

SERVED: August 20, 2021

NTSB Order No. EA-5902

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 19th day of August, 2021

_____)	
STEPHEN M. DICKSON)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	EMERGENCY
)	
v.)	Docket SE-30989
)	
DAVID TUSHIN,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

I. Background

Respondent appeals the oral initial decision of Administrative Law Judge Alfonso J. Montaña, issued on July 23, 2021.¹ By that decision, the law judge determined the 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, flight instructor certificate, ground instructor certificate, and any class of airman medical certificate respondent holds, based on the

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.

violation of § 67.403(a)(1) and in accordance with 14 C.F.R. § 67.403(b)³ and (c).⁴ Respondent timely appealed. For the reasons set forth below, we deny respondent's appeal and affirm the law judge's decision.

A. Facts

On August 15, 2020, the FAA's Office of Audit and Evaluation received an anonymous complaint against respondent through its Hotline Information System.⁵ The complaint alleged that respondent was abusing controlled substances and had a history of substance abuse, psychological issues, attention deficit disorder, erratic behavior, depression, and suicidal ideations.⁶ The complaint further alleged that respondent had previously been admitted to King County Hospital in Seattle, Washington, for multiple drug overdoses and/or suicidal attempts.⁷ The complaint alleged that respondent had indicated he had to attend drug rehabilitation multiple times and had not disclosed this fact to the FAA.⁸ With the hotline complaint, the FAA received a sentencing memorandum from respondent's November 2007 criminal case with the State of Washington King County Superior Court.⁹ The sentencing memorandum indicated that respondent plead guilty to two counts of unlawful issuance of bank checks.¹⁰ The sentencing

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 Exh. A-1. *See* Tr. at 39.

⁶ Exh. A-1 at 1.

⁷ *Id.*

⁸ *Id.*

⁹ Exh. A-2.

¹⁰ *Id.* at 1.

memorandum also indicated that respondent had been engaged in weekly psychotherapy with Steven R. Feldman, Ph.D. since June 2007.¹¹ In a letter attached to the sentencing memorandum, Dr. Feldman stated that respondent was previously evaluated in April and May 2007 by Dr. Kenneth Muscatel, who noted that respondent “showed features of depression, dependency, histrionic personality disorder, anxiety, and a history of chronic pain diagnosed as Reflex Neurovascular Dystrophy [RND].”¹² However, Dr. Feldman indicated that, while respondent did possess “those indicators,” was “somewhat obsessive in his thought patterns,” and had significant stress from his work situation and the criminal case, both he and Dr. Muscatel agreed that respondent did not meet full diagnostic criteria for any of the mental disorders listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM) IV.¹³ In May 2014, in the Order Vacating Convictions, the Superior Court of Washington for King County vacated respondent’s 2007 conviction for unlawful issuance of bank checks.¹⁴ In relevant part, the Order Vacating Convictions noted that, “[f]or all purposes the [respondent] may state that he has never been convicted of the crimes of conviction.”¹⁵

The receipt of the hotline complaint against respondent prompted the investigation by the FAA’s Western Pacific Regional Medical Office.¹⁶ On September 17, 2020, Stephan C. Lenchner, M.D., the Flight Surgeon with the Western Pacific Regional Medical Office, sent a reexamination letter to respondent requesting a submission of any and all treatment records regarding his

¹¹ *Id.* at 1, 3.

¹² *Id.* at 4.

¹³ *Id.* at 4.

¹⁴ Exh. R-19 at 1-3.

¹⁵ *Id.* at 2.

¹⁶ *See* Tr. at 37-38.

history of depression, anxiety, histrionic personality disorder, RND, dependency; a current psychiatric or psychological evaluation; copies of all court documents pertaining to any arrests/convictions; a current history and clinical examination from a treating physician regarding RND; and copies of pharmacy records.¹⁷ Also, as part of the investigation by the FAA, respondent underwent a psychological evaluation by L. Michelle Sugerman, Ph.D. in October 2020 and a psychiatric evaluation by Matthew Goldenberg, D.O. in January 2021.¹⁸ During the evaluation by Dr. Sugerman in October 2020, respondent authorized Dr. Sugerman to release all of respondent's medical records to the FAA.¹⁹ Based on this release, the FAA obtained medical records from respondent's primary care physician Dilip Anmangandla, M.D.²⁰

Respondent saw Dr. Anmangandla from 2016 through 2020.²¹ During several visits in 2016, respondent complained of worsening back pain, which was treated with tramadol, and the magnetic resonance imaging of respondent's lumbar spine showed an annular fissure and a disc bulge near S1 nerve root.²² In January 2017, respondent underwent lumbar disc replacement surgery.²³ Visits in 2017 showed that respondent continued to complain of back pain, for which Dr. Anmangandla prescribed MS Contin, Percocet, and tramadol.²⁴

¹⁷ Exh. A-3 at 1-2.

¹⁸ See Exh. A-10 at 198-207, 212-233.

¹⁹ *Id.* at 187-188.

²⁰ See Exh. A-4.

²¹ Tr. at 303-304.

²² Exh. A-4 at 1-2, 4, 7, 10.

²³ *Id.* at 11, 13. Respondent disclosed the lumbar surgery on the September 15, 2017, medical certificate application. Exh. R-4 at 2-3.

²⁴ Exh. A-4 at 15-18, 23, 29-30, 45.

In February 2018, Dr. Anmangandla noted respondent was “again having issues with chronic back pain...still considerable pain especially after long days flying plane...now flying full time – reports aviation medical examiner [AME] signed off on flying while taking chronic narcotics.”²⁵ The plan was to “add prn Percocet or tramadol to regimen.”²⁶ On May 1, 2018, the plan was to “continue tramadol 50mg tid,” and the EScript record indicates a prescription of 90 tramadol tablets with 2 refills the same day.²⁷ In September 2018, Dr. Anmangandla noted that respondent “has been doing well with tramadol TID.”²⁸ On October 9, 2018, Dr. Anmangandla indicated that respondent “prefer[ed] to go back to tramadol for chronic back pain” and that he “had been doing well with tramadol TID.”²⁹ During the same visit, Dr. Anmangandla also noted that respondent was now a pilot, had a good job lined up, and was flying a lot.³⁰ Also on October 9, 2018, the EScript record indicates a prescription of 90 tramadol tablets with 2 refills.³¹ On December 7, 2018, respondent “continue[d] to use tramadol regularly,” which “manage[d] pain well,” and he was to “continue tramadol for back pain.”³² The EScript record indicates a prescription of 90 tramadol tablets with 2 refills the same day.³³

²⁵ *Id.* at 32.

²⁶ *Id.* at 37. In medical abbreviations, “prn” means “as needed.”

²⁷ *Id.* at 37, 68. “Tid” means “three times a day.”

²⁸ *Id.* at 39.

²⁹ *Id.* at 40, 42.

³⁰ *Id.* at 40.

³¹ *Id.* at 68.

³² *Id.* at 32, 43.

³³ *Id.* at 68.

On February 22, 2019, Dr. Anmangandla indicated that respondent had “constant back pain,” but that he “has been doing well with tramadol TID” and was to continue.³⁴ The EScript record shows a prescription of 90 tramadol tablets with 2 refills the same day.³⁵ On April 15, 2019, Dr. Anmangandla indicated that respondent came to refill medication and his continued use of tramadol for low back pain was effective, and the EScript shows a prescription of 90 tramadol tablets with 2 refills the same day.³⁶ Also on the same day, Dr. Anmangandla indicated that respondent was “inquiring about Provigil – has been struggling due to varying work/flight schedules and difficulty adjusting – feeling excessively tired during work ours [sic] – spoke to MD with airline who noted Provigil approved by FAA and used frequently by pilots,” and “reports stimulant drugs banned by FAA but Provigil allowed.”³⁷ Dr. Anmangandla diagnosed respondent with shift work sleep disorder and prescribed Provigil.³⁸ On July 23, 2019, respondent visited Dr. Anmangandla for a medication refill and reported working a lot and having a hectic schedule.”³⁹ He was to “continue tramadol for lumbago with sciatica.”⁴⁰ The EScript shows a prescription of 90 tramadol tablets with 2 refills the same day.⁴¹

In 2020, respondent continued to visit Dr. Anmangandla with complaints of ongoing back pain, for which he was to continue tramadol and which required an increase in tramadol dosage

³⁴ *Id.* at 45, 47.

³⁵ *Id.* at 68.

³⁶ *Id.* at 48, 68.

³⁷ *Id.* at 48. Provigil is prescribed to treat symptoms of excessive sleepiness. *See, e.g.*, Provigil: A Commentary, 3 *Hastings Sci. & Tech. L.J.* 453 (Summer 2011).

³⁸ Exh. A-4 at 49.

³⁹ *Id.* at 52.

⁴⁰ *Id.* at 54.

⁴¹ *Id.* at 68.

by November 2020.⁴² The EScript shows prescriptions of 90 tramadol tablets with 2 refills in March and August 2020.⁴³ In January 2020, Dr. Anmangandla indicated that respondent “has been busy with work and opened own flight school, back pain [was] unchanged and well managed with tramadol TID (has FAA clearance to use), wants to decrease but unable.”⁴⁴ Dr. Anmangandla also noted that Provigil helped with “fatigue, work” and increased the dosage to 40 tablets per month.⁴⁵

The medical record also shows diagnoses of anxiety disorder during multiple visits between June 2016 and November 2020.⁴⁶ Dr. Anmangandla prescribed respondent clonazepam to take as needed for “insomnia/anxiety” in February, March, May, and October 2018.⁴⁷ Dr. Anmangandla also prescribed respondent clonazepam as needed for insomnia in December 2018 and February 2019.⁴⁸ In July 2019, respondent began using Benadryl for insomnia.⁴⁹

Further, the record shows that, in August 2017, respondent underwent a laparoscopic cholecystectomy, or gallbladder removal.⁵⁰ Over a year later, on September 5, 2018, Dr. Anmangandla’s front office made a note that respondent called to inform them that, a day prior, he had been in the Los Robles emergency department for kidney stones, was given Norco for

⁴² *Id.* at 57, 59, 60, 65.

⁴³ *Id.* at 68.

⁴⁴ *Id.* at 55.

⁴⁵ *Id.* at 57.

⁴⁶ *Id.* at 3, 8, 23, 28, 35-36, 41, 44, 46, 53, 65.

⁴⁷ *Id.* at 33, 35, 37, 42.

⁴⁸ *Id.* at 44, 47.

⁴⁹ *Id.* at 54.

⁵⁰ *Id.* at 21, 25. Respondent disclosed the gallbladder removal procedure on the September 15, 2017, medical certificate application. Exh. R-4 at 2-3.

pain, and advised to wait for stones to pass.⁵¹ Two follow-up visits to Dr. Anmangandla in September and October 2018 note a diagnosis of nephrolithiasis, or kidney stones.⁵² On September 25, 2018, Dr. Anmangandla noted respondent was “still having [left] flank pain, straining urine but ha[d] not passed stone” and was using Percocet to manage the pain.⁵³ In October 2018, Dr. Anmangandla noted that respondent “passed [left]-sided renal stone with Flomax, due to being in public restroom was not able to save stone, no longer having pain.”⁵⁴ Dr. Anmangandla also indicated that a computer tomography (CT) scan at Los Robles showed an “L3mm UVP junction stone.”⁵⁵ In July 2019, Dr. Anmangandla noted respondent had a history of kidney stones and planned to check urine analysis.⁵⁶ Over a year later, in August 2020, respondent visited Dr. Anmangandla complaining of “sudden [left] flank pain with radiation to groin” and reported it was “similar to prior episodes of kidney stone.”⁵⁷ Dr. Anmangandla indicated respondent has had a history of “kidney stone now with renal colic suggestive [of] recurrence.”⁵⁸ In November 2020, respondent “passed kidney stone.”⁵⁹

B. Procedural History and Testimony

On June 10, 2021, the Administrator issued an emergency order of revocation, revoking

⁵¹ Exh. A-4 at 37.

⁵² *Id.* at 39, 42.

⁵³ *Id.* at 38.

⁵⁴ *Id.* at 40.

⁵⁵ *Id.* at 42.

⁵⁶ *Id.* at 54.

⁵⁷ *Id.* at 63.

⁵⁸ *Id.* at 60.

⁵⁹ *Id.* at 65-66.

respondent's airman and medical certificates.⁶⁰ The Administrator filed the emergency order of revocation as the complaint in this case on June 22, 2021. The complaint alleged respondent violated 14 C.F.R. § 67.403(a)(1) by intentionally falsifying his answers to Questions 17.a.,⁶¹ 18.j.,⁶² 18.m.,⁶³ and 18.w.⁶⁴ and Item 20 on the medical certificate applications dated August 31, 2018, and August 7, 2019.

Specifically, the complaint alleged that respondent intentionally falsified his answers to Question 17.a. on the August 2018 and August 2019 medical certificate applications, when he answered "No" and failed to report use of clonazepam and tramadol.⁶⁵ The complaint alleged that respondent intentionally falsified his answers to Question 18.j. on the August 2018 and August 2019 medical certificate applications, when he answered "No" and failed to report his history or diagnoses of kidney stones.⁶⁶ The complaint alleged that respondent intentionally falsified his answers to Question 18.m. on the August 2018 and August 2019 medical certificate applications, when he answered "No" and failed to report a history or diagnoses of anxiety.⁶⁷ The complaint also alleged that respondent intentionally falsified his answers to Question 18.w.

⁶⁰ Emergency order of revocation at 6.

⁶¹ Question 17.a. on the FAA's medical application asks, "Do you currently use any medication (prescription or nonprescription)?"

⁶² Question 18.j. on the FAA's medical application asks, "Have you ever in your life been diagnosed with, had, or do you presently have...kidney stones or blood in urine?"

⁶³ Question 18.m. on the FAA's medical application asks, "Have you ever in your life been diagnosed with, had, or do you presently have...mental disorders of any sort; depression, anxiety, etc."

⁶⁴ Question 18.w. on the FAA's medical application asks an applicant to report a "history of nontraffic conviction(s) (misdemeanors or felonies)."

⁶⁵ Compl. at ¶¶ 5-11, 31-37. *See* Exhs. A-5 at 1; A-6 at 1.

⁶⁶ Compl. at ¶¶ 12-17, 38-43. *See* Exhs. A-5 at 1; A-6 at 1.

⁶⁷ Compl. at ¶¶ 18-23, 44-49. *See* Exhs. A-5 at 1; A-6 at 1.

on the August 2018 and August 2019 medical certificate applications, when he answered “No” and failed to report the 2007 felony conviction pertaining to the unlawful issuance of bank checks.⁶⁸ Finally, the complaint alleged that, on Item 20 of his August 2018 and August 2019 medical certificate applications, he certified that all of his answers were “complete and true to the best of [his] knowledge,” when he knew his certification was fraudulent or intentionally false.⁶⁹

Respondent timely filed his answer to the complaint. In the answer, respondent admitted that he possessed the certificates listed in the complaint and that, on the August 2018 and August 2019 medical certificate applications, he answered “No” in response to Questions 17.a., 18.j., 18.m., and 18.w. and certified that all of his answers to be complete and true to the best of his knowledge under Item 20.⁷⁰ Respondent also admitted that he has a history or diagnosis of kidney stones and anxiety; that, in November 2007, he was convicted of two counts of unlawful issuances of bank checks in the King County Superior Court, State of Washington; that his responses to Question 18.j. on the August 2018 and August 2019 medical certificate applications were false, because he has a history or diagnoses of kidney stones; and that his responses to Question 18.m. on the August 2018 and August 2019 medical certificate applications were false, because he has a history or diagnoses of anxiety.⁷¹

In the answer, respondent denied that he used clonazepam and tramadol; that his responses to Question 17.a. and 18.w. on the August 2018 and 2019 medical certificate applications were false and knowingly false; and that his responses to Question 18.j. and 18.m.

⁶⁸ Compl. at ¶¶ 24-29, 50-55. *See* Exhs. A-5 at 1; A-6 at 1.

⁶⁹ Compl. at ¶¶ 30, 56. *See* Exhs. A-5 at 1; A-6 at 1.

⁷⁰ Answer at ¶¶ 1, 5, 6, 12, 18, 24, 30-32, 38, 44, 50, 56.

⁷¹ *Id.* at ¶¶ 4, 13, 15, 19, 21, 39, 41, 45, 47.

on the August 2018 and August 2019 were knowingly false.⁷²

On July 1, 2021, respondent served his first set of discovery requests on the Administrator, to which the Administrator responded on July 8, 2021. Also, on July 8, 2021, respondent requested subpoenas from the law judge for Drs. Sugerman and Goldenberg. On July 13, 2021, respondent served his second set of discovery requests on the Administrator. On July 19, 2021, the law judge issued subpoenas to respondent for Drs. Sugerman and Goldenberg.

The law judge conducted a hearing on July 20-22, 2021. On July 20, 2021, Drs. Sugerman and Goldenberg filed motions to quash the subpoenas. At the hearing, respondent orally moved for sanctions, because the Administrator did not respond to respondent's second set of discovery requests, and the law judge denied the motion. The law judge also sustained the Administrator's objection to testimonies by Drs. Sugerman and Goldenberg on the ground of relevance.

At the hearing, the Administrator called Ashlee Horner, the Airman Medical Program Analyst with the FAA's Western Pacific Regional Flight Surgeon's Office; and Joye L. Holmes, M.D., the Regional Flight Surgeon for the FAA's Great Lakes Region.⁷³ Respondent testified on his own behalf and did not call any witnesses. The law judge issued an oral initial decision on July 23, 2021. Respondent timely appealed the oral initial decision on July 26, 2021, and filed a supporting brief on August 2, 2021. The Administrator filed a reply brief on August 9, 2021.

1. Testimony of Ashlee Horner

Ms. Horner testified that she has been working since 2015 as Airman Medical Program Analyst with the FAA's Western Pacific Regional Flight Surgeon's Office, where she reviewed

⁷² *Id.* at ¶¶ 3, 7, 9-10, 16, 22, 25, 27-28, 33, 35-36, 42, 48, 51, 53-54.

