibit A-17 as a letter from the
6 Aerospace Medical Certification Division to Respondent dated March
7 16th, 2018, following his January 2018 medical application
8 requesting that he provide from his physician a listing of all
9 medications and diagnosis.

10 She identified Exhibit A-18 as a letter from Physician's
11 Assistant Julie Howard, dated March 28th, 2018, submitted by
12 Respondent in response to Exhibit A-17, which letter referenced
13 only a one time episode of gout.

14 She noted that Exhibit A-10 was Dr. Gogan's 18 April 2018,
15 letter to her, forwarding Dr. Schaffer's October 2016 letter
16 regarding his treatment of Respondent. She indicated the FAA had
17 not seen Dr. Schaffer's letter prior to receiving it from Dr.
18 Gogan on May 1st, 2018.

19 Dr. Northrup noted that Dr. Schaffer's letter indicated
20 Respondent had been a patient of his since October 2014, with the
21 presenting complaint of moderate depression or dysthymia and
22 excessive fatigue. The letter indicated Respondent had been
23 prescribed Wellbutrin which was switched to dextroamphetamine and
24 later changed to Adderall. She observed that all of those are
25 medications that have to be reported on a medical application and

1 all are disqualifying medications.

2 She noted that Respondent had not disclosed any of the
3 information reported in Dr. Schaffer's letter on either his August
4 11th, 2015, medical application or his January 2018, medical
5 application. She stated that if the AME had been provided the
6 information he would have to do further information gathering and
7 evaluation in order to make an informed decision about whether to
8 issue a medical certificate, but at any rate could not have issued
9 a certificate outright. She observed that depression or
10 dysthymia, excessive fatigue and the medications are all matters
11 that could have negatively impacted aviation safety.

12 She identified Exhibit A-19 as her May 2nd, 2018, letter to
13 Respondent as a result of Dr. Schaffer's letter, requesting a
14 detailed status report from Respondent's treating psychiatrist as
15 well as all treatment records.

16 Dr. Northrup identified Exhibit A-5 as the June 8, 2018,
17 letter submitted to the Aerospace Medicine Division in response to
18 her May 2nd, 2018 letter, which included an attached letter from
19 Dr. Schaffer. She noted Respondent never submitted the requested
20 treatment records. She observed that Dr. Schaffer's June 2018
21 letter differed from his earlier October of 2016 letter, now
22 indicating that Respondent was a short term patient and that he
23 diagnosed him with adjustment disorder with depressed mood and
24 insomnia disorder.

25 According to Dr. Northrup, Respondent did not report any of

1 the information in Exhibit A-5 related to Dr. Schaffer on his
2 January 2018, medical application. In her opinion his response to
3 question 18(m) on that application was false because he answered
4 no and he should have answered yes regarding mental disorders.

5 Similarly, she stated his answer to question 19 on the
6 application was false because he failed to report any visits with
7 Dr. Schaffer. She said it was important for AME Shewmaker to be
8 aware of that information when reviewing Respondent's medical
9 application and that he issued Respondent's medical certificate
10 without having the information necessary to make an informed
11 decision about his fitness to fly. She noted Respondent similarly
12 did not report any information about Dr. Schaffer and did not
13 disclose any medications on his August 2015 medical application.

14 She opined that his response to question 17(a) on that
15 application was false if he was taking Wellbutrin,
16 dextroamphetamine or Adderall; that his answer to question 18(m)
17 was incorrect and false because he did not report his depression;
18 and his response to question 19 was false and incorrect because he
19 made no mention of visits with Dr. Schaffer. She noted that he
20 did report a visit to Urgent Care for the flu, but not the visits
21 to his psychiatrist.

22 Dr. Northrup identified Exhibit A-20 as her July 10th, 2018,
23 letter to Respondent asking for a personal statement as to why he
24 did not report his medications, diagnosis, and visits with the
25 psychiatrist on his medical application. She identified Exhibit

1 A-21 as Respondent's response to that letter. In it, Respondent
2 stated his depression was circumstantial in relation to his loss
3 of a job, which was not consistent with Dr. Schaffer's letters.
4 It said that his AME of 10 years, Dr. Gogan suggested and led him
5 to Dr. Schaffer. He indicated that he removed himself from flight
6 status and that he brought the information to his AME and has been
7 as transparent as possible.

8 Dr. Northrup identified Exhibit A-22 as the letter of
9 investigation that she issued to Respondent on October 4th, 2018,
10 notifying him of the investigation for falsification. His
11 response is at Exhibit A-23, in which he says he brought the
12 information to the attention of his former AME and assumed that
13 his AME logged the history. She said the instructions for
14 completing the application are clear, that it is the
15 responsibility of the applicant to mark the application correctly
16 and provide the explanations.

17 Dr. Northrup opined that neither Dr. Gogan or Dr. Shewmaker
18 had adequate information upon which to conclude whether the
19 Respondent was qualified to hold a medical certificate, and she
20 offered that there still is not adequate information upon which to
21 determine whether he is medically qualified. She also concluded
22 based on her review that he had intentionally falsified his August
23 11th, 2015, and January 20th, 2018, medical applications.

24 On cross-examination Dr. Northrup agreed that the FAA was in
25 possession of Dr. Gogan's November 2016 letter forwarding

1 Respondent's voluntarily surrendered medical certificate. She
2 offered that there were a number of letters sent to Respondent
3 between that time and when Dr. Wyrick recommended in April 2018,
4 that Dr. Gogan forward Dr. Schaffer's October 2016 letter to Dr.
5 Northrup.

6 Dr. Northrup indicated it's fairly common for an AME to also
7 be an airman's primary care physician. She indicated that she was
8 not aware that Dr. Gogan had diagnosed Respondent with situational
9 depression and prescribed him Wellbutrin and then afterwards
10 issued a medical certificate to the Respondent on August 11th,
11 2015. Thus, she had not spoken with Dr. Gogan about it, nor was
12 she aware that Dr. Gogan testified that situational depression
13 need not be reported on a medical application and she was
14 surprised by that.