⁷³ *See* Tr. at 36, 91.

airman medical certificate applications and processed enforcement actions.⁷⁴ She testified that she had medical training, which was relevant to the certificate process, review of medical certificate applications, writing of special issuance authorizations, and decisions whether an airman is qualified under Part 67 medical standards, made in collaboration with the Flight Surgeon.⁷⁵

She testified that, in respondent's case, she received the initial hotline complaint, reviewed the documents submitted with the complaint, and, in coordination with Dr. Lenchner, drafted the reexamination letter to respondent requesting additional information.⁷⁶ She testified that the investigations are normally conducted not just based on the allegations in the hotline complaint, but also on any information included in the attached medical documentation.⁷⁷ Further, she personally does not make any determinations regarding potential substance abuse or dependence.⁷⁸ In this matter, she did not make any independent decisions in respondent's investigation and followed the instructions of Dr. Lenchner, who then forwarded respondent's file to the FAA's Regional Counsel's Office for further action.⁷⁹

She testified that she did not make a decision regarding what information to ask of respondent in the reexamination letter; instead, she informs Dr. Lenchner whether the information in the hotline complaint was reported on the airman's medical certificate

⁷⁴ *Id.* at 37.

⁷⁵ *Id.* at 84-85.

⁷⁶ *Id.* at 37-38, 43, 58, 68, 88. *See* Exhs. A-1, A-2, A-3.

⁷⁷ Tr. at 55, 58.

⁷⁸ *Id.* at 58.

⁷⁹ *Id.* at 37-38, 60-63, 68, 83-84.

application.⁸⁰ She testified that she did not know whether anyone in her office relied on the information in Dr. Feldman's letter in their decision to move forward with investigating respondent and that she personally did not discuss Dr. Feldman's letter with any of her superiors.⁸¹ She stated that she spoke to Dr. Lenchner about the sentencing memorandum and that he asked for additional court documents, which she itemized in the reexamination letter.⁸²

Additionally, because Ms. Horner was not an investigator but a medical program analyst, she did not conduct any additional investigation into respondent's criminal history; instead, an airman was required to provide such information under the regulations.⁸³ She testified that she did not follow-up directly with Dr. Feldman in her investigation of respondent.⁸⁴ She did not recall whether the Order Vacating Conviction was provided in response to the reexamination letter, but that she did not review it.⁸⁵ She reviewed only respondent's medical documents.⁸⁶

2. *Testimony of Joye L. Holmes, M.D.*

Dr. Holmes testified that she has been working for eight years as the Regional Flight Surgeon for the FAA's Great Lakes Region.⁸⁷ In her position, she supervises program analysts for air traffic control, air research, and the AME program.⁸⁸ Prior to this position, she worked as an

⁸⁰ *Id.* at 63-64, 65-66, 68. *See* Exh. A-3.

⁸¹ Tr. at 66-67.

⁸² *Id.* at 71.

⁸³ *Id.* at 72-73.

⁸⁴ *Id.* at 74.

⁸⁵ *Id.* at 74-75.

⁸⁶ *Id.* at 75-77.

⁸⁷ *Id.* at 91.

⁸⁸ *Id.*

AME for six years.⁸⁹ She reviewed respondent's medical records seven-to-ten days prior to the hearing and was not involved in his investigation.⁹⁰

Dr. Holmes testified that anxiety disorder, commonly known as nervousness, is typical of people who have increased stress and increased response to stress.⁹¹ She testified that the symptoms of anxiety disorder may impact sleep and ability to make decisions, and that it is a condition that an airman must report on the medical certificate application.⁹² Respondent's medical records showed a diagnosis of anxiety disorder in 2016.⁹³ Dr. Holmes stated that "GAD" stood for "generalized anxiety disorder," and that clonazepam was an anti-anxiety medication.⁹⁴ She testified that tramadol was a disqualifying medication for an FAA medical certificate holder because of its unwarranted or sudden incapacitation, especially given its chronic use purpose.⁹⁵ She testified that some of tramadol's side effects are seizure disorder and sedation.⁹⁶

Dr. Holmes stated that nephrolithiasis, or kidney stones, is a concentration of minerals that collect to a stone-like form in the kidney.⁹⁷ When asked to explain the difference between gallbladder removal and kidney stones, she said that the gallbladder was part of the gastrointestinal system used for digestion of solid foods, while kidneys are responsible for

⁸⁹ *Id.* at 91-92.

⁹⁰ *Id.* at 138, 142.

⁹¹ *Id.* at 95, 104.

⁹² *Id.* at 95, 105.

⁹³ *Id.* at 104.

⁹⁴ *Id.* at 108.

⁹⁵ *Id.* at 106.

⁹⁶ *Id.* at 106, 119-120.

⁹⁷ *Id.* at 114, 117.

disposal of liquids.⁹⁸ She testified that they were two different organ systems and that respondent was required to report kidney stones on his medical certificate applications.⁹⁹

Dr. Holmes testified that the FAA did not clear respondent to fly while using tramadol in January 2020 and that, in her experience, the FAA has never cleared an airman to fly while using tramadol to manage back pain.¹⁰⁰ She confirmed that, between May 1, 2018, and August 5, 2020, respondent received nine prescriptions for tramadol, for 90 tablets each, and each giving respondent 2 refills.¹⁰¹ She testified that a patient could discontinue a prescription or refuse it if he or she no longer used the medication and that respondent could have asked his physician to discontinue the prescription if he had stopped taking tramadol.¹⁰² Had respondent done that, the physician would have made a notation in the record that the prescription was discontinued.¹⁰³

Dr. Holmes testified that, based on the dates of tramadol distribution and the number of refills, it was her opinion that respondent was taking tramadol at the time he completed the August 2018 and August 2019 medical certificate applications and that his answer of “No” in response to Question 17.a. on these applications was incorrect.¹⁰⁴ She testified that information provided in response to Question 17.a. was important to the FAA, because medication could be disqualifying or relate to a diagnosis.¹⁰⁵ Further, if respondent reported use of tramadol in response to Question 17.a., the FAA would have requested him to provide medical records

⁹⁸ *Id.* at 115.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 119.

¹⁰¹ *Id.* at 120-121. *See* Exh. A-4 at 68.

¹⁰² Tr. at 122-123.

¹⁰³ *Id.* at 122.

¹⁰⁴ *Id.* at 123-125, 135.

¹⁰⁵ *Id.* at 125.

showing the reason for the prescription, associated diagnosis, the length of use, and the number of prescriptions.¹⁰⁶

Dr. Holmes testified that respondent's answer to Question 18.j. on the August 2018 and August 2019 medical certificate applications was incorrect because respondent had kidney stones in the past.¹⁰⁷ Question 18.j. was important to the FAA because kidney stones could be incapacitating and require evaluation of their possible recurrence.¹⁰⁸ She testified that respondent's answer of "No" in response to Question 18.m. on the August 2018 and August 2019 medical certificate applications was incorrect because respondent's medical records show a diagnosis of anxiety.¹⁰⁹ She testified that Question 18.m. was important to the FAA because mental disorders may be disqualifying, whether they are chronic or only present for a short period of time.¹¹⁰ If an airman has anxiety for a short period of time prior to completing a medical certificate application, he or she is required to answer "yes" to Question 18.m.¹¹¹

Dr. Holmes testified that respondent's answer to Question 18.w. on the August 2019 medical certificate application was incorrect.¹¹² According to the instructions to the medical certificate application on MedXPress, an airman is required to report a conviction in response to Question 18.w. even if the conviction was subsequently vacated or expunged.¹¹³ An airman may access the instructions either by doing a Google search or by selecting an arrow next to the

¹⁰⁶ *Id.* at 128.

¹⁰⁷ *Id.* at 129, 135.

¹⁰⁸ *Id.* at 129.

¹⁰⁹ *Id.* at 129-130, 136.

¹¹⁰ *Id.* at 130.

¹¹¹ *Id.*

¹¹² *Id.* at 131-132, 136.

¹¹³ *Id.* at 132, 185.

relevant question, which will show a drop-down explanation of the question.¹¹⁴ If an airman is confused about Question 18.w. during the application process, he or she could ask the AME or speak to one of the flight surgeons by calling the Regional Flight Surgeon's office or the FAA's Civil Aerospace Medical Institute.¹¹⁵ She testified that respondent's answers to Questions 17.a., 18.j., 18.m., and 18.w. were capable of influencing the FAA's decision on whether to issue him a certificate, because, if he had answered "Yes" in response to these questions, the FAA would have likely deferred his application and requested more information from him regarding these questions.¹¹⁶ In her opinion, respondent's declaration that all of his answers on the August 2018 and August 2019 medical certificate applications were true, in fact, was false.¹¹⁷

Dr. Holmes testified it was not clear from respondent's medical records whether he purchased tramadol.¹¹⁸ She did not review respondent's pharmacy records, which would indicate whether respondent picked up and paid for these prescriptions.¹¹⁹ She agreed that there is a difference between having anxiety and having an anxiety disorder, because, an anxiety disorder signifies fairly consistent symptoms and its diagnosis is rendered by a psychiatrist or practitioner.¹²⁰ She learned the term "nephrolithiasis" in medical school and that a layman may not understand this term.¹²¹ Additionally, the treatment note that respondent "has not been using clonazepam since pain improved" indicated to her that there may have been a lapse in the time

¹¹⁴ *Id.* at 133.

¹¹⁵ *Id.* at 133-134.

¹¹⁶ *Id.* at 128-130, 136-137.

¹¹⁷ *Id.* at 134, 137.

¹¹⁸ *Id.* at 142-144.

¹¹⁹ *Id.* at 144.

¹²⁰ *Id.* at 143.

¹²¹ *Id.* at 145.

period respondent was taking clonazepam.¹²² However, if someone had repeated prescriptions for a medication, it was highly probable he or she was taking it, and there is a low probability of someone refilling a prescription and not taking it.¹²³ She testified that, based on the primary care appointment on July 23, 2019, it was possible that, on the days leading up to it, respondent was using Benadryl nightly for insomnia, instead of clonazepam.¹²⁴ Last, she stated that use of Provigil was not allowed by the FAA, but that respondent's use of it is unknown without a review of prescription.¹²⁵

Dr. Holmes testified that, while it was unclear whether respondent met the DSM-IV diagnostic criteria for anxiety disorder in 2007, respondent's records from 2016 through 2019 indicated a diagnosis of anxiety disorder.¹²⁶ Although the medical certificate application does not state "anxiety disorder," it requests a reporting of "mental disorders of any sort."¹²⁷ When asked whether a patient was required to terminate their prescription with their provider when he or she decides to stop taking it, she testified that she was not aware of any such written requirement.¹²⁸ She testified that it was possible that a patient could confuse the difference between a gallbladder and kidney stones; however, pain from gallstones is felt in the right upper quadrant of the abdomen, and the pain from kidney stones is felt in the right or left side of the back.¹²⁹

¹²² *Id.* at 145-146.

¹²³ *Id.* at 146-147.

¹²⁴ *Id.* at 149-150. *See* Exh. A-4 at 54.

¹²⁵ Tr. at 150-151, 154.

¹²⁶ *Id.* at 158. *See* Exh. A-2 at 4.

¹²⁷ Tr. at 175-176.

¹²⁸ *Id.* at 161.

¹²⁹ *Id.* at 161-162.

Dr. Holmes testified that, because a patient for gallbladder removal must sign paperwork in the hospital explaining the surgery process and granting permission for the surgery, and because it is malpractice for a doctor not to inform a patient what organ would be removed, respondent would have known his gallbladder was being removed.¹³⁰ She also confirmed that respondent called his primary care physician and informed him that his gallbladder was removed.¹³¹ She confirmed that respondent suffered from kidney stones approximately one year after his gallbladder was removed.¹³² She also testified that it would be highly unlikely for a doctor to prescribe an opioid to manage kidney stone pain without specifying the reason for the prescription.¹³³

3. *Testimony of respondent*

Respondent testified that, in 2017, he worked as a ground and a flight instructor; then received his ATP license and worked for Compass Airlines in 2018; and became a federal flight deck officer in the summer of 2019.¹³⁴ He testified that he also owned a flight school between February 2019 and January 2021.¹³⁵ He testified that the process for becoming a federal flight deck officer involved an extensive background check, including drug testing and a psychological assessment.¹³⁶ He testified that he was also drug-tested as part of his job for Compass Airlines in July 2018 and had two drug tests in October 2020 as part of his psychological evaluation by Drs.

¹³⁰ *Id.* at 171.

¹³¹ *Id.*

¹³² *Id.* at 172.

¹³³ *Id.*

¹³⁴ *Id.* at 219-220, 223.

¹³⁵ *Id.* at 299.

¹³⁶ *Id.* at 220.

Sugerman and Goldenberg.¹³⁷ He testified that all of his tests were negative for prohibited substances.¹³⁸ He stated that, if he tested positive on a random drug and alcohol test while at Compass Airlines, he would have been at risk of losing the job, would be reported to the FAA, and would not have completed the certification process for the flight deck officer position.¹³⁹

Respondent testified that he had never provided false information to the FAA and had always been forthright with the FAA.¹⁴⁰ He said that he did not know how the FAA obtained his medical records from Dr. Anmangandla, that he never signed the release for these records, and that he first saw these records when the FAA provided them to him with the enforcement investigative report (EIR).¹⁴¹ He testified that he never attended medical school, did not have any experience reading or interpreting medical records, only ever filled out requests for records to be sent directly from one doctor to another, and never actually received his own records. Further, he did not review his medical records before submitting the relevant medical certificate applications.¹⁴²

Respondent testified that he believed the medical records from Dr. Anmangandla were inaccurate.¹⁴³ He testified that he did not tell Dr. Anmangandla during a visit on February 1, 2018 that he had considerable pain after flying a plane, that sleeping was difficult, that he was now flying full time, and that an AME had signed off on flying while taking chronic narcotics.¹⁴⁴

¹³⁷ *Id.* at 224-225.

¹³⁸ *Id.* at 225.

¹³⁹ *Id.* at 426-427.

¹⁴⁰ *Id.* at 259.

¹⁴¹ *Id.* at 260, 262, 295.

¹⁴² *Id.* at 228-231.

¹⁴³ *Id.* at 295, 298.

¹⁴⁴ *Id.* at 263-264. *See* Exh. A-4 at 32.

He testified he did not know where this information came from.¹⁴⁵ He testified that he did not tell Dr. Anmangandla that the FAA allowed use of Provigil and did not know the source of this comment.¹⁴⁶ He does not know why Dr. Anmangandla noted that respondent reported use of tramadol to the FAA and testified that he never implied to the doctor whether something was approved or disapproved by the FAA or an AME.¹⁴⁷

Respondent also testified that he never discussed with Dr. Anmangandla that he was a pilot and that he and the doctor never talked about his career, family, or anything outside the reason for the appointment.¹⁴⁸ He did not know how Dr. Anmangandla knew he was a pilot.¹⁴⁹ When asked how Dr. Anmangandla knew that respondent opened a flight school, given his testimony that he never discussed his career with the doctor, he testified that he could have mentioned it in passing to one of the nurses at Dr. Anmangandla's office.¹⁵⁰ Respondent testified that he did not intend to get back into a cockpit or work for airlines, that he was burnt out from the early mornings and late nights as a pilot, that he does not own an airplane, and that he does not enjoy flying anymore.¹⁵¹ He testified that he appealed the order of revocation to protect his reputation and to prove that he did not falsify the records on a federal document.¹⁵²

¹⁴⁵ Tr. at 264.

¹⁴⁶ *Id.* at 264-266. *See* Exh. A-4 at 61, 65.

¹⁴⁷ Tr. at 327-328. *See* Exh. A-4 at 55.

¹⁴⁸ Tr. at 310-311.

¹⁴⁹ *Id.* at 311.

¹⁵⁰ *Id.* at 325-326. *See* Exh. A-4 at 55.

¹⁵¹ Tr. at 227, 431.

¹⁵² *Id.* at 227-228.

Regarding Question 17.a., respondent admitted that he was prescribed and took tramadol for back pain and clonazepam for insomnia in the past.¹⁵³ Respondent testified that his partner picked up respondent's prescriptions.¹⁵⁴ Later in the hearing, respondent testified that he himself picked up tramadol prescriptions.¹⁵⁵ He testified that his prescriptions were automatically renewed through some system, but he didn't know how that system actually worked.¹⁵⁶ He could not recall the dates or how many of his tramadol prescriptions were filled.¹⁵⁷ For the tramadol prescriptions that he received and filled, he could not recall whether he took the pills.¹⁵⁸ Then, he testified that it was possible that he received every prescription for tramadol identified in his medical record, but that he did not fill all of them, and he also could not say whether he or his partner picked up or filled all the tramadol prescriptions.¹⁵⁹

Respondent testified that he took pain relieving medication in 2016 prior to his back surgery in January 2017, but denied using tramadol consistently since May 2018 and testified that, since the surgery, he used it only for acute back pain approximately one or two times every other month.¹⁶⁰ He denied taking tramadol three times a day.¹⁶¹ He testified that he continued to refill tramadol regardless of his need for it so that he did not find himself without it when he had pain, but he did not consume tramadol on a regular basis and his filling of the prescriptions did

¹⁵³ *Id.* at 233-234, 313-315.

¹⁵⁴ *Id.* at 234, 330.

¹⁵⁵ *Id.* at 329.

¹⁵⁶ *Id.* at 248.

¹⁵⁷ *Id.* at 329, 357.

¹⁵⁸ *Id.* at 310.

¹⁵⁹ *Id.* at 330-332.

¹⁶⁰ *Id.* at 243, 306, 309-310, 313, 329.

¹⁶¹ *Id.* at 311.

not mean that he was using the medication.¹⁶² He testified that having his prescribed medication always available to him was akin to having Tylenol or Tums available.¹⁶³ He did not inform Dr. Anmangandla that he was not using tramadol and did not need as many prescriptions.¹⁶⁴ He testified that the downside to terminating a prescription was that he would have to go back to Dr. Anmangandla and obtain a new prescription.¹⁶⁵

Respondent testified that he did not remember a specific date when he took certain medication, but that he never took clonazepam, tramadol, or Xanax while flying, because he was aware of their side effect of drowsiness, thus it was easier for him to remember the dates he did not take the medications as opposed to the dates that he did.¹⁶⁶ He testified he could not tell the exact dates that he had flown an aircraft without looking at his flight log.¹⁶⁷ He testified that he never had back pain when flying.¹⁶⁸

Respondent testified that he took photos of unused clonazepam and tramadol prescriptions two weeks prior to the hearing to show that he does not take these medications.¹⁶⁹ The photos depicted a consolidation of multiple different prescriptions of the same medication within a single bottle.¹⁷⁰ He testified that the photos represented medications that he was

¹⁶² *Id.* at 249, 329.