15 She agreed an airman is not required to surrender a medical
16 certificate just because he is taking medications; that he could
17 self-ground. She also agreed Respondent did not have to
18 voluntarily surrender his certificate in 2016.

19 Dr. Northrup indicated that the MedXpress User Guide updates
20 between 2015 and 2018 included changes to expand the instructional
21 information for users.

22 With respect Exhibit A-10, pages 2 and 3, Dr. Northrup agreed
23 that Dr. Schaffer's October 2016 letter did not use the term
24 "diagnosed with" depression but that the June 2008 letter does use
25 the word diagnosis. Dr. Northrup agreed she does not know when

1 Respondent was told he was diagnosed with a mental disorder,
2 although she noted that a condition must be reported if one seeks
3 treatment for it.

4 She agreed that a minor illness such as an episode of
5 diarrhea does not have to be reported on the medical application
6 simply because the form asks about intestinal trouble. Nor, for
7 instance, would one have to report dizziness experienced after
8 riding the Tea Cup ride at Disney World.

9 Dr. Northrup agreed that an applicant is not required to
10 report pure family counseling, not related to substance abuse or a
11 psychiatric condition. However, she observed that respondent was
12 prescribed pharmaceuticals as part of his psychiatric treatment.

13 Dr. Northrup agreed that she does not know if Respondent was
14 aware of his diagnosis of adjustment disorder with depressed mood
15 on August 11th, 2015, or if he was using Wellbutrin or
16 dextroamphetamine on that date. The doctor said if Respondent was
17 prescribed Wellbutrin for 30 days, he could have self-grounded
18 during that time but then is required to be off the medication for
19 60 days and be asymptomatic in order to be issued a certificate.
20 She noted that even if he did self-ground he would have to report
21 the treatment in response to question 19.

22 Dr. Northrup noted that as indicated on Exhibit A-7, page 57,
23 Respondent reported 170 hours of pilot time in the 6 months prior
24 to his August 2015, medical application. She testified that if an
25 airman sees a psychiatrist and is prescribed medications he has to

1 report that visit and condition regardless of his knowledge of
2 formal diagnosis. Additionally, if he was taking amphetamines but
3 didn't know the diagnosis, he still has to report it. Dr.
4 Northrup noted that Dr. Schaffer's October 2016 letter says
5 Respondent had been a patient and on medication since October
6 2014. His June 2018, letter indicated he last saw Respondent in
7 June 2017.

8 Next, Respondent Christopher Smith testified on his own
9 behalf. He testified that he's 40 years old. He's married with
10 two children ages 15 and 10. He said he first obtained his
11 private pilot certificate in 2006, starting with helicopters and
12 transitioning to fixed wing aircraft up to and including mid-size
13 jets. He noted he holds ATP and Commercial Pilot Certificates,
14 with a number of type ratings, as well as a Mechanic's
15 Certificate, with Airframe and Power plant or A&P ratings.

16 He said he first began working in aviation in 2003,
17 performing line service and detailing aircraft. He noted his
18 first job as a pilot was with K-C Aviation in Montgomery, Alabama,
19 as a contract pilot. He has performed duties in aviation as an
20 A&P mechanic, pilot, and simulator flight instructor. His
21 qualifications, certificates, ratings, and work experience are
22 more fully set out in his resume at Exhibit A-27.

23 Respondent noted that Dr. Gogan became his primary care
24 doctor in 2009 and became his AME in about 2007.

25 He testified his wife had serious health issues requiring

1 numerous surgeries between 2013 and 2015, and he said his job
2 duties were pulling him away from home, at times overnight, and
3 his wife's health issues would pull him away from work duties so
4 he wasn't pulling the same weight at work as he had before. He
5 said he lost his job at Media Aviation in July 2014. He also said
6 that between flying, maintenance, kid's events, and his wife's
7 illness, he suffered from fatigue beginning in 2014 and into 2015.

8 He said after diet and exercise provided no lasting relief,
9 Dr. Gogan suggested he check his testosterone level which turned
10 out to be low. He began seeing a urologist who started him on
11 testosterone injections and then pellets. He said after some
12 initial benefit he noticed the fatigue was worse and he was
13 experiencing mood issues which he discussed with Dr. Gogan and the
14 urologist.

15 He said Dr. Gogan suggested maybe the Respondent and his wife
16 should try counseling but did not refer him to Dr. Schaffer or to
17 a psychiatrist. He said he found Dr. Schaffer through his mom who
18 had seen the doctor previously.

19 Respondent said Dr. Schaffer performed no physical exam and
20 prescribed him no medication initially but simply met with and
21 talked to them. Respondent said he told Dr. Gogan that he had
22 sought counseling and it seemed to be helping but said he did not
23 mention Dr. Schaffer's name or discuss any details about the
24 counseling with him.

25 Respondent said Dr. Schaffer did prescribe medication for

1 him, beginning with Wellbutrin and then Dexedrine, and Ambien. He
2 reviewed Exhibit R-1, and stated that May 2016 was his last
3 prescription for Dexedrine and he has not taken Dexedrine since.

4 With respect to Dr. Gogan's prescription for Wellbutrin in
5 November 2014, he said Dr. Gogan did not tell him he had diagnosed
6 him with depression or tell him he needed to report depression on
7 his medical application.

8 With respect to his August 11th, 2015, medical application
9 Respondent said he was not using any medications at that time. He
10 said he was aware he was required to report if he was using
11 medications in response to question 17(a) and supply additional
12 information about the medications. He said he answered no because
13 he wasn't currently taking any medications.