¹⁶³ *Id.* at 248.

¹⁶⁴ *Id.* at 330.

¹⁶⁵ *Id.* at 248.

¹⁶⁶ *Id.* at 266-268, 351-354.

¹⁶⁷ *Id.* at 427-428.

¹⁶⁸ *Id.* at 312-313.

¹⁶⁹ *Id.* at 235, 237-239. *See* Exh. R-25.

¹⁷⁰ Tr. at 242-243.

prescribed and opted not to use.¹⁷¹ He testified that the photos do not represent all the prescriptions that were filled since the beginning of 2018, because his partner consolidates all expired medication in one bottle to discard them.¹⁷² He testified that he could not say how many pills were used out of the clonazepam bottle prescribed on August 29, 2017.¹⁷³ He agreed that, at the time he completed the August 2018 medical certificate application, he was aware of his prior use of clonazepam.¹⁷⁴

He admitted that he received tramadol prescriptions in May and October 2018 and in July and December 2019, but testified that this did not necessarily mean he picked them up and denied using tramadol before or after completing the relevant medical certificate applications.¹⁷⁵ When asked to admit that Dr. Anmangandla prescribed him tramadol on October 9, 2018, he first answered that he did not know what EScript meant, but eventually admitted that he received the prescription.¹⁷⁶

Regarding Question 18.j., respondent testified that that he was not aware of the diagnosis and treatment for kidney stones until he reviewed the medical records.¹⁷⁷ He disagreed that his negative answer to Question 18.j. on the August 2018 and August 2019 medical certificate applications was false.¹⁷⁸ He testified that he never had kidney stones.¹⁷⁹ He testified that he did

¹⁷¹ *Id.* at 247.

¹⁷² *Id.* at 242, 246-247.

¹⁷³ *Id.* at 243.

¹⁷⁴ *Id.* at 348.

¹⁷⁵ *Id.* at 333-335, 345-346.

¹⁷⁶ *Id.* at 336-337.

¹⁷⁷ *Id.* at 233, 253-254, 257, 361, 364.

¹⁷⁸ *Id.* at 338-340.

¹⁷⁹ *Id.* at 346-347.

not call Dr. Anmangandla's office on September 5, 2018, to advise him of the Los Robles emergency department visit for kidney stones and that this information "could be [from] anybody who came in through the front door, it could be a physician or a friend, a relative."¹⁸⁰ He explained that he never calls Dr. Anmangandla's office, because he uses a Teladoc website or phone application to schedule an appointment with him.¹⁸¹

Respondent testified that he recalled being in the emergency department in September 2018, but that he thought it was due to stomach pain and ongoing gallbladder issues.¹⁸² He testified that, although his gallbladder had been removed a year prior to the September 2018 emergency department visit, he was not a medical doctor, the pain was similar to the pain from his previous gallbladder condition, and he did not know exactly how much or what was removed during his gallbladder removal surgery.¹⁸³ He did not recall whether he underwent a CT scan at Los Robles.¹⁸⁴ He testified that, at Los Robles, he signed releases to send the records from his emergency department visit directly to Dr. Anmangandla, so he never reviewed them.¹⁸⁵ He testified that no one at Los Robles explained to him that he was experiencing kidney stones and that he understood that he was prescribed Norco for pain from his previous gallbladder procedure.¹⁸⁶ Respondent testified that he did not report the use of Norco to the FAA, because it was for short term use.¹⁸⁷

¹⁸⁰ *Id.* at 262. *See* Exh. A-4 at 37.

¹⁸¹ Tr. at 262-263.

¹⁸² *Id.* at 317.

¹⁸³ *Id.* at 318-319, 321, 429.

¹⁸⁴ *Id.* at 323. *See* Exh. A-4 at 39.

¹⁸⁵ Tr. at 323.

¹⁸⁶ *Id.* at 319, 321, 338.

¹⁸⁷ *Id.* at 338.

Respondent testified that he never used a urine strainer, did not have trouble urinating, did not recall having left flank pain, did not recall taking Percocet for kidney stone pain, and did not recall taking Flomax.¹⁸⁸ He testified that, when Dr. Anmangandla prescribed him Percocet, the doctor did not specify that he would be taking this medication for kidney stones and that the doctor only explained it was for the “feeling in [his] stomach area.”¹⁸⁹ He testified that it could have been indigestion, although he had never taken an opioid for indigestion.¹⁹⁰ He confirmed that, even though he was in the emergency department and had two follow-up visits with Dr. Anmangandla for kidney stones, at no point was he advised that he had kidney stones.¹⁹¹

Regarding Question 18.m., respondent testified that he was not aware of any mental diagnosis, including anxiety disorder, at the time he answered Question 18.m. on the August 2018 and August 2019 medical certificate applications and believed that his answer of “No” was true.¹⁹² He testified that he believed Question 18.m. asked for information about a formal diagnosis of a mental disorder that was an established and ongoing condition, as opposed to a short event or one-time, acute anxiety leading up to a surgery, and that he had never had such a formal diagnosis.¹⁹³ He testified that he was not aware that Dr. Anmangandla had diagnosed him with anxiety disorder until he received his medical records as part of the EIR.¹⁹⁴ He testified that he never discussed having anxiety with Dr. Anmangandla.¹⁹⁵

¹⁸⁸ *Id.* at 320-321, 323-324.

¹⁸⁹ *Id.* at 321-322, 324.

¹⁹⁰ *Id.* at 322.

¹⁹¹ *Id.* at 324.

¹⁹² *Id.* at 254, 258.

¹⁹³ *Id.* at 358-360, 363.

¹⁹⁴ *Id.* at 230, 261, 341, 348, 358, 360, 364.

¹⁹⁵ *Id.* at 304.

Respondent testified that he never concluded nor was told that he had a mental disorder that impacted his activities.¹⁹⁶ He testified that he experienced acute anxiety, and not an anxiety disorder, when he felt anxious and unsure of the outcome of the January 2017 lumbar surgery and took Xanax, which was a single prescription, along with other pre-operative medications.¹⁹⁷ He testified that he “wasn’t under any impression that acute anxiety which is for a, literally a one week period taking that medication would qualify under [the] types of conditions” that Question 18.m. asks to disclose.¹⁹⁸

Regarding Question 18.w., respondent testified that he was convicted in 2007 for writing checks without having appropriate funds in the bank account.¹⁹⁹ He testified that it was due to his naivete, that it was a low point in his past, and that he had learned from his mistake.²⁰⁰ He testified that, in 2014, he engaged a criminal attorney Kurt Bennett to vacate his conviction.²⁰¹ He testified that, at that time, Mr. Bennet advised him that he did not need to disclose his 2007 conviction on any government form, because the Order Vacating Convictions was akin to a marriage annulment and any record of his arrest would be removed from any justice system.²⁰²

Respondent testified that, in filling out any application since his conviction was vacated, he relied on Mr. Bennett’s advice and on the language in the Order Vacating Convictions that “[f]or all purposes [he] may state that he has never been convicted of the crimes of

¹⁹⁶ *Id.* at 426.

¹⁹⁷ *Id.* at 304-305, 340-341, 347-348, 425.

¹⁹⁸ *Id.* at 363.

¹⁹⁹ *Id.* at 205-206. *See* Exh. A-2 at 1-3.

²⁰⁰ Tr. at 206.

²⁰¹ *Id.* at 370.

²⁰² *Id.* at 211, 214-215, 254-255, 258, 365.

conviction.”²⁰³ He testified that, given Mr. Bennett’s advice and the language in the Order Vacating Convictions, he did not need to read the instructions to Question 18.w. on the August 2018 and August 2019 medical certificate applications.²⁰⁴ He testified that, in 2014, he spoke with Mr. Bennett on the phone and discussed what he would be required to disclose on “the FAA medical.”²⁰⁵ He testified that he did not reach out to Mr. Bennett to get advice about whether to report his 2007 conviction on the August 2018 and August 2019 medical certificate applications, because Mr. Bennett was clear with his advice in 2014.²⁰⁶ He testified that he also believed his 2007 conviction was nullified, because he confirmed with the Washington State Patrol, Seattle Police Department, and the FBI that he had no criminal record.²⁰⁷ He agreed that, at the time he completed these medical certificate applications, he knew he had been convicted of a felony in 2007.²⁰⁸

On questioning by the law judge, respondent testified that he was convicted for passing bad checks because he was naïve and did not understand that he had to have money in the bank account before writing a check.²⁰⁹ He testified that he was ashamed and remorseful about his past conviction, but that he learned from it and overcame it.²¹⁰ He testified that he did not recall whether he was convicted in a plea agreement, but that there was no jury trial.²¹¹ He testified that

²⁰³ *Id.* at 211-213; Exh. R-19 at 2.

²⁰⁴ Tr. at 342-343, 349-350.

²⁰⁵ *Id.* at 214-215.

²⁰⁶ *Id.* at 430.

²⁰⁷ *Id.* at 362.

²⁰⁸ *Id.* at 244, 350.

²⁰⁹ *Id.* at 366.

²¹⁰ *Id.* at 367.

²¹¹ *Id.* at 368-369.

he spent one night in jail, paid restitution, and performed 100 days of community service.²¹² He testified that he received the advice from Mr. Bennett about not needing to report the 2007 conviction on any government forms shortly after the Order Vacating Conviction was entered in 2014.²¹³

Respondent testified that he did not ask Mr. Bennett specifically about an FAA medical certificate application or speak to Mr. Bennett before he filled out his August 2018 medical certificate application.²¹⁴ He testified that Mr. Bennett did not specifically advise him about filling out FAA medical certificate applications and that no attorney ever advised him that he could answer “No” in response to Question 18.w. on FAA medical certificate applications, but that he assumed Mr. Bennett’s advice from 2014 applied to his August 2018 and August 2019 medical certificate applications.²¹⁵ He testified that he knew he had a past conviction at the time he filled out these applications.²¹⁶

Respondent then testified that he first received his medical records as part of Dr. Sugerman’s report, not the EIR, and he first reviewed them the Friday before the hearing.²¹⁷ When told by the law judge that this contradicted his earlier testimony, he testified that he received the medical records in the EIR.²¹⁸ He testified that he never signed the release for his medical records provided to the FAA and that he only authorized Dr. Sugerman to provide her

²¹² *Id.* at 368-369.

²¹³ *Id.* at 370.

²¹⁴ *Id.* at 370, 417-418.

²¹⁵ *Id.* at 371-372, 417.

²¹⁶ *Id.* at 416.

²¹⁷ *Id.* at 432-433.

²¹⁸ *Id.* at 433-434.

report to the FAA.²¹⁹ When the law judge asked why he did not take any action against the FAA if he thought the FAA had obtained his medical records without his release, he testified that “[t]his was the first time that [he’d] talked with counsel yesterday when they were brought up and shown” and that “[i]n terms of kind of putting everything together, [he] saw them within Dr. Sugerman’s report.”²²⁰

Respondent testified that a prescription for Xanax was “given to [him] a couple days prior to the surgery” and that he “had the anxiety a couple, a day or two, three days before surgery.”²²¹ He agreed that, at the time he answered “No” to Question 18.m., he knew he had anxiety in the past.²²² When the law judge asked whether he understood that Question 18.m. asked if he *ever had* anxiety, respondent gave a lengthy explanation about his interpretation of Question 18.m. only asking about a diagnosis of a mental disorder and noted the psychiatrists could not come to a conclusion of a diagnosis in 2007.²²³ He testified that he had never been told that he had anxiety but that he did have anxiety in the past and took medication for anxiety prescribed by his surgeon.²²⁴ When asked what “had or do you presently have any of the following” meant to him, he testified that it was “either a diagnosis or past tense.”²²⁵ When asked, in “the past tense in your time on this earth, have you had anxiety,” he testified that he did.²²⁶

²¹⁹ *Id.* at 435. *See* Exh. A-10 at 187.

²²⁰ Tr. at 376.

²²¹ *Id.* at 388.

²²² *Id.* at 388-389.

²²³ *Id.* at 390.

²²⁴ *Id.* at 391-392.

²²⁵ *Id.* at 392-393.

²²⁶ *Id.* at 393.

Respondent testified that he took drug tests, which were negative, but did not recall whether those drug tests were performed around the time he submitted the August 2018 and August 2019 medical certificate applications.²²⁷ He testified that he did not know until hearing Dr. Holmes's testimony that clonazepam and tramadol were drugs that airmen could not take while flying.²²⁸ He testified that he did not inquire with the AME about these medications either in 2018 or 2019.²²⁹

Respondent testified that he stopped taking any medication on July 23, 2018, the date he began simulator training in Minnesota, which lasted until late November or early December 2018, because he did not take any medication while he was in simulator training.²³⁰ He then testified that he did not take the medication during his simulator training, because he did not bring any medication with him to Minnesota.²³¹ However, shortly after, respondent testified that he did not take the medication during his simulator training, because there was no need for it, even though he brought the medication with him.²³² When asked about the inconsistent testimony, he first answered that he was assuming he had the medication with him and then that he had the medication with him.²³³ He testified that he remembered less when he took medications, versus when he did not take them, but that he recalled not having any back pain around the time of the August 2018 medical certificate application.²³⁴ He testified that, during

²²⁷ *Id.* at 393-394.

²²⁸ *Id.* at 418-419.

²²⁹ *Id.* at 419.

²³⁰ *Id.* at 395-398.

²³¹ *Id.* at 398.

²³² *Id.* at 399.

²³³ *Id.*

²³⁴ *Id.* at 402-403.

the time of the August 2019 medical certificate application, he was not taking any medications in July through September 2019, because he was busy flying for Compass Airlines.²³⁵ He testified he did not read the instructions to medications, he did not know what the side effects were, but he assumed that any side effect lasted only the day he took the medications.²³⁶

Respondent did not know who recorded the information in his medical records during his visits to Dr. Anmangandla.²³⁷ He testified that he never made the statements about FAA's approval of medications, that he did not recall making those statements to a physician or anybody else, and that he did not imply that one medication was approved versus another.²³⁸ When pressed which it was, he testified he did not recall making those statements.²³⁹ He testified that he did not speak to Dr. Anmangandla after he received the medical records in the EIR.²⁴⁰ When asked why he did not ask Dr. Anmangandla to testify about the allegedly incorrect entries in the medical records, respondent testified that he did not start reviewing his medical records until recently and so he did not know what was in the records.²⁴¹ When asked whether he personally believed Dr. Anmangandla could testify to the records being wrong about anxiety and kidney stones diagnoses and respondent's statements about FAA's approval of his medications, respondent testified that he believed Dr. Anmangandla could.²⁴²

²³⁵ *Id.* at 401-402.

²³⁶ *Id.* at 399-401.

²³⁷ *Id.* at 404-405.

²³⁸ *Id.* at 408.

²³⁹ *Id.* at 408-409.

²⁴⁰ *Id.* at 407.

²⁴¹ *Id.* at 378-380.

²⁴² *Id.* at 406-407.

Respondent testified that he did not make the call on September 5, 2018, to Dr. Anmangandla's office about the Los Robles emergency department visit for kidney stones.²⁴³ He testified that he went to Los Robles for stomach pain, where he had a number of tests and was prescribed pain medication.²⁴⁴ He testified he was only told to follow-up with his primary care physician, but that they did not tell him the cause of the pain or the basis for giving him the narcotic pain medication.²⁴⁵ He did not recall whether he made a follow-up appointment with Dr. Anmangandla about this pain.²⁴⁶ He testified that Dr. Anmangandla never told him he had kidney stones and that he never complained of having kidney stones, only of stomach pain.²⁴⁷ He testified that he last flew professionally in March 2020, but that he last flew in June 2021.²⁴⁸ Then, he testified that the last time he flew was September 2020 and not June 2021.²⁴⁹

C. Law Judge's Oral Initial Decision

The law judge issued an oral initial decision on July 23, 2021. The law judge determined that the Administrator proved the regulatory violations of 14 C.F.R. §§ 67.403(a)(1), 67.403(b), and 67.403(c) as alleged by a preponderance of the evidence.²⁵⁰ In making this determination, the law judge summarized the regulatory violations alleged in the complaint; discussed respondent's admissions and denials in his answer; discussed the admitted exhibits; discussed witness and respondent's testimony at length; assessed the credibility of the witnesses and

²⁴³ *Id.* at 409-410.

²⁴⁴ *Id.* at 411.

²⁴⁵ *Id.* at 411-413.

²⁴⁶ *Id.* at 412-413.

²⁴⁷ *Id.* at 413.

²⁴⁸ *Id.* at 421-422.

²⁴⁹ *Id.* at 439-440.

²⁵⁰ Oral Initial Decision at 565.

respondent; and discussed the *Hart v. McLucas*²⁵¹ standard.

In discussing respondent's testimony, the law judge stated that there were many instances of concern with respondent's credibility and that he frequently found respondent's testimony to be evasive and nonresponsive.²⁵² The law judge found Ms. Horner's and Ms. Holmes's testimonies credible because their answers were straightforward and non-evasive.²⁵³ The law judge found respondent's assertion about inaccuracy of medical records to be not credible because there was no evidence to support it beyond his own testimony and because his medical record is replete with complaints about his conditions and contains references to the FAA approving respondent's use of narcotic medication, while his physician is not an AME.²⁵⁴

The law judge found that the preponderance of the evidence showed that the entries of "No" in response to Questions 17.a. on the August 2018 and August 2019 medical certificate applications were false and made with knowledge of falsity.²⁵⁵ The law judge indicated that respondent's photos of medications proved nothing and were highly suspicious; respondent's testimony that he did not regularly take tramadol and clonazepam was not credible; and his testimony that he did not take any prescribed medications on the day he filled out the August 2018 and August 2019 medical certificate applications was "wholly without credibility."²⁵⁶ The law judge explained that respondent provided no corroborating testimony from his partner that his partner routinely disposed of pills; that any unused pulls from 2018 and 2019 would have

²⁵¹ See 535 F.2d 516, 519 (9th Cir. 1976).

²⁵² *Id.* at 532, 535, 539, 542, 545.

²⁵³ *Id.* at 544.

²⁵⁴ *Id.* at 546-548.

²⁵⁵ *Id.* at 551, 556.