14 With respect to question 18(m) on that application he said he
15 answered no because he had no personal knowledge that he had been
16 diagnosed with a mental disorder. He said Dr. Gogan did not tell
17 him he had to report a mental disorder.

18 As to question 19 he said he answered yes but he did not
19 report visits to Dr. Schaffer at that time because he thought it
20 was just counseling. He said he was not aware that medications
21 being prescribed amounted to treatment.

22 Respondent said he next applied for a medical certificate in
23 September 2016, but it was not completed until October because Dr.
24 Gogan received his prescription history from the urologist's
25 records and told Respondent he would need information from Dr.

1 Schaffer. Respondent said he went to Dr. Schaffer's office to
2 retrieve the letter at Exhibit A-10 and presented it to Dr. Gogan.
3 Respondent said he also reviewed the letter which he noted
4 discussed fatigue. He indicated Dr. Gogan then issued his medical
5 certificate dated October 17th, 2016, being fully aware of
6 Respondent's treatment with Dr. Schaffer and medications. He said
7 Dr. Gogan then later suggested he should surrender his certificate
8 because of his use of unapproved medications.

9 With respect to the letter in Exhibit A-8 that Respondent
10 wrote to Dr. Gogan, he testified that he was writing to apologize
11 to Dr. Gogan for his use of unapproved medications. Respondent
12 said he relied on Dr. Gogan's advice and counsel for his primary
13 care as well as airman medical certification. He said he
14 surrendered his medical certificate to Dr. Gogan because he was
15 taking unapproved medications although he now understands that he
16 was not required to surrender it but could have self-grounded.

17 Respondent said Dr. Gogan did not again issue him a medical
18 certificate after October 2016.

19 He noted he moved in 2017, from Alabama, eventually to
20 Clermont, Florida, where he was working part time as a flight
21 simulator instructor until he lost his certificates. He said he
22 was able to do that job without a medical certificate because
23 there is no actual flying. He was however required to have a
24 valid ATP or commercial pilot's certificate.

25 Respondent indicated that in January 2018, he applied for a

1 new medical certificate through Dr. Shewmaker completing the
2 application on January 20th; he said he answered no to question
3 18(m) because he did not know then that he had been diagnosed with
4 a mental disorder. He said he answered yes to question 19, but
5 did not list Dr. Schaffer because he understood his interaction
6 with him was just counseling.

7 Respondent said that in June 2018, he sent a letter to the
8 FAA Southern Region which included an attached letter from Dr.
9 Schaffer which is at Exhibit A-5. According to Respondent that
10 was the first time he was aware Dr. Schaffer had diagnosed him
11 with adjustment disorder with depressed mood and insomnia
12 disorder. He noted that in January 2019, he submitted a medical
13 application and answered yes to question 18(m) and included Dr.
14 Schaffer's diagnosis in his response.

15 Respondent discussed various correspondence with the FAA
16 beginning with a March 16th, 2018, request for current medical
17 information and culminating with his October 10th, 2018, response
18 to a letter of investigation; and those are Exhibits A-17 through
19 A-23 and A-5. He said he discussed the requests and his proposed
20 responses with his AME Dr. Shewmaker and relied on his advice.
21 Respondent said he did not intentionally withhold information from
22 the FAA, that any incorrect responses were a mistake.

23 In cross-examination, Respondent agreed that he understands
24 the importance of the information submitted on the medical
25 application and that it is used to determine an airman's medical

1 qualifications. He said he also understands the danger to
2 aviation safety if an individual is not honest and forthcoming on
3 the medical application.

4 He denied being fired from his job, saying he was permitted
5 to resign in conjunction with corporate restructure. He stated he
6 was not surprised that Harold Stinson said they were both fired
7 because the company could not figure out which one of them was
8 lying.

9 With respect to Exhibit A-8, Respondent confirmed he wrote
10 the letter to Dr. Gogan in 2016. He said he was not diagnosed by
11 Dr. Schaffer with ADHD, despite his reference on page 2 of that
12 document to Dr. Schaffer's initial diagnosis of ADHD. He
13 confirmed he did not report a diagnosis of ADHD on any medical
14 application. He agreed he was prescribed both Dexedrine and
15 Ambien by Dr. Schaffer and took Dexedrine over a period of 8 or 10
16 months.

17 Respondent said he did not believe he needed to disclose his
18 visits to Dr. Schaffer on either his 2015 or 2018 medical
19 applications but agreed he did report visits for Urgent Care for a
20 swollen toe and for the flu.

21 With respect to question 19 on the 2015 and 2018
22 applications, Respondent conceded that the instructions on the
23 MedXpress User Guide, at Exhibit A-1, page 16, require an
24 applicant to report all visits to any health professional,
25 including a psychiatrist, for treatment, examination, or medical

1 or mental evaluation. He also agreed that instructions for
2 question 18 on page 14 of the guide require an applicant to select
3 yes for every condition that you have ever had or been diagnosed
4 with and the approximate date of the occurrence, in addition to
5 any diagnosis. Respondent offered that he did not say he had
6 reviewed the guide in its entirety.

7 With respect to Exhibit A-10 Respondent agreed Dr. Schaffer's
8 letter indicates he presented with moderate depression or
9 dysthymia and excessive fatigue and not just with fatigue.

10 He also conceded that he told Dr. Gogan in the letter in
11 Exhibit A-8 page 2 that he chose to ask for forgiveness instead of
12 permission with regard to his use of pharmaceuticals. On page 1
13 of that letter, Respondent also apologized to Dr. Gogan for not
14 discussing his next actions in beginning treatment with a
15 psychiatrist.

16 With respect to Exhibit A-10, Respondent agreed that Dr.
17 Gogan, rather than Respondent, forwarded Dr. Schaffer's 2016
18 letter to the FAA.

19 In response to questions by me, Respondent indicated he wrote
20 the letter in Exhibit A-8 to Dr. Gogan after receipt of Dr.
21 Schaffer's October 2016 letter, and the surrender of his October
22 2016 medical certificate. Respondent also testified that he self-
23 grounded during the entire approximately 10-month period that he
24 was prescribed medications by Dr. Schaffer. He indicated he did
25 not fly at all during that period.

1 On recross examination, Respondent agreed that on his
2 September 2016 medical application he reported 180 hours of pilot
3 time in the previous 6 months which was within the time frame he
4 was prescribed the medications, although he noted that was minimal
5 hours.

6 Dr. Susan Northrup was recalled by the Acting Administrator
7 as a rebuttal witness and testified that an airman may self-ground
8 during a period when he is taking dextroamphetamine or Dexedrine
9 but would be required to wait for 90 days after his last dose and
10 then have to be cleared through an AME and the FAA before he could
11 fly again. She stated the waiting period for Wellbutrin is 60
12 days.

13 Having summarized the evidence and testimony I'll now discuss
14 that evidence as it pertains to the allegations of the complaint.
15 With respect to the alleged violations of 14 CFR Section
16 67.403(a)(1), the elements of intentionally false statement are:
17 a false representation; in reference to a material fact; made with
18 knowledge of its falsity. Of course those elements are based on
19 the Hart v. McLucas case which is at 535 F.2nd 516. Those
20 elements apply to all of the allegations of intentionally false
21 statements under both Count 1 and Count 2.

22 As a preliminary matter I'd like to address the materiality
23 element of the alleged violations. Respondent's Counsel has
24 conceded the materiality of the information sought in response to
25 items 18(m) and 19 of Respondent's January 20, 2018, application

1 for medical certificate, as well as items 17(a), 18(m), and 19, of
2 Respondent's August 15, 2015, application for medical certificate.
3 His concession is also consistent with Board precedent which makes
4 it clear that "materiality is established by virtue of the fact
5 that the information was specifically sought in a form used by the
6 Administrator to determine an applicant's qualifications to hold
7 an airman medical certificate." And I quote this from the case of
8 Administrator v. Krings, at NTSB Order EA-3908; it's a 1993 case.

9 Beyond that, the testimony of Dr. Northrup establishes the
10 materiality of the information supplied on the applications. She
11 testified about the importance of questions on medical
12 applications and how an applicant's responses help determine
13 whether he or she is medically qualified to hold an FAA medical
14 certificate. She also noted Respondent was issued the certificate
15 in question without all the information that was needed to make an
16 informed decision regarding his eligibility for a medical
17 certificate.

18 Therefore, based on all of those things I find that the
19 information provided by Mr. Smith in response to questions 17, 18,
20 and 19, on both the January 20th, 2018, and August 15th, 2015,
21 applications for medical certificate, was material.

22 Now, turning specifically to Count 1, which alleges two
23 intentionally false statements pertaining to Respondent's
24 responses to items 18(m) and 19 of this January 20th, 2018,
25 application for First Class Medical Certificate. With regard to

1 item 18(m) and in particular to Respondents No response to
2 question 18(m) of the application, Respondent admits that the
3 response was incorrect in that he has a history of adjustment
4 disorder with depressed mood and insomnia disorder, as diagnosed
5 by Dr. Schaffer.

6 The evidence, including Dr. Schaffer's October 2016 letter at
7 Exhibit A-10 and June 2018 letter in Exhibit A-5, further supports
8 that diagnosis and Respondent's admission.

9 Thus, I find that Respondent's No response to item 18(m) is
10 incorrect or false, and that the Acting Administrator has met the
11 false representation prong of the Hart v. McLucas intentional
12 falsification test with respect to item 18(m) on the January 20th,
13 2018 medical application.

14 Having found that the Acting Administrator has met both the
15 false representation and materiality prongs of the Hart v. McLucas
16 test, I turn to the knowledge of the falsity of the statement
17 which is the critical issue to be decided with respect to item
18 18(m) on that application.

19 Respondent contends that he did not know that he had been
20 diagnosed with a mental disorder until June 2018, when he received
21 a copy of Dr. Schaffer's June 8, 2018, letter. He argues that the
22 prefatory language of question 18 requires there to be a formal
23 diagnosis of a mental disorder and that, because Respondent was
24 not aware of a formal diagnosis, his false No response could not
25 have been known.

1 Contrary to his contention, the plain language of question 18
2 addresses conditions an applicant has either been diagnosed with
3 or had. The instructions for completing the application as set
4 forth in the MedXpress User Guide at Exhibit A-1 also provide that
5 an applicant is required to select "yes" under question 18 for any
6 condition he's had or been diagnosed with and refers to
7 approximate dates of occurrences as well as diagnosis.

8 Specific items listed under question 18 also clearly include
9 conditions aside from formal diagnoses, such as frequent or severe
10 headaches, admissions to hospital, and fainting spells. This is
11 also consistent with the purpose for gathering the medical history
12 under question 18 as testified to by Dr. Northrup, so that the AME
13 and the FAA can make a fully informed decision about whether an
14 applicant is medically qualified to hold a medical certificate,
15 which Respondent testified he fully understood.

16 I also find less than credible Respondent's assertion that
17 prior to June 2018 he did not understand that he had a mental
18 disorder of any sort that he should report in response to question
19 18(m) on his medical application. At least as early as October of
20 2016, Respondent was in possession of and indicated he reviewed
21 Dr. Schaffer's letter at Exhibit A-10. That letter makes it clear
22 that Dr. Schaffer was treating the Respondent for moderate
23 depression or dysthymia and excessive fatigue, with medications
24 including Wellbutrin, Dexedrine and Adderall. That treatment had
25 started in 2014, and continued until 2017. Respondent's own

1 letter to Dr. Gogan from that same time frame, which is Exhibit A-
2 8, notes that he sought treatment from a psychiatrist for
3 situational depression secondary to chronic fatigue which was
4 being treated with pharmaceuticals including Wellbutrin and
5 Dexedrine. Respondent also testified about the stressors in his
6 life which led him to seek out Dr. Schaffer's professional
7 services.