²⁵⁶ *Id.* at 550-551.

been destroyed before the hearing; and that respondent contradicted himself when he testified that he did not know if clonazepam or tramadol were prohibited drugs, but yet he refrained from taking them on the days he flew.²⁵⁷

The law judge further found that preponderance of the evidence showed that the entries of “No” in response to Questions 18.w. on the August 2018 and August 2019 medical certificate applications were false and made with knowledge of falsity.²⁵⁸ The law judge found respondent’s testimony regarding alleged advice by Mr. Bennett not credible.²⁵⁹ The law judge explained that respondent provided no corroborating evidence that Mr. Bennett advised him he did not need to disclose the 2007 conviction on any government forms; that the Order Vacating Conviction is devoid of any reference to the application to federal law; that respondent provided no authority that the state order supersedes federal law; and that Dr. Holmes testified that nontraffic convictions must be reported even if expunged or vacated.²⁶⁰ The law judge found that respondent’s answers to Questions 17.a., 18.j., 18.m., and 18.w. on the August 2018 and August 2019 medical certificate applications were material, given Dr. Holmes’s testimony on point.²⁶¹

Regarding the third prong of *Hart v. McLucas*, the law judge noted that the most critical concern was respondent’s credibility, that he had listened and observed respondent throughout the hearing, and that he found that his testimony was not “in any way credible.”²⁶² The law judge explained that respondent was evasive and nonresponsive to cross-examination; refused to

²⁵⁷ *Id.* at 449-550.

²⁵⁸ *Id.* at 553. 556.

²⁵⁹ *Id.* at 552.

²⁶⁰ *Id.* at 552-553.

²⁶¹ *Id.* at 553-554.

²⁶² *Id.* at 555.

answer questions with a “yes” or “no” answer; provided lengthy answers and irrelevant information; and that his answers intended to evade, confuse, or avoid answering questions.²⁶³

The law judge further pointed out that respondent changed his sworn testimony over the course of the hearing, such as on issues of when he first reviewed his medical record.²⁶⁴ The law judge found that respondent was “wholly without credibility” and “completely unbelievable,” gave his testimony no weight, and indicated that he “ha[d] difficulty believing anything he says.”²⁶⁵

The law judge further concluded that respondent had knowledge of falsity of the answer of “No” in response to Question 18.j. on the August 2018 and August 2019 medical certificate applications. In support of this conclusion, the law judge in detail discussed respondent’s testimony concerning kidney stones and indicated that he provided no corroborating evidence to support his claim he never had or was told that he had kidney stones; that the medical record clearly documents the diagnosis of and treatment for kidney stones; and that his “self-serving, uncorroborated testimony” is without credibility and his defense is “preposterous.”²⁶⁶

The law judge also concluded that respondent had knowledge of falsity of the answer of “No” in response to Question 18.m. on the August 2018 and August 2019 medical certificate applications.²⁶⁷ In support of this conclusion, the law judge discussed respondent’s testimony regarding anxiety and found that respondent’s claim that Dr. Anmangandla never told respondent he was diagnosed with anxiety disorder and had kidney stones “unfathomable” and that his

²⁶³ *Id.* at 555.

²⁶⁴ *Id.* at 555-556.

²⁶⁵ *Id.* at 556.

²⁶⁶ *Id.* at 558.

²⁶⁷ *Id.* at 560.

medical records were reliable and accurate.²⁶⁸ The law judge found respondent's testimony on this issue "without a scintilla of credibility," self-serving, unreasonable, and something he "simply made...up."²⁶⁹

The law judge further indicated that he also did not find credible respondent's testimony that he had no interest in flying anymore and that he appealed the emergency order of revocation solely to secure his reputation.²⁷⁰ The law judge explained that the ATP certificate is the highest, most difficult, and most expensive to achieve and that respondent was fully motivated to misstate facts, falsify documents, and be dishonest during these proceedings.²⁷¹

The law judge concluded that the Administrator proved the allegations in the complaint by the preponderance of the evidence and that respondent lacks the qualifications and the trustworthiness necessary to hold the ATP and the airman medical certificates.²⁷² The law judge further concluded that the sanction of revocation was appropriate in this case, given that respondent made no specific arguments about mitigating factors on the sanctions issue and the Board's prior ruling that even one falsification warrants revocation.²⁷³

D. Issues on Appeal

On appeal, respondent argues that the law judge committed prejudicial errors; his findings were not supported by a preponderance of reliable, probative, and substantial evidence;

²⁶⁸ *Id.* at 558-559.

²⁶⁹ *Id.* at 559-560.

²⁷⁰ *Id.* at 560-561.

²⁷¹ *Id.*

²⁷² *Id.* at 562-565.

²⁷³ *Id.* at 565-567.

and the conclusions were not made in accordance with law, precedent, and policy.²⁷⁴

Specifically, respondent contends that the law judge made the following procedural errors: the law judge untimely issued subpoenas to Drs. Sugerman and Goldenberg; the law judge failed to sanction the Administrator for the failure to respond to respondent's second set of written discovery requests; the law judge admitted into evidence the medical records that are inadmissible as hearsay under rule 802 of the Federal Rules of Evidence; and the law judge allowed Dr. Holmes to testify on specifics within respondent's medical records, which falls outside of the scope of her expert witness report.²⁷⁵ Respondent contends that these procedural rulings by the law judge demonstrated a clear bias in favor of the Administrator and against respondent.²⁷⁶

Respondent further argues that the law judge erred in interpreting Question 18.m. to seek disclosure of "regular instances of anxiety" and this interpretation was "proffered purely as an attempt to trap" respondent.²⁷⁷ Respondent contends that the law judge's questioning of him also showed a clear bias in favor of the Administrator and against respondent, because the law judge was hostile, focused on minor inconsistencies in respondent's testimony, repeatedly asked respondent about trial strategy, put words in respondent's mouth, and decided to rule against respondent before all the evidence was put forth.²⁷⁸ Respondent finally argues that the law judge erred in finding that the Administrator proved by preponderance of reliable, probative, and substantial evidence that respondent's answers to Questions 17.a., 18.j., 18.m., and 18.w. on the

²⁷⁴ Appeal Br. at 6-33.

²⁷⁵ *Id.* at 16-29.

²⁷⁶ *Id.* at 31-33.

²⁷⁷ *Id.* at 32-33.

²⁷⁸ *Id.* at 29-31.

August 2018 and August 2019 medical certificate applications were made with knowledge of falsity and that the law judge erred in determining that respondent lacked credibility in his testimony to the contrary.²⁷⁹ The Administrator argues the law judge committed no error and opposes respondent's arguments for reversal.

II. *Decision*

While we give deference to our law judge's rulings on certain issues, such as credibility determinations,²⁸⁰ we review the law judge's decision *de novo*.²⁸¹

A. *Procedural Rulings*

Respondent challenges a number of the law judge's evidentiary decisions. We will not disturb a law judge's evidentiary ruling unless it amounts to an abuse of discretion and results in prejudice to the party.²⁸² We find that the law judge did not abuse his discretion in issuing the evidentiary rulings and that respondent is unable to demonstrate that he suffered prejudice as a result of these rulings.

1. *Issuance of Subpoenas to Drs. Sugerman and Goldenberg*

Respondent asserts that the law judge erred in failing to timely issue subpoenas that respondent sought for the testimonies of Drs. Sugerman and Goldenberg. Respondent requested the subpoenas on July 8, 2021, but the law judge did not issue the subpoenas until July 19, 2021,

²⁷⁹ *Id.* at 7-16.

²⁸⁰ *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).

²⁸¹ *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).

²⁸² *Administrator v. Knight*, NTSB Order No. EA-5892 at n.210 (citing *Administrator v. Freiwald*, NTSB Order No. EA-5774 at 8 (2016) & n.228 (2021) (citing *Administrator v. Yerby*, NTSB Order No. EA-5771 at 10-11 (2016) (collecting cases))).

the day before the hearing.²⁸³ Drs. Sugerman and Goldenberg began examining respondent in October 2020, which is over a year after respondent completed the medical certificate applications at issue in August 2018 and August 2019.²⁸⁴ Thus, their testimonies were not relevant to the Administrator's allegations against respondent, which concern respondent's mental condition prior to or at the time he completed the noted medical certificate applications.

Respondent has not demonstrated that the timing of the law judge's subpoenas prejudiced him. Drs. Sugerman's and Goldenberg's examinations and conclusions were unrelated to respondent's mental condition prior to or at the time he completed the medical certificate applications, and, therefore, any testimony they would have provided was not relevant to the issues in the case. Because the witnesses' testimonies were not relevant and the timing of the law judge's issuance of the subpoenas had no impact on the outcome of the case, we perceive no prejudice to respondent's defense.²⁸⁵ Respondent's allegation that the law judge erred is without merit.

2. *Sanction of the Administrator for Failure to Respond to a Discovery Request*

Respondent alleges that the law judge erred in refusing to sanction the Administrator for failing to respond to respondent's discovery requests. Respondent propounded a second set of discovery requests on the Administrator on July 13, 2021, and the Administrator did not respond. During the hearing, the Administrator explained that there was insufficient time to respond to the

²⁸³ Appeal Br. at 17; Reply Br. 2-3. We acknowledge that the delay in issuing the subpoena was not congruous with the spirit of our regulations; however, as discussed *infra*, we conclude that the delay did not result in any prejudice to respondent.

²⁸⁴ Exh. A-10 at 198-207, 212-261.

²⁸⁵ Drs. Sugerman and Dr. Goldenberg did not testify because the law judge granted each witness's motions to quash the subpoena. The law judge found that their testimonies were irrelevant, and respondent did not properly identify them as expert witnesses. Oral Initial Decision at 496; Tr. at 449.

second set of discovery requests and that the requests sought information that the Administrator already provided in response to the first set of discovery requests.²⁸⁶ The law judge denied respondent's motion for sanctions because respondent could have raised the failure to receive responses to the discovery requests at the practice session the day before the hearing commenced, but did not do so.²⁸⁷ Further, the law judge explained that respondent was aware of the issues in this case as they were described in the Administrator's complaint, and had respondent needed additional time to obtain discovery after the discovery deadline, he should have notified the law judge.²⁸⁸

Section 821.19(b) of our Rules of Practice require the parties to exchange information in accordance with the Federal Rules of Civil Procedure.²⁸⁹ Law judges have broad discretion in overseeing discovery; thus, we review the law judge's procedural rulings for an abuse of discretion after a party shows such a ruling prejudiced him or her.²⁹⁰ Here, we conclude that the law judge did not abuse his discretion in declining to issue sanctions. The law judge provided a reasonable explanation for his decision – the Administrator's failure to respond to duplicative requests propounded after the hearing had already commenced did not warrant sanctions.²⁹¹ Further, in his appeal, respondent fails to explain what information he would have gleaned from the Administrator's response to the discovery responses and how the absence of such

²⁸⁶ Tr. at 24-25.

²⁸⁷ *Id.* at 26.

²⁸⁸ *Id.* at 26-27.

²⁸⁹ 49 C.F.R. § 821.19(b). Additionally, 49 C.F.R. § 821.55(d), governing emergency proceedings, states, "The provisions of § 821.19 shall apply, modified as necessary to meet the exigencies of this subpart's accelerated timeframes."

²⁹⁰ *Knight*, NTSB Order No. EA-5892.

²⁹¹ Tr. 26-27.

information caused him prejudice.²⁹² As a result, we deny respondent's claim that the law judge erroneously declined to issue sanctions regarding the discovery requests.

3. *Admission of Medical Records into Evidence*

Respondent posits that the law judge erred in permitting some of respondent's medical records into evidence at the hearing. Specifically, respondent argues that the Administrator offered no foundation for the records and that the records were hearsay under the Federal Rules of Evidence.²⁹³ The law judge overruled respondent's objection to the admission of the medical records because respondent provided those records to the Administrator as part of the investigation and, therefore, the records were deemed an admission by respondent.²⁹⁴ We afford our law judges significant discretion in overseeing hearings. The Federal Rules of Civil Procedure and the Federal Rules of Evidence are applicable to our proceedings "to the extent practicable."²⁹⁵

First, respondent has not demonstrated that the law judge's ruling was contrary to the Federal Rules of Evidence. Rule 801(d)(2)(B) provides a hearsay exception for a "statement [that] is offered against an opposing party and ... is one the party manifested that it adopted or believed to be true."²⁹⁶ We have previously held that records a respondent provided to the

²⁹² See *Stricklen v. FAA*, 32 F.3d 572 (9th Cir. 1994) (citing *Janka v. NTSB*, 925 F.2d 1147, 1152 (9th Cir. 1991)) (finding no prejudice in the law judge's discovery rulings when respondent failed to demonstrate "that the information he sought was significantly different from the information that had been produced by the FAA before the hearing or that earlier receipt of answers to the discovery requests would have changed the outcome of the hearing in any meaningful way").

²⁹³ Appeal Br. at 21.

²⁹⁴ Tr. 48 (admitting Exh. A-4).

²⁹⁵ Pilot's Bill of Rights, Pub. L. 112-153 § 2(a), 126 Stat. 1259 (2012).

²⁹⁶ Fed. R. of Evid. 801(d)(2)(B).

Administrator are non-hearsay under this exception.²⁹⁷ Here, contrary to respondent's testimony he never signed the release for his medical records to be provided to the FAA, respondent did sign the release authorizing Dr. Sugerman to release all of his medical records to the FAA.²⁹⁸ Thus, we find that the law judge's ruling was consistent with the Federal Rules of Evidence.

Second, even if it was not, to the extent that respondent argues that the law judge did not adhere strictly to the Federal Rules of Evidence, we have held that, "[w]hen resolving issues involving the admission of evidence, the Board considers the Federal Rules of Evidence to be 'non-binding guidance.'"²⁹⁹ Rather, as discussed *supra*, we assess the law judge's evidentiary rulings for prejudicial error and abuse of discretion. We find that respondent has not established that the law judge abused his discretion in his evidentiary ruling. The law judge's ruling is reasonable, because respondent provided the medical records to the Administrator, and respondent's attempt to question the records' authenticity falls short. We agree with the law judge's determination and decline to hold that the law judge erred in admitting respondent's medical records into evidence.

4. *Scope of Dr. Holmes's Testimony*

Respondent argues that the law judge erroneously permitted Dr. Holmes to provide testimony beyond the scope of her expert report. Respondent claims that he lacked notice that Dr. Holmes would testify to "specifics contained within certain medical records regarding [respondent]."³⁰⁰ Yet, the record contradicts respondent's assertion. Dr. Holmes's report

²⁹⁷ See *Administrator v. Phillips*, NTSB Order No. EA-5877 at 25 (2020) (documents that respondent admitted to providing the FAA inspector during a ramp inspection were not hearsay and therefore, admissible, even if respondent did not fully read or understand the documents).

²⁹⁸ See Exh. A-10 at 187-188.

²⁹⁹ *Administrator v. Ferguson*, NTSB Order EA-5360 (2008).

³⁰⁰ Appeal Br. at 26.

explicitly states that she will testify based on her review of respondent's FAA medical file, and that, as a result of respondent's failure to disclose the necessary and relevant information on his medical certificate application, the Administrator lacked the information necessary to determine whether respondent was medically qualified to hold a medical certificate.³⁰¹ The law judge carefully considered the parties' positions regarding respondent's objection to the testimony and held that Dr. Holmes's expert report contemplated testimony concerning respondent's medical records.³⁰² Again, respondent has not established that the law judge abused his discretion. The law judge's decision was based on the record before him, and a reasonable reading of the expert report includes testimony regarding respondent's medical records to ascertain whether he falsified his medical certificate application.

Further, respondent cannot demonstrate that he was prejudiced by the law judge's ruling. Respondent was aware of the contents of the FAA medical file, which was admitted into evidence. It is illogical for respondent to contend that he was not prepared to address testimony concerning his own medical records and whether he accurately responded to the medical certificate application questions. These issues were at the heart of the Administrator's complaint, and respondent was on notice of the allegations against him.

Even in cases in which we have expressed concerns about a law judge's ruling regarding expert testimony, we have explained that "prejudice is an essential component when considering whether to reverse a law judge's evidentiary ruling on appeal."³⁰³ For example, in *Administrator v. Oeming*³⁰⁴, we concluded that the Administrator failed to directly identify an expert witness,

³⁰¹ Exh. A-8 at 2.

³⁰² Tr. at 103-04.

³⁰³ *Knight*, NTSB Order No. EA-5892 at 36.

³⁰⁴ NTSB Order No. EA-3542 (1992).

but regarding prejudice, stated, “Nevertheless, we do not find this requires ignoring the witness'[s] testimony, as respondent urges. Respondent points to no direct injury suffered as a result of [the expert witness’s] testimony. It is clear that respondent recognized the issues in this case and was fully prepared.”³⁰⁵ Similarly in the case *sub judice*, respondent’s request for relief – reversal of the law judge’s decision – is extreme in light of the lack of prejudice he suffered as a result of Dr. Holmes’s testimony. We deny respondent’s claim.

B. Intentional Falsification

To prove intentional falsification under *Hart v. McLucas*, the 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.³⁰⁶

1. False Representation

Respondent admits that his answers to Questions 18.j. and 18.m. on the August 2018 and August 2019 medical certificate applications were false.³⁰⁷ However, respondent denies and appeals the law judge’s determination that his answers to Questions 17.a. and 18.w. on the August 2018 and August 2019 medical certificate applications were false.³⁰⁸

Respondent contends that his answer to Question 17.a. was not false because he was not taking clonazepam or tramadol when he submitted the noted applications.³⁰⁹ The medical records reflect sufficient proof that respondent was taking clonazepam at the time he submitted the August 2018 medical certificate application. Dr. Anmangandla prescribed respondent

³⁰⁵ *Id.* at 3-4.

³⁰⁶ 535 F.2d at 519.

³⁰⁷ Answer at ¶¶ 15, 21.

³⁰⁸ Appeal Br. at 1, 10.

³⁰⁹ *Id.* at 10.

clonazepam for anxiety and/or insomnia in February, March, May, September, October, and December 2018.³¹⁰ These prescriptions closely precede and follow respondent's submission of the August 2018 medical certificate application.

We agree with respondent that there is insufficient proof that he was taking clonazepam when he submitted the August 2019 medical certificate application. Dr. Anmangandla last advised respondent to continue taking clonazepam for insomnia in February 2019.³¹¹ During the next visit in April 2019, there is no mention of treatment for insomnia or anxiety with clonazepam.³¹² In July 2019, respondent began using Benadryl for insomnia, and the subsequent visits in 2020 do not reflect any treatment with clonazepam.³¹³ Thus, the most recent use of clonazepam was in February 2019, which is six months prior to respondent's submission of the August 2019 medical certificate application, and is too remote for us to conclude that respondent's answer of "No" to Question 17.a. on this application as it concerns use of clonazepam was false.