8 Based on the foregoing, I find that the No response to
9 question 18(m) made by Mr. Smith in his January 20th, 2018
10 application for medical certificate was made with knowledge of its
11 falsity.

12 Accordingly, I find that the Acting Administrator has
13 established all the elements of intentional falsification by
14 preponderance of reliable, probative and credible evidence,
15 pertaining to question 18(m) of the January 20th, 2018
16 application.

17 Turning next to Respondent's response to question 19 on his
18 January 20th, 2018, application for medical certificate. As to
19 the falsity element, Respondent, while conceding that his failure
20 to list Dr. Schaffer in response to question 19 as a health
21 professional visited within the past 3 years was an incorrect
22 statement, asserted that he correctly answered Yes to question 19
23 and that his failure to list Dr. Schaffer is an omission, and that
24 such an omission is not sufficient to establish false
25 representation.

1 I disagree. Respondent, in the explanation of his Yes
2 response to question 19, listed only a visit to Dr. Gogan in 2017.
3 He had an obligation to include his multiple visits to Dr.
4 Schaffer between 2014 and 2017, which included treatment with
5 prescribed pharmaceuticals, including non-approved medications.
6 By failing to include such visits, he deprived the AME of critical
7 information upon which to make an informed decision about whether
8 Respondent was medically qualified to hold the certificate. I
9 conclude that his failure to report those visits to Dr. Schaffer
10 on his January 20th, 2018, medical application constitutes a false
11 representation.

12 The materiality of the information provided having already
13 been established, the last element, knowledge of the falsity of
14 the statement, is the critical determination to be made here. The
15 question of the knowledge of the falsity of the information
16 provided turns largely on the credibility of Respondent's
17 explanations regarding his failure to list Dr. Schaffer as a
18 health professional visited in response to question 19. He
19 testified that he did not list Dr. Schaffer in response to
20 question 19 because he understood his interaction with him was
21 just counseling and he did not believe counseling was required to
22 be reported. That testimony is contrary to the instructional
23 guidance in the MedXpress User Guide, Exhibit A-1, page 16, which
24 notes applicants are required to enter all visits with any health
25 professional, which specifically includes psychiatrists. Nor is

1 that explanation consistent with the letter Respondent prepared to
2 Dr. Gogan in which he never mentioned counseling, but acknowledged
3 seeking and receiving treatment with a psychiatrist for
4 situational depression secondary to chronic fatigue, and discussed
5 his research into and use of unapproved pharmaceuticals as part of
6 that treatment regimen.

7 I find that the inconsistencies between Respondent's
8 testimony and the explanation provided to his then primary care
9 provider and AME undermines the credibility of that testimony.
10 Respondent's letter to Dr. Gogan, Exhibit A-8, makes it clear that
11 he was well aware of the nature and extent of his treatment with
12 Dr. Schaffer, which involved far more than simple counseling.

13 Based on the foregoing, I find Respondent's failure to list
14 Dr. Schaffer in response to question 19 of his January 20th, 2018,
15 application for medical certificate was done with knowledge of its
16 falsity. Accordingly I find that the Acting Administrator has
17 established all the elements of intentional falsification by a
18 preponderance of reliable, probative, and credible evidence with
19 respect to question 19 of the application.

20 Turning next to Count 2, which alleges three intentionally
21 false statements pertaining to Respondent's responses to items
22 17(a), 18(m), and 19, of the August 11th, 2015, application for
23 Second Class Medical Certificate. First, with respect to item
24 18(m): Again, with regard to his No response to question 18(m) on
25 the August 11th, 2015, application, Respondent admits that the

1 response was incorrect, which is fully supported by the
2 documentary evidence, thereby establishing the false
3 representation prong of Hart v. McLucas, consistent with the
4 analysis above regarding the January 20th, 2018, medical
5 application. I likewise find the materiality element to have been
6 satisfied and established. Thus I turn to the knowledge of the
7 falsity of the statement, which again is the critical issue to be
8 decided with respect to question 18(m).

9 Respondent again contends that he did not know he had been
10 diagnosed with a mental disorder until June 2018, when he received
11 a copy of Dr. Schaffer's June 8th, 2018, letter. He argues that
12 the prefatory language of question 18 requires there to be a
13 formal diagnosis of the mental disorder and that because he was
14 not aware of a formal diagnosis, his false No response could not
15 have been a knowing one. Again, contrary to that contention, the
16 plain language of question 18 addresses conditions an applicant
17 has either been diagnosed with, or had. Instructions for
18 completing the application in the MedXpress user guide, Exhibit A-
19 1, also provide that an applicant is required to select Yes under
20 question 18 for any conditions he's had or been diagnosed with and
21 refers to approximate dates of occurrences as well as diagnosis.

22 Specific items listed under question 18 also clearly include
23 conditions aside from formal diagnoses, again, such as frequent or
24 severe headaches, admissions to hospital, and fainting spells.
25 This is also consistent with the purpose for gathering medical

1 history under question 18, as testified to by Dr. Northrup, so
2 that the AME and FAA can make a fully informed decision about
3 whether an applicant is medically qualified to hold a medical
4 certificate.