However, the Administrator's failure to prove that respondent falsified Question 17.a. on the August 2019 medical certificate application when he did not report use of clonazepam does not materially affect the outcome of the case. We find that the Administrator sufficiently proved that respondent falsified Question 17.a. on the August 2018 and August 2019 medical certificate applications when he did not report his use of tramadol. First, respondent's use of tramadol for back pain at the time he submitted these applications is consistent with EScript tramadol prescriptions in May, October, and December 2018; and February, April, July, and December

³¹⁰ Exh. A-4 at 33, 35, 37, 42, 44.

³¹¹ *Id.* at 47.

³¹² *See id.* at 48-49.

³¹³ *See id.* at 54, 57, 59, 63, 66.

2019.³¹⁴ Second, respondent's testimony regarding tramadol prescriptions is highly conflicting and confusing: he first testified that his partner picked up his medications, but later that he picked up his own medications;³¹⁵ he testified he did not pick up every prescription, but also that he did not know if he picked up all of his prescriptions and did not know how many he actually picked up;³¹⁶ he testified that he filled the prescriptions but used them only one or two times every other month.³¹⁷ In support of the latter, respondent submitted photographs of three prescription bottles filled with pills.³¹⁸ The bottle for clonazepam is dated August 29, 2017, but the dates are not visible on the two tramadol bottles.³¹⁹ Respondent claimed that his partner consolidated all his unused pills in random, spare prescription bottles to discard them.³²⁰ However, no corroborating testimony from his partner was offered in support of this claim, and it is unclear when the pills in the photographs were prescribed and how many were unused from each prescription.³²¹

In addition, the respondent's medical record unequivocally shows that respondent used tramadol at the time he answered "No" to Question 17.a. on the August 2018 and August 2019 medical certificate applications. Dr. Anmangandla noted in May, September, October, and December 2018 that respondent had back pain and was to continue to treat it with tramadol three

³¹⁴ *Id.* at 68.

³¹⁵ Tr. at 234, 330, 329.

³¹⁶ *Id.* at 329, 330-332, 357.

³¹⁷ *Id.* at 243, 306, 309-310, 313. 329.

³¹⁸ *See* Exh. R-25.

³¹⁹ *See id.*

³²⁰ *See* Tr. at 234, 330, 242, 246-247.

³²¹ *See id.* at 330-332.

times a day.³²² Dr. Anmangandla also indicated in April and July 2019 and January 2020 that respondent continued to treat low back pain with tramadol.³²³ These treatment notes closely precede and follow the submission of the August 2018 and August 2019 medical certificate applications and make clear that respondent was taking tramadol for back pain at the time he submitted these applications. Therefore, we find that his answers to the contrary are false.

We also find that respondent's answers to Question 18.w. on the August 2018 and August 2019 medical certificate applications were false. While respondent puts forth arguments why his answer of "No" in response to this question was not intentionally false, he does not make any arguments in support of his claim that it is not false.³²⁴ Respondent's argument that he believed he did not need to disclose the conviction given the Order Vacating Convictions and Mr. Bennett's advice concerns the issue of intentional falsification, not false representation. His answer to Question 18.w. on the noted applications is objectively false because respondent indeed was convicted in 2007 of unlawful issuance of bank checks and he admitted to this conviction in his testimony.³²⁵ He was required to disclose this conviction, even if it was subsequently vacated.³²⁶ As such, his negative answers to Question 18.w. on the August 2018 and August 2019 medical certificate applications are false.

2. *Material Fact*

Respondent does not appeal the law judge's determination that his answers to Questions 17.a., 18.j, 18.m., and 18.w. on the August 2018 and August 2019 medical certificate

³²² Exh. A-4 at 36, 39, 42, 43.

³²³ *Id.* at 48, 54, 57.

³²⁴ *See* Appeal Br. at 13-14.

³²⁵ Exh. A-2 at 1-3; Tr. at 205-206.

³²⁶ *See* Tr. at 132, 185.

applications were made in reference to a material fact. Therefore, the issue of materiality of respondent's answers to these questions is not before us, and we find that the Administrator has met his burden of proof with respect to the second prong of the *Hart v. McLucas* standard.

3. *Knowledge of Falsity*

The third prong of the *Hart v. McLucas* test requires respondent to have known the representations were false when he made them. Direct evidence of actual knowledge is not required to prove a case of intentional falsification, and the element of knowledge may be inferred from circumstantial evidence.³²⁷ The law judge's credibility findings of the witnesses are essential in intentional falsification cases³²⁸ and should be based explicitly on factual findings in the record.³²⁹ We will not overturn a law judge's credibility determination unless a party can establish the determination was arbitrary and capricious,³³⁰ and the Board will not withhold deference to a law judge's credibility findings simply because other evidence in the record could have been given greater weight.³³¹

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

Respondent contends that he did not intentionally falsify Question 17.a. on the August 2018 and August 2019 medical certificate applications because he was not currently taking any

³²⁷ *Olsen v. NTSB*, 13 F.3rd 471, 475 (9th Cir. 1994); *Erickson v. NTSB*, 758 F.2d 285, 288 (8th Cir. 1985).

³²⁸ *Porco*, NTSB Order No. EA-5591 at 28-29; *Administrator v. Singleton*, NTSB Order No. EA-5529 (2010) (stating a law judge must make credibility determinations in intentional falsification case);

³²⁹ *See Dillmon v. NTSB*, 588 F.3d 1085, 1094 (D.C. Cir. 2009); *Administrator v. Reynolds*, NTSB Order No. EA-5641 at 8 (2012).

³³⁰ *Porco*, NTSB Order No. EA-5591 at 20-21.

³³¹ *Administrator v. Swaters*, NTSB Order No. EA-5400 at n.8 (2008), citing *Administrator v. Crocker*, NTSB Order No. EA-4565 at 6 (1997). *See Administrator v. Klock*, 6 NTSB 1530, 1531 (1989).

medications; there is no evidence of what prescriptions were filled; Dr. Holmes based her opinion on probability, not certainty, of respondent taking the medication at the time of his submission of the applications; and the photographs of the clonazepam and tramadol bottles support his assertion.³³² Respondent also contends that the Administrator failed to provide direct knowledge of falsity of his answer to Question 17.a.³³³

We disagree with respondent's contentions. As discussed, the photographs are unavailing as evidence that the prescriptions either were not filled or not used.³³⁴ The Administrator's failure to provide evidence of pharmacy records to show what prescriptions were filled is not dispositive, since respondent agreed that he filled and picked up the prescriptions and the photographs show what is purported to be each medication.³³⁵ The circumstantial evidence of repeated prescriptions of tramadol for consistent and ongoing complaints of back pain in the medical record indicates a high probability that respondent took tramadol when he submitted the relevant applications and a low probability that he kept refilling tramadol without taking it.³³⁶ Respondent's contention he did not intentionally falsify Question 17.a. on the noted applications because he was not currently taking the medications is simply against the weight of the evidence, and we have no reason to overturn the law judge's determination on this issue. We agree with the law judge's finding that respondent's testimony that he did not regularly take tramadol and clonazepam was not credible based on lack of corroborating testimony from his partner about

³³² Appeal Br. at 10-11.

³³³ *Id.* at 9-10.

³³⁴ *See supra* at 47.

³³⁵ *See* Tr. at 243, 249, 306, 309-310, 313, 329.

³³⁶ *See id.* at 146-147.

disposal of medications, the fact that any unused medications from 2018 and 2019 would have been long destroyed, and the contradictions in respondent's testimony.³³⁷

Respondent's claims are inconsistent with Dr. Anmangandla's treatment notes showing that, unfortunately, respondent never fully recovered from his January 2017 lumbar surgery and continued to have significant, ongoing back pain that required use of tramadol three times a day from May 2018 through August 2020 and then worsening and requiring increase in the dosage in November 2020.³³⁸ Likewise, his testimony he never had back pain while flying is inconsistent with Dr. Anmangandla's note that respondent had "considerable pain especially after long days flying plane."³³⁹ Absurdly, respondent claims that he never spoke to Dr. Anmangandla about being a pilot, flying, or opening a flight school, despite ample reference in the medical records to the contrary.³⁴⁰ In addition, respondent's explanation he could have mentioned opening a flight school to one of the nurses is speculative and disingenuous.³⁴¹ Respondent simply provided no basis why Dr. Anmangandla would invent all this information. Furthermore, his statements to

³³⁷ Oral Initial Decision at 449-551. Respondent's testimony is replete with contradictions. He testified that he did not know until hearing Dr. Holmes's testimony that tramadol and clonazepam were disqualifying medications, yet he opted not to take any medications while allegedly undergoing simulator training in Minnesota in August 2018 and while flying for Compass Airlines in August 2019. Tr. at 395-398, 401-402, 418-419. His reason for not taking medication while training in the simulator is also unclear. He first testified that he simply did not take medication while in the simulator training. Tr. at 395-398. He then testified he did not take the medication while in the simulator training, because he did not bring any medication with him to Minnesota. Tr. at 398. He then changed his testimony yet again and testified he brought he medication with him but had no need for it. Tr. at 399. He also testified that he did not know what side effects tramadol and clonazepam had, but then testified that he was aware of their side effect of drowsiness, which is why he did not take them while flying. Tr. at 266-268, 351-354, 399-401.

³³⁸ See Exh. A-4 at 32, 37, 39, 40, 42, 43, 45, 47, 48, 54, 57, 59, 60, 65, 68.

³³⁹ See Tr. at 312-313; Exh. A-4 at 32.

³⁴⁰ See Tr. at 310-311; Exh. A-4 at 40, 48, 55.

³⁴¹ See Tr. at 325-326; Exh. A-4 at 55.

Dr. Anmangandla that he was excessively tired during his pilot work hours because of varying flight schedule and the diagnosis of shift work sleep disorder treated with Provigil are entirely corroborated by respondent's own testimony that he no longer wished to fly because he was burnt out.³⁴²

Thus, the law judge's finding that respondent's testimony was "wholly without credibility" and "completely unbelievable" is firmly based on the facts of the evidence and, therefore, not arbitrary and capricious. We find that respondent intentionally falsified Question 17.a. on the August 2018 medical certificate application when he failed to disclose his use of clonazepam. We also find that respondent intentionally falsified Question 17.a. on the August 2018 and August 2019 medical certificate applications when he failed to disclose his use of tramadol.

b) Question 18.j. (diagnosed with, had, or presently have kidney stones)

Respondent contends he did not intentionally falsify Question 18.j. on the August 2018 and August 2019 medication certificate applications, when he failed to disclose the diagnosis of and treatment for kidney stones because he confused it with the gallbladder treatment.³⁴³ He also contends that the FAA did not provide any evidence that respondent was aware of kidney stones treatment when he answered the question.³⁴⁴ We disagree. Again, respondent's denial of the information in the medical records concerning treatment of kidney stones is meritless.

Respondent testified he never had kidney stones, even though the medical record shows they are recurrent.³⁴⁵ Respondent testified he never called Dr. Anmangandla in September 2018 to advise

³⁴² See Tr. 227, 431; Exh. A-4 at 48, 57.

³⁴³ Appeal Br. at 13.

³⁴⁴ *Id.*

³⁴⁵ See Tr. at 346-347; Exh. A-4 at 60, 63, 65-66.

him of the Los Robles emergency department visit for kidney stones and speculated that it could have been a friend or a relative.³⁴⁶ Then, respondent testified he was in the emergency department in September 2018 for stomach pain and ongoing gallbladder issues, so it is unclear why, if we were to believe respondent, a friend or a relative would have called Dr. Anmangandla to inform him of respondent's emergency department visit for kidney stones.³⁴⁷

Further, his claim he was in the emergency department for ongoing gallbladder issues is illogical, given that his gallbladder had completely been removed a year prior.³⁴⁸ By calling it in the appeal brief "gallbladder treatment," and not removal, respondent downplays the fact that, at the time of the September 2018 emergency department visit, his gallbladder was absent, making it odd to confuse an absent organ with kidney stones. Respondent's testimony that he was not told he was prescribed Percocet and Norco for kidney stone pain, that he never used a urine strainer, never had a left flank pain, and never took Flomax to help pass the kidney stone is also entirely inconsistent with the medical record.³⁴⁹ Respondent also contradicted himself when he testified that he did not recall whether he followed up with Dr. Anmangandla about the Los Robles emergency department visit, but then testified that he followed up twice but was not told by Dr. Anmangandla that he had kidney stones.³⁵⁰

We find the medical records on the issue of kidney stone treatment reliable because they are highly detailed and internally consistent, while respondent's testimony on this point vague and inconsistent. The law judge appropriately found that respondent's testimony he was not

³⁴⁶ See Tr. at 262, 409-410; Exh. A-4 at 37.

³⁴⁷ See Tr. 317, 411.

³⁴⁸ See Exh. A-4 at 21, 25.

³⁴⁹ See Tr. at 319-324, 338; A-4 at 37, 38, 40.

³⁵⁰ See Tr. at 324, 412-413.

aware of the kidney stones diagnosis and treatment was “self-serving, uncorroborated,” and “preposterous,” and this finding is appropriately based on respondent’s testimony that is internally conflicting and contradicts the ample medical record.³⁵¹ Thus, we find that respondent intentionally falsified his answers to Question 18.j. on the August 2018 and August 2019 medical certificate applications.

c) Question 18.m. (diagnosed with, had, or presently have a mental disorder)

Respondent contends that his negative answer to Question 18.m. on the August 2018 and August 2019 medical certificate applications was not made with knowledge of falsity, because he experienced “regular anxiety” or “acute anxiety” leading up to his January 2017 lumbar surgery, and not a formal anxiety disorder, and because he did not learn he was formally diagnosed with anxiety disorder until he reviewed the medical records in preparation for the hearing.³⁵²

Respondent argues that the Administrator provided no direct evidence of respondent’s knowledge of Dr. Anmangandla’s entries showing the diagnosis of anxiety disorder.³⁵³

Respondent also calls the law judge’s and the Administrator’s stance that Question 18.m. seeks disclosure of “minor, regular anxiety” or “regular instances of anxiety” disingenuous, wrong, ridiculous, and disgraceful and “proffered purely as an attempt to trap” respondent.³⁵⁴

However, Question 18.m. seeks to elicit this precise type of information. Respondent’s argument focuses almost exclusively on his alleged lack of knowledge of a formal diagnosis. We previously disposed of such argument in *Administrator v. Smith*, finding that it “improperly narrows the scope of the preamble” to Question 18.m., asking “have you ever in your life been

³⁵¹ Oral Initial Decision at 558.

³⁵² Appeal Br. at 11-12.

³⁵³ *Id.* at 12.

³⁵⁴ *Id.* at 12, 32-33.

diagnosed with, *had*, or do you presently have...mental disorders of any sort; depression, anxiety, etc.” and instructing to answer “yes” or “no” for every “condition listed.”³⁵⁵ We found that it was “clear from the text of the form...that [Question 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.”³⁵⁶

The current case is similar to *Smith*, where the respondent admitted to having had depression in the past, received treatment for depression from a psychiatrist, and took Wellbutrin to manage it.³⁵⁷ In *Smith*, despite the respondent’s claim he was not aware of a formal diagnosis of depression, the preponderance of the evidence showed the respondent was aware of the underlying condition of depression.³⁵⁸ Similarly, here, respondent testified repeatedly at the hearing that he knew he had anxiety in the past and that he took Xanax for anxiety leading up to his January 2017 lumbar surgery.³⁵⁹ Respondent also knew, and his medical records establish, that he was repeatedly prescribed clonazepam, an anti-anxiety medication, by his primary care physician.³⁶⁰ Even if we believe that respondent was never told of a formal anxiety disorder diagnosis by Dr. Anmangandla, he nevertheless was aware of the underlying condition of anxiety for which he sought medical treatment and took Xanax and clonazepam. Here, too, respondent gave contradictory testimony. He first testified that he took Xanax for “a one week period,” and

³⁵⁵ NTSB Order No. EA-5849 at 24-25 (2019). *See also Administrator v. Finazzo*, NTSB Order No. EA-5412 at 13 (2008) (holding that “[a] reasonable reading of Question 18 on the medical certificate application indicates that the question is extremely broad.”)

³⁵⁶ *Id.* at 25.

³⁵⁷ *See* NTSB Order No. EA-5849 at 3-4, 25.

³⁵⁸ *See* NTSB Order No. EA-5849 at 3, 25.

³⁵⁹ *See* Tr. at 304-305, 340-341, 347-348, 388-389, 391-393, 425.

³⁶⁰ *See* Tr. at 28, 108; Exh. A-4 at 33, 35, 37, 42.

then testified that he took it for “a couple, a day or two, three days before surgery.” In evaluating respondent’s testimony and the medical record on this issue, the law judge appropriately found it without a scintilla of credibility, self-serving, and unreasonable.³⁶¹ We agree and find that respondent intentionally falsified Question 18.m. when he failed to report he had anxiety on his August 2018 and August 2019 medical certificate applications.

d) Question 18.w. (history of nontraffic convictions)

Respondent contends he did not intentionally falsify Question 18.w. on the August 2018 and August 2019 medical certificate applications, because he reasonably believed he was not required to disclose his 2007 conviction, given the advice of his criminal attorney Mr. Bennett and the language in the Order Vacating Convictions stating that “[f]or all purposes [respondent] may state that he has never been convicted of the crimes of conviction.”³⁶² Respondent also contends that, even under the False Claims Act, one may avoid liability if he acted in good faith on the advice of counsel.³⁶³

We disagree. Respondent’s testimony on this issue is also self-contradicting. He first testified that, after his 2007 conviction was vacated in 2014, he spoke with Mr. Bennett on the phone and discussed what he would be required to disclose on “the FAA medical.”³⁶⁴ But, he later testified that Mr. Bennett did not specifically advise him about filling out FAA medical certificate applications and only advised him that he did not need to disclose it on any government form.³⁶⁵ Respondent admitted that, at the time he completed the August 2018 and

³⁶¹ Oral Initial Decision at 559-560.

³⁶² Appeal Br. at 13-14.

³⁶³ *Id.* at 14.

³⁶⁴ *See* Tr. at 214-215.

³⁶⁵ *See id.* at 370-372, 417.

August 2019 medical certificate applications, he knew he had been convicted of a felony in 2007, yet he felt he did not need to read the instructions to Question 18.w., which direct disclosure of expunged and vacated convictions.³⁶⁶

We previously found that failure to disclose an expunged arrest under Question 18.v. when a respondent failed to read instructions amounted to intentional falsification because it exhibited willful disregard for truth or falsity of the answer.³⁶⁷ Our holding applies here because both questions, 18.v. and 18.w. seek disclosure of past criminal record, even if subsequently expunged or vacated. By finding he did not need to read the instructions to Question 18.w., respondent deliberately ignored the fact that the question required disclosure of his 2007 conviction notwithstanding its “vacated” status and thus exhibited willful disregard for the truth or falsity of his answer.

Further, an affirmative defense under a False Claims Act claim is unrelated to the issue of intentional falsification of an FAA medical certificate application under the Federal Aviation Regulations. And, even if relevant, respondent fails to show he acted in good faith on advice of counsel when answering Question 18.w., given his contradicting testimony about Mr. Bennett’s advice and absence of corroborating evidence in the form of a letter or testimony by Mr. Bennett. The law judge discussed the absence of such corroborating evidence as well as respondent’s conflicting testimony and the fact that respondent cited to no authority that the state order supersedes federal law and found respondent’s testimony not credible.³⁶⁸ We find the law

³⁶⁶ See *id.* at 132-133, 185, 244, 342-343, 349-350.

³⁶⁷ See *Administrator v. Malone*, NTSB Order No. EA-5851 (2019); *Taylor v. Huerta*, 723 F.3d 210, 213 (2013), citing *Cooper v. NTSB*, 660 F.3d 476 (D.C. Cir. 2011) (finding that a respondent acts knowingly if he deliberately closes his eyes to what otherwise would have been obvious to him and does not act through ignorance, mistake, or accident).

³⁶⁸ Oral Initial Decision at 552-553.

judge's determination is based on the facts of the evidence and, therefore, not arbitrary and capricious. As such, we find that respondent intentionally falsified his answer to Question 18.w. on the August 2018 and August 2019 medical certificate applications when he failed to disclose his 2007 conviction.

C. Bias

Respondent alleges that the law judge's bias denied him a fair hearing and requests a reversal of the initial oral decision.³⁶⁹ Specifically, respondent alleges that the law judge was relatively hostile while questioning respondent; unfairly considered his answers evasive and nonresponsive; took issue with minor, irrelevant inconsistencies and relied on them to make significant credibility determinations; called respondent a liar; attempted to elicit privileged communications when he asked respondent about trial strategy; put words in respondent's mouth when he referred to respondent's testimony about medical entries coming from someone "off the street," when respondent never said such words; and referred to respondent in a derogatory way.³⁷⁰

Respondent also alleges that the law judge's procedural rulings demonstrated a "clear bias" in favor of the Administrator and against the respondent.³⁷¹ In support of this allegation, respondent points to nothing except to the law judge's adverse rulings. This is insufficient, since unfavorable rulings are not evidence of bias.³⁷² In addition, as discussed above, we find that the law judge's procedural rulings were made in accordance with the law, policy, and precedent.³⁷³

³⁶⁹ Appeal Br. at 31.

³⁷⁰ *Id.* at 29-31.

³⁷¹ *Id.* at 31-33.

³⁷² *Administrator v. Pruss and Douglas*, NTSB Order EA-4599 at n.9 (1997).

³⁷³ *See supra* text at 39-45.

We have held that, to disqualify a law judge for bias, “the bias...must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge has learned from his or her participation in the case.”³⁷⁴ Here, the appeal brief contains few carefully selected excerpts of transcript text to show that the law judge had pre-determined the case. After a thorough review of the transcripts, we do not agree that the law judge was biased and find that he properly exercised his authority to seek clarifications from respondent.

We find the law judge’s determinations that respondent was evasive and non-responsive consistent with respondent’s testimony at the hearing. For example, when asked whether it was true that Dr. Anmangandla wrote a tramadol prescription to him in October 2018, respondent first stated he did not know if it was picked up and then that he did not know what EScript was.³⁷⁵ He then stated he *could* say whether or not he received this prescription from Dr. Anmangandla, but then stated he did not know how to answer whether he received it.³⁷⁶ After the law judge asked respondent to answer with a “yes or no” and reminded respondent he was under oath, respondent testified that he did receive this prescription.³⁷⁷ Indeed, these type of answers are evasive and nonresponsive and justifiably prompted the law judge on other occasions during the hearing to remind respondent to answer with a “yes or no.”³⁷⁸

We also find that the law judge rightly relied on the inconsistencies in respondent’s testimony when assessing his credibility. Respondent calls the inconsistencies in his testimony

³⁷⁴ *Administrator v. Lackey*, NTSB Order No. EA-5419 at 11 (2008), *aff’d*, *Lackey v. FAA*, 386 Fed. Appx. 689, 2010 WL 2781583 (9th Cir. 2010); *Administrator v. Steel*, 5 NTSB 239, 243 n. 8 (1985).

³⁷⁵ Tr. at 335-336.

³⁷⁶ *Id.* at 336-337.

³⁷⁷ *Id.* at 337.

³⁷⁸ *See id.* at 354, 367, 406.

about when he first reviewed his medical records minor and irrelevant.³⁷⁹ We disagree with respondent and find that his testimony on this issue is significant and highly relevant, given respondent's affirmative defense that he did not intentionally falsify Questions 18.j. and 18.m. on the August 2018 and August 2019 medical certificate applications because he had not seen his medical records and, therefore, did not know that he was diagnosed with anxiety disorder and kidney stones.

Moreover, the law judge also did not improperly question respondent about why Dr. Anmangandla did not testify at the hearing. Respondent contends that the law judge attempted to elicit privileged attorney-client communications.³⁸⁰ However, the law judge specifically stated he was not asking to reveal such communications, but only respondent's opinion about whether he believed Dr. Anmangandla would testify to corroborate respondent's claim that the diagnoses of anxiety disorder and kidney stones were untrue.³⁸¹ Similarly, there are no entries in the transcripts where the law judge called respondent a liar or referred to him derogatorily. We agree that the law judge exhibited frustration when characterizing respondent's September 2018 Los Robles emergency department visit as if it came from someone "off the street."³⁸² However, we agree with the law judge's finding that respondent's testimony was not credible, given his implausible explanation that it came from anybody who came to Dr. Anmangandla's office through the front door, such as a friend or a relative – an attempt by respondent to deny the relevant information in his own medical records and speculate as to its source.³⁸³

³⁷⁹ Appeal Br. at 30.

³⁸⁰ *Id.*

³⁸¹ Tr. at 406-407.

³⁸² See Exh. A-4 at 37; Tr. at 377-378, 527.

³⁸³ See Tr. at 262.

In questioning respondent, the law judge did not become an advocate for the Administrator's case but tried to elicit direct and reliable testimony to clarify the record and develop an understanding of the material issues in the case. We have long allowed law judges to engage in such questioning.³⁸⁴ None of the law judge's questions were irrelevant or went beyond the scope of these proceedings. To the contrary, the law judge gave respondent ample opportunity to testify on all issues in his case openly and truthfully. And, respondent does not show how the law judge materially harmed his case by asking questions. As we previously noted, "[w]hile perhaps the law judge might maintain a calmer aspect, his irritation in the face of what he saw as continued excursions into irrelevant details does not equate to reversible error."³⁸⁵ Furthermore, the law judge issued a well-reasoned decision, and the overwhelming weight of the evidence in this case, including respondent's own testimony, establishes the truth of the Administrator's allegations.

³⁸⁴ See *Administrator v. Mize*, NTSB Order No. EA-5579 (2011); *Administrator v. Simmons*, NTSB Order No. EA-5275 at 9-10 (2007) (citing 49 C.F.R. § 821.35(b)); *Administrator v. Kachalsky*, NTSB Order No. EA-4847 at 3 n.4 (2000).

³⁸⁵ *Administrator v. Somerville*, NTSB Order No. EA-5086 at 3-4 (2004).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's oral initial decision is affirmed; and
3. The Administrator's revocation of respondent's airline transport pilot certificate, flight instructor certificate, ground instructor certificate, airman medical certificates issued on or about August 8, 2019, and August 31, 2018, and any other airman or unexpired medical certificates is affirmed.

HOMENDY, Chair; LANDSBERG, Vice Chairman; GRAHAM

and CHAPMAN, Members of the Board, concurred in the above opinion and order.

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

* * * * *

In the matter of: *

STEPHEN M. DICKSON, *
ADMINISTRATOR, *
FEDERAL AVIATION ADMINISTRATION, *

Complainant, *

v. *

Docket No.: SE-30989
JUDGE MONTAÑO

DAVID TUSHIN, *

Respondent. *

* * * * *

Via Zoom Videoconference

Friday,
July 23, 2021

The above-entitled matter came on for hearing,
pursuant to notice at 2:00 p.m.

BEFORE: ALFONSO J. MONTAÑO
Chief Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

FATIMAH STOKELY, Esq.
Federal Aviation Administration
Enforcement Division - Western Team
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On behalf of the Respondent:

JARED A. SCHNEIDER, Esq.
Tressler LLP
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I N D E X

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<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
(None)	--	--	--	--

E X H I B I T S

<u>EXHIBIT NUMBER</u>	<u>DESCRIPTION</u>	<u>MARKED</u>	<u>RECEIVED</u>
<u>ADMINISTRATIVE LAW JUDGE</u>			
ALJ-1	Motion to quash the subpoena for Dr. Sugerman and Respondent's response	496	496
ALJ-2	Motion to quash the subpoena for Dr. Goldenberg and Respondent's response	496	496

P R O C E E D I N G S

(2:03 p.m.)

1
2
3 JUDGE MONTAÑO: Good morning, everyone, or good afternoon.
4 It's 2 o'clock Eastern Standard Time or Eastern Time, in
5 Washington, D.C.

6 We are reconvening in the case of Administrator, Stephen M.
7 Dickson, v. David A. Tushin, Respondent, Case No. 30989. And the
8 purpose we are convening is so that I can issue an oral initial
9 decision in this case. So what I plan to do is issue my oral
10 initial decision at this time and then I will inform the parties
11 of their appeal rights when I have completed my decision.

12 So I will proceed at this point.

13 ORAL INITIAL DECISION AND ORDER

14 JUDGE MONTAÑO: This has been a proceeding under the
15 provisions of 49 USC Section 44709, formerly Section 609, of the
16 Federal Aviation Act. And it involves the provisions of the Rules
17 of Practice in Air Safety Proceedings of the National
18 Transportation Safety Board and the sections pertaining to
19 emergency proceedings instituted by the Administrator, Federal
20 Aviation Administration.

21 This matter has been heard before me as the administrative
22 law judge that's been assigned to hear and decide this case, and
23 as required by the regulations in emergency cases, I am issuing an
24 oral initial decision in these proceedings.

25 Pursuant to notice, this matter came on for virtual hearing

1 on July 20th, 21st, 22nd, and today is the 23rd of July, 2021.
2 The Administrator is represented by Ms. Fatima Stokely, Esq.,
3 attorney with the Enforcement Division, Western Team. The
4 Respondent is represented by Mr. Jarad A. Schneider, Esq. The
5 parties were afforded a full opportunity to offer evidence, to
6 call, examine and cross-examine witnesses and make arguments in
7 support of their respective cases and respective positions.
8 Mr. Tushin has been in attendance throughout this virtual hearing.

9 I will not discuss all of the evidence in detail. I have,
10 however, considered all of the evidence, both oral and
11 documentary. That which I do not specifically mention is viewed
12 by me as being corroborative or not materially affecting the
13 outcome of this case.

14 So first, I will talk about some agreements in the case.
15 There was a complaint filed and then there was an answer to the
16 complaint. Some of the allegations were admitted to and some were
17 not, so I will read that into the record at this point.

18 The Respondent filed an answer to the complaint in which he
19 admitted some of the allegations and denied others. The
20 Respondent admitted the allegations in paragraphs 1 through 6,
21 paragraphs 12, 13, 15, 18, 19, 21, 24, 30, 31, 32, 38, 44, 45, 47,
22 50 and 56. As the Respondent has admitted those allegations that
23 were alleged in the Administrator's complaint, they are considered
24 established for the purpose of this case and this decision. All
25 of the other allegations in the complaint the Respondent has

1 denied, and we will talk about them specifically when I go through
2 any findings of facts and conclusions of law. The Respondent also
3 denied the allegations that Administrator's prayer for relief and
4 the determination of emergency, but I note that there was no
5 challenge to the emergency in this case, I believe. So those are
6 the agreements.

7 Now I will talk about the exhibits that were admitted into
8 evidence in this case, but before doing that, I did make a ruling
9 relative to a motion to quash a subpoena for Dr. Sugerman and
10 Dr. Goldenberg, who the Respondent was seeking to subpoena to
11 testify in this case. So I will admit them into evidence as --
12 the motion to quash the subpoena by Dr. Sugerman's attorney and
13 the response by Mr. Schneider will be identified and entered into
14 evidence as Administrative Law Judge Exhibit 1. The motion to
15 quash in the case of Dr. Goldenberg and the response from
16 Mr. Schneider will be admitted into evidence as Administrative Law
17 Judge Exhibit 2.

18 (Administrative Law Judge Exhibits
19 ALJ-1 and ALJ-2 marked for
20 identification and received into
21 evidence.)

22 JUDGE MONTAÑO: As far as the other exhibits are concerned in
23 this case -- if the parties will bear with me one second.

24 All right. The exhibits, the Administrator had moved for the
25 admission of Exhibits A-1, A-2, A-3, A-4, A-5, A-6, and A-10,

1 which were admitted into evidence. A-4 and A-10 were admitted
2 over the Respondent's objections. The Respondent moved for the
3 admission of Exhibits R-19, R-12, R-20, R-25, R-4, R-12, which
4 were admitted into evidence. Exhibit R-4 was admitted over the
5 Administrator's objection. Respondent's Exhibits 16, 17, and R-10
6 were offered but were not admitted into evidence. They are part
7 of the record as rejected exhibits in this case.

8 So what I will do is first talk about the testimony in this
9 case or discuss the testimony in this case and summarize what I,
10 from my notes, that I understood the testimony to be. And then at
11 that point I will then discuss how this testimony and evidence
12 that's been submitted will be used to make my decisions in this
13 case.

14 So I will start with the Administrator's case. The
15 Administrator has the burden of proof. The Administrator
16 presented the testimony of Ms. Ashlee Horner and Dr. Joye Holmes,
17 MD, MBA, MPH.

18 Ms. Horner was the first witness called to testify. She
19 testified that she currently works for the FAA as an airman
20 medical program analyst. She testified that she reviews medical
21 applications, processes enforcement actions, and discusses medical
22 issues with airmen. She has worked for the FAA for a total 14
23 years, during which time she also worked for the Airport Division,
24 the Van Nuys Flight Standards District Office, and she also worked
25 with air traffic control.

1 Ms. Horner testified that her involvement in this case began
2 when she received a hotline complaint in this case. She reviewed
3 the complaint and spoke to the regional flight surgeon, who agreed
4 that the hotline complaint should be reviewed. As part of the
5 review, Ms. Horner testified that she requested documents relative
6 to the anonymous complaint and forwarded the issues to the
7 regional flight surgeon and discussed those documents with him.
8 She testified that after the flight surgeon reviewed the
9 documents, the information was forwarded to the Enforcement
10 Division of the Federal Aviation Administration.

11 Ms. Horner identified the hotline complaint which is at
12 Exhibit A-1. She testified that the hotline complaint indicated
13 that the Respondent had undisclosed substance abuse and
14 psychological issues which had not been disclosed to the FAA. The
15 complaint also alleges the Respondent is abusing controlled
16 substances, has a history of substance dependence, substance
17 abuse, psychological problems, erratic behavior, anxiety,
18 depression, and suicidal ideation. The complaint alleges that the
19 Respondent had been hospitalized for drug overdoses and has been
20 through drug rehabilitation multiple times.

21 Ms. Horner testified that the FAA did not know who filed the
22 hotline complaint. Ms. Horner testified that she prepared a
23 reexamination letter which requested specific additional evidence
24 from Mr. Tushin and she sent that letter to Mr. Tushin.

25 She identified Exhibit A-2 as a court document from King

1 County, Washington, which is labeled as Defendant Sentencing
2 Memorandum. She testified the document included a letter from
3 psychologist Dr. Steven R. Feldman regarding the evaluation he
4 provided to Mr. Tushin. She testified the letter indicated that
5 the Respondent showed features of depression, dependency,
6 histrionic personality disorder, anxiety, and a history of chronic
7 pain. However, I must note that that report also indicated that
8 Mr. Tushin, despite having all of these features, did not meet any
9 one of the diagnostic codes in the DSMV-4, which is of course the
10 authority used to document psychological problems.

11 Mr. Horner identified Exhibit A-3, which is the reexamination
12 letter that she wrote requesting additional information from the
13 Respondent after receipt of the hotline complaint. She testified
14 that she specifically requested any and all records regarding your
15 history of chronic pain, and any and all treatment records
16 regarding a history of dependency, as noted in the evaluation
17 conducted by Dr. Feldman in 2007; a current psychiatric and
18 psychological evaluation in compliance with the enclosed
19 specifications, which were enclosed with the letter; copies of all
20 court documents pertaining to any arrests, convictions; current
21 history, clinical examinations regarding any history of reflex
22 neurovascular dystrophy. Ms. Horner also testified that she also
23 requested copies of pharmacy records from any and all pharmacies
24 that Mr. Tushin had used in the past 2 years.

25 She testified that the Respondent provided the documents

1 requested, or some of the documents requested, which Ms. Horner
2 testified were included as Exhibit A-4, which consists of 68
3 pages. She identified Exhibit A-5 as a medical application which
4 was completed by the Respondent and dated August 31, 2018.
5 Ms. Horner testified that A-6 is the exhibit which includes the
6 medical application form, the 8500-8, which was completed by the
7 Respondent and is dated August 8, 2019. Ms. Horner identified
8 Exhibit A-10, which is the blue ribbon record of Mr. Tushin's FAA
9 medical file.