5 I also find less than credible his assertion that prior to
6 June 2018 he did not understand he had a mental disorder of any
7 sort that he should report in response to question 18(m) on the
8 application. As noted previously, he began treatment with Dr.
9 Schaffer in 2014, treatment which was ongoing in August 2015, and
10 continued on until 2017. His letter to Dr. Gogan, although
11 subsequent to the August 2015 application, sheds light on the
12 treatment he sought and received. He notes in the first line of
13 that correspondence that he sought treatment for situational
14 depression secondary to chronic fatigue. His letter also makes
15 clear that he sought that treatment with a psychiatrist and again
16 notes that his fatigue was manifesting into depression. The
17 course of treatment included pharmaceutical intervention including
18 the medication Wellbutrin, Dexedrine, Ambien, and Adderall.
19 Respondent also testified about the stressors in his life which
20 led him to first seek out Dr. Schaffer's professional services.

21 Based on the foregoing, I find that the No response to
22 question 18(m) made by Mr. Smith on this August 11th, 2015,
23 application for medical certificate was made with knowledge of its
24 falsity. Accordingly I find that the Acting Administrator has
25 established all the elements of intentional falsification by a

1 preponderance of reliable, probative, and credible evidence as
2 that pertains to question 18(m) of the August 11th, 2015,
3 application.

4 Turning next to Respondent's response to question 19 on the
5 August 2015, application. As to the falsity element, Respondent,
6 while conceding that his failure to list Dr. Schaffer as a health
7 professional visited within the past three years was an incorrect
8 statement, asserted that he correctly answered it Yes and that his
9 failure to list Dr. Schaffer is an omission, and that such an
10 omission is not sufficient to establish false representation.
11 That's the same contention that Respondent made with respect to
12 his response to question 19 on the January 2018 medical
13 application, and my analysis likewise remains the same.

14 Respondent, in the explanation to his Yes response to
15 question 19 listed only a visit to Dr. Gogan in 2015 and a 2014
16 visit to Urgent Care for the flu. He had an obligation to include
17 his multiple visits to Dr. Schaffer between 2014 and 2015 which
18 included treatment with prescribed pharmaceuticals including
19 unapproved medications. By failing to include such visits he
20 deprived the AME of critical information upon which to make an
21 informed decision about whether Respondent was qualified to hold a
22 medical certificate. I conclude that his failure to report those
23 visits to Dr. Schaffer on his August 2015 medical application
24 constitutes a false representation.

25 Again, the materiality of the information has already been

1 established, so the last element, knowledge of the falsity, is
2 once again the critical element to be considered. The question of
3 the knowledge of the falsity of the information provided turns
4 largely on the credibility of Respondent's explanations regarding
5 his failure to list Dr. Schaffer as a health professional visited.

6 He testified he did not list Dr. Schaffer in response to
7 question 19 because he understood his interaction with him as just
8 counseling and didn't believe counseling was required to be
9 reported. That testimony again is contrary to instructional
10 guidance in the MedXpress User Guide which notes applicants are
11 required to enter all visits with any health professional,
12 specifically including psychiatrists. Nor is the explanation
13 consistent with the subsequent letter Respondent prepared to Dr.
14 Gogan in which he never mentioned counseling but acknowledged
15 seeking and receiving treatment with a psychiatrist for
16 situational depression secondary to chronic fatigue and discussed
17 his research into and use of unapproved pharmaceuticals as a part
18 of that treatment regimen.

19 I find the inconsistencies between Respondent's testimony and
20 the explanation provided to his then primary care provider and AME
21 undermines the credibility of his testimony. Respondent's letter
22 to Dr. Gogan at Exhibit A-8 makes it clear he was well aware of
23 the nature and extent of his treatment with Dr. Schaffer, which
24 involved far more than simple counseling. Given the nature of
25 this treatment with Dr. Schaffer, his failure to list him as a

1 health professional is also incongruent with his decision to
2 include a routine visit to Urgent Care for the flu.

3 Based on the foregoing I find the Respondent's failure to
4 list Dr. Schaffer in response to question 19 of his August 11th,
5 2015, application for medical certificate was done with knowledge
6 of its falsity. Accordingly I find the Acting Administrator has
7 established all of the elements of intentional falsification by a
8 preponderance of reliable, probative, and credible evidence.

9 Lastly I turn to Respondent's response to question 17(a) of
10 his August 11th, 2015 application for medical certificate. As to
11 the falsity element, after the close of the Acting Administrator's
12 case-in-chief the Respondent moved to amend his answer to deny
13 that he was using Wellbutrin and/or dextroamphetamine/Dexedrine at
14 the time he completed the medical application. For reasons I have
15 already addressed on the record, I denied the motion, thereby
16 establishing by virtue of the pleadings filed in this case that
17 his answer to question 17(a) was false. However, given the
18 emergency nature of the proceeding I informed the parties that I
19 would allow evidence and argument on the merits of the allegation
20 to facilitate a timely review on the merits on any subsequent
21 review and appeal.

22 In light of that, Respondent argues that his No answer to
23 question 17(a) was not false because he was not using Wellbutrin,
24 Dexedrine, or any medications on August 11th, 2015, when he
25 completed the application. There is no direct evidence of his use

1 of Dexedrine or Wellbutrin on August 11th, 2015. However, there
2 is evidence in the form of prescription records in Exhibit R-1
3 that Respondent was prescribed Dexedrine on August 10th, 2015, the
4 day before he completed his application for medical certificate
5 and that he filled that prescription on August 12th, 2015, the day
6 after receiving his medical certificate. He then filled
7 prescriptions for Dexedrine an additional 10 times through at
8 least May 2016.

9 Respondent's letter to Dr. Gogan at Exhibit A-8, shows his
10 awareness of the disparate treatment between the use of
11 pharmaceuticals by military versus civilian pilots. In that
12 letter Respondent bemoans the fact that military pilots have been
13 using pharmaceuticals for decades, yet their use is not approved
14 for civilian pilots. Despite this prohibition, Respondent
15 discusses the research he completed and his prescribed use first
16 of Wellbutrin and then Dexedrine, which is consistent with the
17 pharmacy records. Respondent also articulated in that letter his
18 decision to, "ask for forgiveness instead of permission."