10 On cross-examination, Ms. Horner testified that she reviewed
11 the hotline complaint and reviewed the issues. When asked if her
12 review of documents indicated that there was evidence of substance
13 abuse, she testified that she was not an expert, she only
14 requested the records, she testified. When asked if the documents
15 she reviewed supported the allegation of suicidal ideation, she
16 testified that she did not ask for that information from the
17 Respondent. Ms. Horner further testified that she was not sure if
18 that allegation was in Dr. Feldman's letter which discussed
19 Respondent's psychological issue. I did not see any record of any
20 suicidal ideation in this case.

21 Ms. Horner was asked to read Dr. Feldman's letter at A-2 and
22 was asked if the description of the issues in the second to the
23 last paragraph led her to determine what issues to review, and
24 Ms. Horner testified that she did not make any independent
25 decisions in this case as to what to investigate or what to

1 review.

2 Ms. Horner was asked to read the second paragraph in
3 Dr. Feldman's letter and was asked if the paragraph was a basis
4 for the FAA's investigation into the issues. She responded by
5 stating no. She testified she does not make decisions about what
6 issues are investigated. She reviews information and presents the
7 information to the regional flight surgeon.

8 She agreed that Dr. Feldman's letter indicated that two
9 doctors had indicated that the Respondent, while he had
10 experienced or displayed parts of different psychological
11 diagnoses, Respondent did not fit neatly into any of the DSM-4
12 diagnosis codes. Ms. Horner agreed that that is what the letter
13 said.

14 When asked if she knew if anyone used the information in the
15 second paragraph of Dr. Feldman's letter as a basis to investigate
16 the Respondent, she testified she could not give him an accurate
17 answer about that. She testified she reviews the information,
18 discussed it with the regional flight surgeon, and she personally
19 did not make a decision what to investigate and what not to
20 investigate.

21 Ms. Horner testified that her office received the hotline
22 complaint. She reviewed it, discussed it with the regional flight
23 surgeon, a decision was made to ask for additional information.
24 When the additional information was received, she reviewed it and
25 discussed it with the flight surgeon. She testified that the

1 regional flight surgeon decides how to proceed once the documents
2 are reviewed.

3 Ms. Horner was asked if the information relative to the
4 allegations of failure to report a criminal conviction led her to
5 investigate the Respondent, and again she testified she does not
6 make any decisions nor does she reach any conclusions as to what
7 to investigate. She testified she informed the regional flight
8 surgeon of the information that she had received.

9 When asked if she does any investigation in her job, she
10 responded by stating to some degree. However, she testified she
11 is not an investigator, she does not seek out additional
12 information. In this case, the Respondent provided the
13 information they requested. And she testified other sections of
14 Federal Aviation Administration do conduct investigations.

15 She testified that she never followed up with Dr. Feldman
16 regarding his letter of 2007. Ms. Horner testified that she does
17 not review all of the records provided in response to the
18 reexamination letter, she only reviews the medical records.

19 When asked if she had ever seen R-19, the court order
20 vacating Respondent's conviction, she at first testified she did
21 not, but then indicated it may have been provided with some of the
22 records she received. She did say she thought it may have been
23 provided with Dr. Feldman's records. She testified she did not
24 review the document, and again, she only reviews medical
25 documents.

1 When asked why she would not review the documents at R-19,
2 she testified she provides it to the regional flight surgeon and
3 he decides if it is relevant. Ms. Horner was asked if she had
4 seen Exhibit R-16 before, and testified that she had. She
5 testified that the letter was dated March 16, 2021, and appeared
6 to be from Mr. Fox, the Respondent's previous attorney.
7 Ms. Horner testified that, again, that she makes no
8 recommendations regarding the cases she works on. She makes no
9 decisions relative to the cases she is assigned. When asked who
10 made the decisions in this case, she testified the regional flight
11 surgeon made all of the decisions as to how to proceed with the
12 case. She testified the flight surgeon makes the determination,
13 as was made in this case, whether a case should be forwarded to
14 general counsel's office for enforcement action.

15 Ms. Horner was asked if she had medical training, and she
16 responded that she has medical training, but testified that her
17 medical background is not utilized regarding her current position
18 in reviewing these types of complaints. She has used her medical
19 training in her involvement in cases involving special issuances.
20 She testified that she cannot say if her medical training was not
21 utilized relative to this case.

22 Ms. Horner was then asked if she had seen Exhibit R-17, a
23 letter from Dr. Walter Jacobson, to which replied she had seen the
24 document after the FAA had completed the investigation of
25 Mr. Tushin. She testified she did not know if the letter was

1 considered by the FAA in their determinations in this case.

2 There was no redirect, no recross. I asked her to identify
3 the flight surgeon with whom she worked, which she did, and his
4 name is in the record. There was no follow-up to my questions.

5 The next witness to be called by the Administrator was
6 Dr. Joye L. Holmes. Dr. Holmes testified as to her education and
7 experience as an airman medical examiner, as a regional flight
8 surgeon, and her experience in the aerospace medicine field. Her
9 curriculum vitae is admitted into evidence as Exhibit A-7.
10 Dr. Holmes was qualified as an expert in airman medical
11 certification without objection from the Respondent.

12 She stated she had reviewed the records that are in evidence
13 in this case. Dr. Holmes testified as to the record at Exhibit
14 A-4. She testified that the record indicated a medical visit with
15 the Respondent on June 7, 2016. She testified that page 3 of that
16 document sets forth the assessment of the Respondent's conditions
17 and is entitled, "Diagnosis attached to this encounter." One of
18 the conditions noted specifically relevant to this case is an
19 entry indicating anxiety disorder. Other diagnoses, including
20 lumbago with sciatica, annular tear, lumbar disc peripheral
21 neuropathy, and peptic ulceration, and GERD are also noted.
22 Dr. Holmes testified that the Respondent was required to report
23 the anxiety disorder on his medical application form filed on
24 August 31, 2018 and August 8, 2019.

25 Dr. Holmes then addressed the medical entry at page 7 of

1 Exhibit A-4, which described Respondent's medical visit on October
2 26, 2016. She testified the record indicated the chief complaint
3 of back pain. The record indicates that the Respondent used
4 tramadol usually twice a day, hydrocodone as needed, at an average
5 of once a day.

6 Let's go off the record for a second.

7 (Off the record at 2:24 p.m.)

8 (On the record at 2:28 p.m.)

9 JUDGE MONTAÑO: Dr. Holmes testified that the Respondent was
10 again required to report the anxiety disorder on his medical
11 application forms filed on August 31, 2018 and August 8, 2019.

12 She then addressed the medical entry at page 7, Exhibit A-4,
13 which described Respondent's medical visit of October 26, 2016.
14 She testified the record indicated a chief complaint of back pain.
15 And again, the record indicated the Respondent used tramadol
16 usually twice per day, with hydrocodone as needed, on an average
17 of one time per day. Dr. Holmes testified that tramadol is a
18 disqualifying medication as it may cause side effects such as
19 sudden incapacity or seizures. She testified that the Respondent
20 must report the use of tramadol on his medical application form.

21 The diagnosis of anxiety disorder is repeated in his medical
22 record as well. The record indicates the plan is to continue
23 tramadol PRN and was provided a 2-month prescription to the
24 Respondent. She testified that the record also indicates that
25 number 3 on page 8 of A-4, that for the initials GAD, which she

1 testified meant general anxiety disorder, the plan was to continue
2 clonazepam as needed, I believe, PRN. Dr. Holmes testified that
3 clonazepam is an anti-anxiety medication. She then testified as
4 to Respondent's medical visit on August 3, 2017, which indicated
5 the plan for the diagnosis of general anxiety disorder was again
6 continued with the drug clonazepam.

7 Dr. Holmes then testified as to the medical records which she
8 described as an addendum dated August 14, 2017. At A-4, page 21,
9 the addendum indicates that the Respondent had called the doctor's
10 office on Monday morning saying that he had had his gallbladder
11 out. At page 32 of A-4, Dr. Holmes testified the medical records
12 indicate that the Respondent had issues with chronic low back pain
13 and was tapering down to MS Contin 15 milligrams. The record also
14 notes problems with sleeping and notes that 30 milligrams daily
15 works well. The record indicates that the patient now flying
16 full-time -- well, I quote, "PT now flying full-time; reports
17 aviation medical examiner signed off on flying when taking chronic
18 narcotics." Dr. Holmes testified that an AME would never have
19 signed off on flying while using chronic narcotics. She also
20 testified that an AME would have been required to report a pilot's
21 use of opioids to the Federal Aviation Administration. She
22 testified that MS Contin is a disqualifying medication when it is
23 used on a chronic basis.

24 Dr. Holmes testified as to page 36 of the record, which she
25 indicated documented that Respondent was using tramadol three

1 times a day and includes a comment in the record that it is
2 helping the patient. On page 37, Dr. Holmes testified that the
3 plan was to continue tramadol three times daily GID, and Lyrica
4 two times a day. The plan also indicated that the Respondent was
5 taking clonazepam nightly for insomnia and anxiety.

6 Dr. Holmes then testified as to an addendum to the medical
7 record at page 37 of A-4, which indicates: Spoke to patient on
8 9/4/18. Patient was in the ED Los Robles for kidney stones. Was
9 given Norco for pain and was advised to wait for stones to pass.
10 Patient was only given 10 days worth of medications. ED stands
11 for emergency department.

12 Dr. Holmes was asked to describe the difference between
13 symptoms of gallbladder issues and pain, the difference between
14 that and the pain or symptoms of kidney stones. She testified
15 that the gallbladder is a part of the gastrointestinal system and
16 functions in the removal of solid waste. Kidney stones are part
17 of the urinary tract system and function in the removal liquid
18 waste. They are two separate and distinct organs with distinct
19 pain manifestations. Gallbladder problems manifest in the abdomen
20 just below the left rib cage, where kidney stones present with
21 left to right flank pain and would descend as the stone descended.
22 She said these are two different types of pain locations between
23 gallbladder and kidney stones. She testified that the Respondent
24 was required to report both conditions on his medical application
25 form, both the kidney stone and the gallbladder, which, as

1 indicated, was in the medical records as well.

2 Dr. Holmes testified that there was a follow-up visit on
3 September 25, 2018, which was described as a follow-up relative to
4 kidney stones. There was an indication that the kidney stone had
5 not yet passed. The plan was to decrease Percocet to two times a
6 day or less and start Flomax, and the Respondent was instructed to
7 strain his urine.

8 She then addressed the Respondent's medical visit of July 23,
9 2019, which included an entry which stated the plan was to
10 continue tramadol and notes that increased risk of seizure from
11 the medication was discussed. The record also notes a history of
12 kidney stones again.

13 Dr. Holmes then testified as to the entry on page 55 at A-4,
14 which indicated that the back pain was unchanged and well managed
15 with tramadol three times a day, and indicated, and I quote, "He
16 has FAA clearance to use. The patient indicates he wants to
17 decrease but is unable to do so." Dr. Holmes testified that the
18 FAA would never clear a pilot to use tramadol. Respondent was not
19 cleared to use tramadol nor has any other pilot ever been cleared
20 to use tramadol while flying. Dr. Holmes testified that tramadol
21 has potential side effects, again, sudden incapacity and seizures.
22 Not things good to happen in flight. Dr. Holmes then -- that was
23 my comment, not her testimony.

24 Dr. Holmes then addressed the prescription for tramadol at
25 A-4, page 68. The documentation indicates tramadol, 50

1 milligrams, one tablet every 8 hours. The prescriptions start on
2 5/1/2018 to 8/10/2020, each with a notation of two refills with a
3 quantity of 90; nine prescriptions with two refills each of 90
4 pills. Dr. Holmes testified that if the medication was not being
5 used, that the Respondent could have asked his doctor to stop
6 prescribing completely or prescribing less medication. There is
7 no note in the medical records that the Respondent ever talked to
8 his doctor about his use or non-use of prescription medication.

9 Dr. Holmes testified that based on her review of the medical
10 record, she opined that Respondent was using tramadol before and
11 after his medical application dated August 31, 2018 and was using
12 tramadol before and after his August 31, 2019 medical application
13 form.

14 Dr. Holmes then testified as to the entries in the medical
15 application forms in issue in this case. She addressed A-6, which
16 is the medical application form for August 8, 2019. Dr. Holmes
17 described the MedXPress process. When the airman goes to
18 MedXPress online to complete the medical application form, the
19 form is completed and saved. It can be downloaded by the airman
20 medical examiner who is providing the airman medical exam for the
21 airman. She testified that question 17(a) asks if the airman is
22 currently using any medication prescribed or nonprescribed.
23 Dr. Holmes testified that the airman must indicate if she or she
24 is using medications since they last applied for their medical.
25 Dr. Holmes testified the Respondent should have answered yes to

1 question 17(a). Based on her review of the record, she testified
2 that the preponderance of the evidence is that the Respondent was
3 using prescription medication when he filled out the medical
4 application forms.

5 She testified that Respondent was prescribed tramadol. He
6 refilled the medication and there was no indication in the medical
7 record that he stopped using the medication. Respondent had
8 prescriptions which were filled before and after the August 8,
9 2019 medical application as well, and there's no indication in the
10 medical record that there was a notation that the Respondent had
11 stopped using his prescribed medication of tramadol.

12 She testified if the use of medication had been reported to
13 the AME in this case, he would have requested additional
14 information about why the medication was being taken and for how
15 long it had been prescribed and had been taken. Dr. Holmes
16 testified that the answer to this question certainly would affect
17 the Administrator's determination as to whether a medical
18 certificate should be issued.

19 Dr. Holmes was asked if the Respondent correctly answered
20 question 18(j) which asked if the airman had ever in his or her
21 life had kidney stones or blood in his urine or her urine. She
22 testified the medical records document the Respondent had a
23 diagnosis of kidney stone. She testified that kidney stones can
24 be incapacitating and a medical evaluation of that condition would
25 be necessary. She testified that the answer to this question

1 could influence the airman medical examiner and the Administrator
2 in determining if a medical certificate should be issued.

3 As to question 18(m), Dr. Holmes testified the question asks
4 have you ever in your life been diagnosed with, had or do you
5 presently have mental disorder of any sort; depression, anxiety,
6 etc. Dr. Holmes testified the Respondent's medical records
7 clearly indicate that he had a diagnosis of anxiety disorder.
8 Respondent answered no to question 18(m), which is not correct,
9 nor were the other answers in the previous questions correct.

10 Respondent answered no. She testified that it was important
11 for the FAA to know if the airman has this condition. Dr. Holmes
12 testified that anxiety that lasts even for a short of period of
13 time had to be reported. She testified that the answer to
14 question 18(m) can influence the decision as to whether an AME and
15 the Administrator would issue a medical certificate.

16 Regarding Respondent's answer to question 18(w), which asks
17 if there has been a history of nontraffic convictions, Dr. Holmes
18 testified that the records indicate that the Respondent had a
19 criminal conviction, and Respondent admits that he has a criminal
20 conviction. She testified that the Respondent's answer to
21 question 18(w) was not correct. She testified that even if a
22 conviction is vacated or expunged it must be reported. Dr. Holmes
23 testified that there is a dropdown explanation to this question in
24 the instructions, and there is such a dropdown explanation in
25 every question. In the question 18(w), the dropdown explanation

1 indicates that all convictions have to be reported, whether
2 they've been expunged or vacated.

3 Dr. Holmes testified that if there is still confusion after
4 reading the instructions about 18(w) or any question, the airman
5 can always ask the airman medical examiner about the question or
6 he can call the regional flight surgeon's office of the FAA to get
7 clarification or obtain clarification. The airman can also call
8 the local Flight Standards District Office or an organization
9 called CAMI in Oklahoma City that deals specifically with airman
10 medical issues. Dr. Holmes testified that the AMEs, airman
11 medical examiners, are trained to answer questions relative to the
12 medical application form. Dr. Holmes testified that the answer to
13 18(w) is capable of influencing the Administrator's decision to
14 issue a medical certificate.

15 Dr. Holmes then testified as to the medical application form
16 completed by Respondent on Augusts 31, 2018 at Exhibit A-5. She
17 again testified that Respondent's answer to question 17(a)
18 regarding the use of prescription drugs was not correct. She
19 testified the Respondent's answer to question 18(j) was not
20 correct in that his medical records indicate the Respondent had
21 been diagnosed with kidney stones. As to Respondent's answer to
22 question 18(m), Dr. Holmes again testified that the Respondent's
23 answer was not correct, as he was diagnosed with anxiety disorder,
24 as indicated in the medical records. She testified he was
25 prescribed medication for the anxiety disorder. As to 18(w),

1 Dr. Holmes testified that the Respondent's answer to question
2 18(w) was not correct, again, as the record indicated that all
3 nontraffic convictions, even if expunged or vacated, have to be
4 reported.

5 Dr. Holmes testified that each one of these false answers can
6 influence the Administrator's decision to issue a medical
7 certificate. She testified if the Respondent had answered
8 correctly, answered yes to these questions, the airman medical
9 examiner would have deferred issuing the medical and would have
10 requested additional information before issuing a medical
11 certificate.

12 Finally, Dr. Holmes testified that the Respondent's
13 certification in the certification block at number 20 of the form
14 was not correct because the questions in issue in this case were
15 not correct both on the August 31, 2018 and August 8, 2019 medical
16 application forms.

17 On cross-examination, Dr. Holmes testified that she first
18 reviewed the medical records in this case 7 to 10 days before the
19 hearing. She testified she was not involved in the investigation
20 and not involved in any decisions by the regional flight surgeon.
21 She agreed that she did not know what was going through the mind
22 of the regional flight surgeon who handled the hotline complaint;
23 however, she testified that she is trained and has acted as a
24 regional flight surgeon in the past. She testified that the
25 investigation is a collaborative process in the regional flight

1 surgeon's office.

2 I'm going to go off the record for a second.

3 (Off the record at 2:46 p.m.)

4 (On the record at 2:47 p.m.)

5 JUDGE MONTAÑO: Dr. Holmes testified she reviewed all of the
6 medical records in this case, which were the records for the
7 Respondent's primary care physician, Dr. Anmangandla. Dr. Holmes
8 was asked if the fact that tramadol and Norco were prescribed to
9 the Respondent, as noted in A-4, page 2, meant that the Respondent
10 actually purchased the medications. Dr. Holmes testified that the
11 medical record does not provide that information.