19 Considered together, these documents demonstrate that
20 Respondent was aware of both the use of pharmaceuticals by
21 military aviators and the prohibition against their use by
22 civilian pilots. The evidence also firmly establishes his use of
23 Dexedrine in August of 2015. And while he testified that he self-
24 grounded during the entire period that he was taking the
25 medication, his 2016 medical application lists 180 hours of pilot

1 time during the 6-month period prior to the application during
2 which he was taking the medication. And his letter to Dr. Gogan
3 also suggests that he was flying, noting that he did not take the
4 medication within an a 8-hour period of flying.

5 Those inconsistencies between his testimony and documentary
6 evidence undermine the credibility of his testimony. At minimum,
7 the evidence establishes an individual with a strong motive not to
8 disclose his use of Dexedrine, whose words and actions are
9 indicative of an individual trying to conceal his use of an
10 unapproved medication. Thus, knowing that he had been prescribed
11 the medication and intending to fill the prescription and begin
12 using it the next day, he nonetheless answered No to question
13 17(a). Such actions are deceptive and designed to circumvent the
14 purpose of the medical application process and question 17(a)
15 specifically, which is to identify medications that may impact an
16 individual's medical fitness to fly.

17 Thus, I find that, independent of Respondent's admissions to
18 paragraph 18 of the complaint, the evidence establishes that
19 Respondent's No answer to question 17(a) on his August 11th, 2015,
20 medical application was false and was made with knowledge of its
21 falsity.

22 The materiality of the information sought by question 17(a)
23 has already been established. Thus, I further find the
24 Administrator has established all the elements of intentional
25 falsification with respect to question 17(a) by a preponderance of

1 reliable, probative, and credible evidence.

2 Having found that the Administrator has established all the
3 elements of intentional falsification by a preponderance of
4 evidence I further conclude, consistent with the above
5 discussions, that Respondent has failed to establish the
6 affirmative defense of mistake as asserted in his answer.

7 Respondent's Counsel also argued that the pleadings with
8 respect to allegations 10 and 20 were insufficient in that they do
9 not specifically allege intentional falsification. He suggested
10 that the pleadings in question do not provide fair notice as to
11 what Respondent had to defend against.

12 I would note that our pleadings are notice pleadings. Here
13 the numbered allegations set forth specific factual allegations
14 and include a general allegation that, as a result, Respondent
15 made or caused to be made intentionally false statements in
16 violation of 14 CFR Section 67.403(a)(1).

17 I conclude that the pleadings are sufficient to put
18 Respondent on notice that he must be prepared to defend against
19 the allegations of making intentionally false statements,
20 including for allegations 10 and 20. I would also note there's
21 been no evidence presented to establish any prejudice to his
22 ability to prepare a defense against those allegations of the
23 complaint.

24 Respondent also raised reasonable reliance as an affirmative
25 defense, arguing that Respondent relied on Dr. Gogan who was aware

1 of Respondent's treatment by Dr. Schaffer and was in receipt of
2 Dr. Schaffer's October 16th, 2016 letter prior to issuing
3 Respondent's October 17th, 2016 medical certificate. At the
4 outset, I note that the doctrine of reasonable reliance is one of
5 narrow applicability. In the case of Administrator v. Fay and
6 Takacs -- that's NTSB Order EA-3501 from 1992 -- the Board held
7 that if a particular task is the responsibility of another, if the
8 pilot in command has no independent obligation, or ability to
9 ascertain the information and if the captain has no reason to
10 question the other's performance, then and only then will no
11 violation be found.

12 Here I conclude that the evidence does not establish that
13 Dr. Gogan was aware of Dr. Schaffer's treatment of Respondent
14 prior to issuing the October 2016 medical certificate. Dr. Gogan,
15 who I found to be a more credible witness, testified that he did
16 not see Dr. Schaffer's letter until sometime after issuing the
17 Respondent's October 17th, 2016 medical certificate and that he
18 then suggested Respondent surrender that certificate based upon
19 his use of unapproved medications.

20 Dr. Gogan's actions in having Respondent surrender the
21 certificate after it was issued are consistent with an individual
22 becoming aware of disqualifying information after the fact. While
23 Respondent indicated Dr. Gogan knew before issuing the
24 certificate, he was unable to articulate a reason why Dr. Gogan
25 would change his mind other than the fact that there was indicated

1 use of unapproved drugs, which Dr. Gogan was reportedly already
2 aware of before issuing the certificate. I don't find plausible
3 Respondent's explanation that Dr. Gogan simply changed course for
4 no articulable reason.

5 Further, Respondent's letter to Dr. Gogan, which he indicated
6 was written after the certificate was surrendered, apologizes to
7 Dr. Gogan for not making him aware of his treatment by Dr.
8 Schaffer, not sharing with Dr. Gogan the research he had done on
9 the use of pharmaceuticals, and specifically notes that he chose
10 to ask for forgiveness rather than permission. That
11 correspondence is not consistent with an individual who had
12 brought the information to the attention of Dr. Gogan before the
13 certificate was issued.

14 At any rate, reliance is not available as a defense to an
15 individual who has an independent obligation to carefully read the
16 application and instructions and to answer the questions on the
17 medical application fully and accurately. There is absolutely no
18 evidence that Dr. Gogan directed Respondent to answer the
19 questions on either application in a particular way or provided
20 him inaccurate or incorrect guidance on what information he should
21 report. Thus I find that the Respondent has failed to meet his
22 burden of establishing the affirmative defense of reasonable
23 reliance by a preponderance of evidence.

24 Respondent's Counsel also included a number of other listed
25 affirmative defenses in his answer to the complaint. For those

1 additional affirmative defenses, there has been little or no
2 evidence or argument presented to support those, and thus I find
3 no merit in them and find the Respondent has failed to meet his
4 burden of establishing those affirmative defenses by a
5 preponderance of evidence.

6 Based on the foregoing, I find that all of the numbered
7 allegations in the complaint, paragraphs 1 through 21, are
8 established by a preponderance of reliable, probative, and
9 credible evidence. Accordingly I further find that the evidence
10 establishes that Respondent violated 14 CFR Section 67.431(a)(1)
11 by making intentionally false statements on applications for
12 medical certificates dated January 20th, 2018, and August 11th,
13 2015.

14 I now turn to the sanction imposed by the Administrator. In
15 August 2012, the Pilot's Bill of Rights was signed into law by the
16 President and became effective immediately upon enactment. The
17 Pilot's Bill of Rights specifically strikes from 49 United States
18 Code Sections 44709 and 44710 language that in cases involving
19 amendments, qualifications, suspensions and revocation of airman
20 certificates the Board is, quote, "bound by all validly adopted
21 interpretations of laws and regulations the Administrator carries
22 out, and of written agency policy guidance available to the public
23 relating to sanctions to be imposed under this section, unless the
24 Board finds the interpretation arbitrary, capricious, or otherwise
25 not according to law."

1 While I am no longer bound to give deference to the FAA by
2 statute, that agency is entitled to judicial deference due all
3 other federal administrative agencies. In applying the principles
4 of judicial deference to the interpretations of laws, regulations,
5 and policies the Administrator carries out, I must analyze and
6 weigh the facts and circumstances in each case to determine if the
7 sanction selected by the Administrator is appropriate.

8 In the case at hand, the Administrator has argued that the
9 appropriate sanction based upon deference to FAA sanction
10 guidelines and past precedent is revocation of any and all airman
11 and medical certificates. The Administrator further suggests that
12 revocation is appropriate in any case where, as here, the
13 violation involves intentional falsification and thus goes to a
14 lack of qualifications to hold any certificate.

15 Respondent argued that the false representations were
16 mistakenly rather than knowingly made, thereby making a sanction
17 under 14 CFR Section 67.403(c) the only appropriate consideration.
18 He suggested that any sanction should be limited to indefinite
19 suspension or revocation of Respondent's medical certificates
20 until such time as his medical qualifications can be determined.

21 Board precedent firmly establishes that even one intentional
22 falsification compels the conclusion that the falsifier lacks the
23 necessary care, judgment and responsibility required to hold any
24 airman certificate. One such case illustrating that precedent is
25 Administrator v. Berry. That's NTSB Order EA-2689 and that was

1 decided in 1988. Since that decision, the Board has found and
2 continues to find that even one intentional falsification compels
3 the conclusion that the falsifier lacks the necessary care,
4 judgment, and responsibility required to hold any airman
5 certificate.

6 I find therefore that the sanction sought by the
7 Administrator is appropriate and warranted in the public interest
8 in air commerce and air safety. Therefore I find that the
9 Emergency Order of Revocation, the complaint herein, must be and
10 shall be affirmed as issued.

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ORDER

IT IS HEREBY ORDERED THAT the Emergency Order of Revocation, the Complaint herein, is affirmed as issued.

Respondent's airline transport pilot and commercial pilot certificates are hereby revoked.

Respondent's airman medical certificates issued on January 24, 2018, and August 11, 2015, and any other airman medical certificate held by him are hereby revoked.

Entered this 14th day of March 2019, at Orlando, Florida.

Edited on
March 21, 2019

STEPHEN R. WOODY
Administrative Law Judge

APPEAL

1 JUDGE WOODY: And that concludes my oral initial decision.

2 Mr. Smith, I'm certain you are disappointed in the decision,
3 but, as I'm sure your counsel has told you, you have the
4 opportunity to appeal my decision if you so desire.

5 MR. SMITH: It's understandable, Your Honor.

6 JUDGE WOODY: All right.

7 Mr. Winton, do you need a written advisement of appellate
8 rights or are you going to take care of that yourself?

9 MR. WINTON: I don't need any written advisement, thank you.

10 JUDGE WOODY: I thought not, but thank you.

11 All right, the one thing I would like to emphasize to you,
12 sir, is just the timeline, as I'm sure your counsel will -- you
13 have a very limited time especially in an emergency proceeding in
14 which to file your notice of appeal, if you want to appeal, and in
15 which to perfect that. It's very important that you don't miss
16 that deadline, as I'm sure your counsel will not let you do, but
17 please keep that in mind because if you do miss the deadline the
18 Board is unlikely to accept the appeal.

19 All right, is there anything of an administrative nature that
20 we should discuss before we adjourn?

21 MR. WINTON: Nothing for the Respondent, Your Honor.

22 MS. GOTIMER: Nothing for the Acting Administrator.

23 JUDGE WOODY: Well, thank you both. I know that this
24 proceeding has been perhaps a bit more involved than we initially
25

1 thought it might be, but I appreciate everyone's efforts as we
2 worked through that both last week and this week, so thank you
3 very much.

4 Mr. Smith, good luck to you, sir.

5 MR. SMITH: Thank you, sir.

6 JUDGE WOODY: And with that, we will adjourn the proceeding
7 and go off the record.

8 (Whereupon, at 12:44 p.m., the hearing in the above matter
9 was concluded.)

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CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

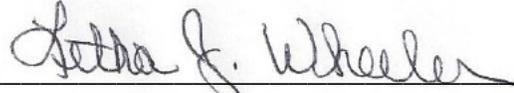
IN THE MATTER OF: Christopher A. Smith

DOCKET NUMBER: SE-30615

PLACE: Orlando, Florida

DATE: March 14, 2019

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.



Letha J. Wheeler
Official Reporter