12 Dr. Holmes was asked to explain the difference between an
13 anxiety disorder and anxiety. She testified that anxiety disorder
14 is determined after an evaluation by a practitioner and anxiety is
15 what is experienced where a diagnosis has not been made by someone
16 who is a physician who has evaluated the patient. She testified
17 anxiety that's not been evaluated is sometimes called nervousness.

18 As to page 7 of Exhibit 4, which indicates a prescription for
19 tramadol and Percocet, Dr. Holmes testified that the record does
20 not indicate that the Respondent took the prescription to the
21 pharmacy and purchased it. Dr. Holmes testified that pharmacy
22 records would indicate if the Respondent filled the prescription
23 and purchased it. The FAA reexamination letter specifically asked
24 the Respondent to provide the pharmacy records and he did not.

25 Dr. Holmes was asked about the assessment at page 39 of the

1 records, which included the term nephrolithiasis, which is a
2 medical term for kidney stones, if I'm pronouncing that correctly.
3 She was asked if a layperson would know what that meant, and she
4 responded a layperson would not know what that meant.

5 Dr. Holmes agreed that the entry at A-4 in the record, at
6 page 39, indicated the Respondent had not been using clonazepam
7 since pain improved and he was able to sleep for that period of
8 time. However, she testified that it was highly probable he was
9 still using the clonazepam, as he kept filling the prescription.
10 When asked just because he was refilling the prescription did not
11 mean Respondent was taking it, she testified that repeated filling
12 of prescriptions made it highly probable that the Respondent was
13 still taking the medication.

14 She testified that MS Contin is a disqualifying medication
15 when asked on cross. She agrees that MS Contin was not an issue
16 in this case even though it is noted in the record that the
17 Respondent used it. And she was asked again if it was possible
18 that the Respondent simply stopped using clonazepam this visit,
19 and she testified that it was possible.

20 Dr. Holmes was asked about the entry on page 54 of the
21 medical records which indicated the patient advised to clear new
22 medication with employer, and I quote, "Report stimulant drugs
23 banned by the FAA, but Provigil allowed; continue taking Provigil,
24 200 milligrams 1 hour prior to shift working well." Dr. Holmes
25 was asked if this entry indicated the Respondent was attempting to

1 move on to other nonprohibited medications. Dr. Holmes testified
2 that Provigil is a prohibited drug and not allowed by the FAA.

3 Dr. Holmes was asked about the Respondent's sentencing
4 memorandum at A-2, and she agreed that Dr. Feldman's report
5 indicated that the Respondent showed features of anxiety and
6 personality disorder and other psychological issues but it was not
7 easy assign the Respondent with a specific diagnosis. Dr. Holmes
8 agreed that that was the report indicated, but she testified that
9 that was in 2007. She testified that the medical records for 2016
10 to 2019 in this case document a diagnosis of anxiety disorder and
11 the record also indicates that there was a prescription for it and
12 insomnia.

13 Dr. Holmes was asked if doctors make mistakes, to which she
14 answered yes. She testified that there was no written requirement
15 for a patient to inform a doctor if he or she stopped taking
16 medication; however, she testified the patient should inform the
17 doctor they are no longer taking medication.

18 Dr. Holmes was asked if it was possible for Respondent to
19 confuse gallbladder pain and kidney stone pain. She testified
20 Respondent's gallbladder had been removed the year before. The
21 records indicate that he had kidney stones, therefore that would
22 not be a mistake since the gallbladder was no longer in the
23 Respondent's body. She described the symptoms of pain in
24 gallbladder problems and kidney stones do not present in the same
25 way or the same part of anatomy. Kidney stone pain is in the back

1 and the flank, which starts at the upper quadrant and progresses
2 downwards as the kidney stone descends. Gall stone pain manifests
3 in the upper front quadrant near the ribcage.

4 Dr. Holmes was then asked if her prior testimony was
5 contradicted by a letter from the FAA at R-12. She testified that
6 that letter and her testimony was not in conflict. Both indicated
7 the FAA did not have enough information to issue a medical
8 certificate because of the false entries in the medical
9 application the Respondent completed and the case was referred to
10 legal to investigate.

11 The point of this line of questioning was not clear nor is it
12 made clear how it is relevant. Clearly, there are two paths here.
13 One is to deny an airman medical if they don't have enough
14 information to issue the medical. The second is to move for an
15 enforcement action by the general counsel for the FAA when there
16 is a falsification of the medical application form. Two separate
17 things. Two separate decisions can be made; if possible, they can
18 be made.

19 On redirect, Dr. Holmes agreed that a person can suffer from
20 anxiety without being diagnosed with anxiety disorder. She agreed
21 that Dr. Feldman's 2007 letter in the sentencing document states
22 the following: We began treatment by dealing with first things
23 first, immediate stressors that were exacerbated by chronic pain,
24 his memory difficulties, and anxiety. So even at that time,
25 Dr. Feldman noted anxiety.

1 Dr. Holmes agreed that that indicated that Respondent had
2 anxiety even if he was not diagnosed with an anxiety disorder at
3 that time. She testified the diagnosis of anxiety disorder was
4 repeated numerous times throughout the medical record history in
5 this case in the records at R-4. Dr. Holmes testified that the
6 medical records in this case in an addendum, that the Respondent
7 had called and informed his treating doctor that his gallbladder
8 had been removed. She agreed that the medical records at page 37
9 indicated that the Respondent called the primary care doctor to
10 let him know that he had had his gallbladder removed 1 year before
11 he indicated he was suffering from gall stones.

12 In recross, Dr. Holmes agreed Respondent reported his
13 gallbladder had been removed in the medical application form. And
14 as Dr. Holmes testified, that was in the medical record and that
15 was not something that Mr. Tushin took exception with. That
16 record indicates he called, informed the office he had his
17 gallbladder removed at another location. He does not disagree
18 with that entry. The gallbladder is not an issue in this case.
19 He denied he ever called the doctor's practice to inform the
20 practice that he had gone to the emergency at Los Robles for
21 kidney stones. He takes exception with that. He said he never
22 made that call, the entry in the record is essentially the same in
23 form, except one deals with the gallbladder and the second with
24 the kidney stones, which Mr. Tushin denies he ever had. On
25 recross, when asked if an airman must report normal anxiety not

1 diagnosed as an anxiety disorder, she answered yes.

2 In response to my question, I asked for clarification about
3 the instructions regarding reporting convictions that had been
4 expunged or vacated. She explained the dropdown feature in the
5 MedXPress which instructs that a conviction must be reported even
6 if expunged and vacated. In questioning by Respondent's counsel
7 in follow up to my questions, Dr. Holmes agreed that she has no
8 legal training. After stating she had no legal training, the
9 Respondent's counsel asked her her medical or legal opinion in
10 terms of citing a law or authority that requires reporting an
11 expunged or vacated conviction. Dr. Holmes testified that Part 67
12 of the Federal Aviation Regulations require the reporting of
13 convictions even if expunged and MedXPress instructs the airman to
14 report such convictions.

15 The Administrator rested his case in chief after the
16 completion of the testimony of Dr. Holmes. I will now discuss the
17 Respondent's case.

18 At the close of Administrator's case, the Respondent moved
19 for directed verdict and dismissal of the case, arguing that the
20 Administrator had not met his burden of proving a prima facie case
21 relative to the allegations in this case. I heard arguments on
22 the motion from both parties and denied the motion. The rationale
23 for my denial of the motion is on the record.

24 After that, Mr. Tushin was called to testify. He testified
25 he lives in the Agoura Hills, California with his partner and two

1 dogs. Mr. Tushin testified that in 2007 he had issued a bad check
2 and was accused of kiting. He testified he was naïve and he did
3 not understand the check writing process. He was arrested and
4 convicted of bank fraud. Mr. Tushin testified that he was not
5 ashamed of this event. He paid restitution and completed all of
6 the other court-ordered requirements. He identified Exhibit A-2
7 as the sentencing memorandum for the criminal case, which included
8 a psychiatric evaluation by Dr. Feldman and Dr. Muscatel. He
9 testified he understood he had not been diagnosed with any mental
10 disorder by these two doctors in 2007.

11 Mr. Tushin identified Exhibit R-19 as a court order vacating
12 his criminal conviction. He testified he understood the document
13 annulled a conviction in the same way a marriage is annulled, the
14 conviction simply doesn't exist anymore. He testified in this
15 manner: He testified that his attorney informed him that he did
16 not have to disclose his conviction. He testified that his
17 attorney had advised him that he did not have to report the
18 conviction on any application; state, local or federal
19 applications. He testified his attorney told him that the court
20 order vacating the conviction ruled over all other requirements.
21 He identified Exhibit R-20 as the order restoring his rights to
22 own a firearm, and also testified that his right to vote was
23 restored.

24 Mr. Tushin discussed his educational background, stating he
25 went to college from 2012 to 2015 and earned an associate's degree

1 in accounting. He is attending a Lutheran college and is working
2 on completing a bachelor of arts in economics. He testified that
3 he has been admitted into law school, I believe. He testified he
4 started flight school or training in 2017. He aggressively
5 pursued the training and earned a private pilot certificate and is
6 certified to teach advanced ground instruction. He obtained his
7 commercial certificate and became a certified flight instructor
8 and then a certified flight instructor for instrument training.
9 He then obtained his multiengine certificate and his air transport
10 pilot certificate. He testified he was certified as a federal
11 flight deck officer and had undergone a background check. He
12 testified he had to take a drug test for that position but he did
13 not remember when that occurred.

14 Mr. Tushin testified he underwent other drug tests when he
15 was flying as an ATP, airline transport pilot, in December of 2018
16 and around the summer of 2019. He testified he underwent other
17 drug tests, but his testimony was vague as to when and for what
18 reasons he was required to take these drug tests. While he
19 testified the tests were negative, no tests were provided to
20 corroborate his statement. He testified that he had drug tests
21 when he was evaluated by Dr. Sugerman and Dr. Goldenberg, which
22 was after he filed the medical application forms in issue. He
23 testified that the drug tests were conducted between 2018 and
24 2020, but again he provided no evidence to corroborate his claim.
25 He said he only had one positive result for Benadryl.

1 I'm making my comments on his testimony at this point because
2 there's a number of issues which I need to address.

3 He testified that he started working for Compass Airlines in
4 2018. As far as his business ventures, he testified he learned
5 that he enjoyed teaching and opened a flight school called
6 Checkride Prep. He testified he divested himself of that
7 business. He testified he was burnt out and was flying and he did
8 not want to be involved with it anymore. He testified he does not
9 plan to fly again. He testified he is only pursuing this appeal
10 because he wants to protect his reputation. He does not want an
11 allegation that he had made a falsification open to the public.
12 He testified he did not falsify any federal form. Mr. Tushin
13 later testified that there is a civil suit pending and a hearing
14 is scheduled for next week regarding his flight school that he
15 indicated in passing that he had divested himself of. He
16 testified that he was the plaintiff and provided no other details
17 of the civil suit.

18 Mr. Tushin testified he's not a doctor, has no experience in
19 reading and interpreting medical records. He testified that the
20 first time he had seen the medical records in this case was only
21 after they were provided by the FAA. He testified that he worked
22 with the FAA psychologist and psychiatrist as he was instructed to
23 do in this case relative to the letter of reevaluation.

24 Mr. Tushin testified that before reviewing his medical
25 records he was not aware that he had been diagnosed with an

1 anxiety disorder. He testified that he had experienced anxiety
2 such as when he was in a new environment, but that was acute. He
3 testified he had no other problems other than a bicycle accident
4 in 2013. He testified he had his gallbladder removed. However
5 the medical records indicate he had additional issues with back
6 problems. He didn't mention that in his testimony. A number of
7 other problems are listed in the medical records, but I don't see
8 those listed in his testimony.

9 Mr. Tushin testified that when we reviewed the medical
10 records he learned that he had been diagnosed with kidney stones.
11 He testified he did not know that. He testified he had been
12 prescribed tramadol and clonazepam and that medication was
13 refilled a number of times. He testified the medication was on an
14 automatic refill program and that his partner picked up the
15 medication for him because he traveled so much flying. He agreed
16 that he used tramadol and clonazepam, and I believe he testified
17 that he used the medication regularly. He testified that tramadol
18 was for chronic back problems called sciatic and used clonazepam
19 for insomnia. He identified photographs of prescription pill
20 bottles and pills. He testified he took the photos 2 weeks ago.
21 He testified they were the remaining pills that he had found. He
22 testified he doesn't always take his medications. He testified
23 that those photos of the prescription pill bottles are at R-25,
24 and he indicated at page 7 was a prescription of clonazepam and
25 the next photo depicted the same prescription container with

1 unused medication. He testified they were the pills that he had
2 not used. He testified that the photos also depicted clonazepam
3 and tramadol both.

4 Mr. Tushin testified that his partner does an annual cleaning
5 of the medication. His partner collects all of the medication for
6 that year and discards them. If Mr. Tushin's testimony about this
7 cleaning yearly and discarding of unused pills, then his partner
8 discarded the pills for 2018 and 2019 long before these photos
9 were taken. Mr. Tushin testified that one of the prescription
10 bottles had a date of 8/29/2017; however, he had just testified
11 that his partner would have destroyed the pills in 2017. He then
12 testified that his partner used an old pill bottle apparently from
13 2017 to consolidate unused pills.

14 I found this testimony to be vague and irrelevant. The photo
15 depicts nothing but a staged effort to make it appear he does not
16 use all of his pills. However, it does not prove he did not use
17 all of his pills in 2018 and 2019 or when he was filling out his
18 medical application forms for 2018 and 2019. Again, those photos
19 do not relate to his prescriptions issued prior to August 31,
20 2018, the 2018 medical application, or his August 8, 2019 medical
21 application. Respondent's testimony relative to these pill
22 bottles is not corroborated by any other witnesses or any other
23 documentation in this case.

24 Mr. Tushin was asked why he continued to fill prescriptions
25 if in fact he is not using the medication. Mr. Tushin replied

1 that when he was in pain, he wanted to make sure he had medication
2 available to him. He was asked if he was taking clonazepam or
3 tramadol when he filled out his medical application forms, and he
4 testified that he was not taking either of these medications at
5 the time he filled out his medical application forms that are at
6 issue in this case.

7 Mr. Tushin then identified Exhibit R-4, which is his medical
8 application form dated September 29, 2017. He testified that
9 application form indicated and reported his gallbladder removal
10 for 2017. Mr. Tushin then identified Exhibit A-5, his medical
11 application form completed on August 31, 2018, in which he again
12 reported that his gallbladder had been removed. He was asked how
13 he answered question 18(j), which reads: Have you ever in your
14 life had, been diagnosed with, have or continue to have kidney
15 stones or blood in urine? Mr. Tushin testified he answered no.
16 He testified he had not suffered from kidney stones; he would have
17 reported it, just like he did report his gallbladder removal in
18 his previous two medical application forms.

19 When asked how he answered question 17(a), did he currently
20 use any medication, prescription or nonprescription, he testified
21 he answered no because he was not taking those medications on the
22 day he completed his medical application form. He did not testify
23 he did not have a prescription and he did not testify he didn't
24 fill the prescription that he had before or after he filled out
25 that application form.

1 Respondent was then shown A-6, the medical application form
2 completed on August 8, 2019 and was asked about the entries on
3 that form. Respondent was asked if the reason he answered no to
4 question 18(j) was because he believed that he was providing a
5 correct answer. Mr. Tushin answered yes. When asked if his
6 answer to that question was a true statement, Mr. Tushin answered
7 yes, it was a true statement. He was then asked if the reason he
8 did not answer yes to question 17(a) regarding the current use of
9 medication was because he was not taking medication the day he
10 filled out the form. Mr. Tushin answered yes. Mr. Tushin was
11 asked by his attorney that the reason he answered no to question
12 18(m) was because he was not aware he had a diagnosis of anxiety
13 disorder, and Mr. Tushin responded by stating that's true. He
14 testified that he answered no to question 18(w) because he did not
15 believe he had to report it because in consultation with his
16 lawyer, who told him he did not have to disclose the vacated
17 conviction in any state, local, or federal application. When
18 asked if he ever answered a question on a medical application form
19 falsely, Respondent answered that he never had.

20 Respondent was then asked about the medical records at A-4.
21 Mr. Tushin testified that the records are from his primary care
22 physician, and the first time he saw the records is when he was
23 provided by the FAA, I believe he said, the EIR, enforcement
24 investigative report. He testified he did not know how the FAA
25 obtained the records. He testified he did not provide a release.

1 Respondent testified that he had never seen the June 7, 2016
2 entry in the record at A-4, page 3, regarding a diagnosis of
3 anxiety disorder. He testified he was never aware of the entry or
4 how the entry was made. When asked if it was true that he did not
5 know how entries were made by his physician in the medical
6 records, he answered that he did not know how his doctor made
7 entries in the medical records.

8 Respondent testified that he had never seen the entry in the
9 medical records at page 37, entitled an Addendum, which indicated
10 he called his physician to inform him he was suffering from kidney
11 stones. Mr. Tushin testified that he did not know who the source
12 of that information in the medical record was about kidney stones.
13 He testified it could have been anyone. It could have been
14 someone off the street. When asked if he made the call documented
15 in the record, he responded no. He testified he never calls the
16 office, had no clue where that office originated. However, I must
17 note again Mr. Tushin did not provide the same testimony when the
18 record indicated that he called into his doctor's office and
19 informed the office that he had his gallbladder removed.

20 On page 32 of the medical record it includes an entry which
21 states: Patient, PT, flying full-time now, reports aviation
22 medical examiner signed off on flying while taking chronic
23 narcotics. The Respondent testified he did not make that
24 statement to his doctor, does not know where the statement came
25 from. Page 61 of the records, there is an entry which reads:

1 Advised to clear any new medication with employer; reports
2 stimulant drugs barred by the FAA but Provigil allowed. Again he
3 testified he did not make such a statement and does not know the
4 source of that statement. The same statement is made on page 65,
5 and again Respondent denied making the statement and commented
6 that it looked like a copy and paste type of entry.

7 He testified he's never used tramadol or clonazepam when he
8 flies. When asked if he knew what medications are prohibited by
9 the FAA used in flight, Mr. Tushin testified that he had a list of
10 the medications prohibited but not a thorough, a complete list.
11 As I note later, he testified later that he did not know what the
12 prohibited drugs were and he denied having ever made a list.

13 Respondent identified Exhibit R-12, which he described as the
14 FAA letter informing him he was not qualified for any class of
15 medical certificate and the case was being referred to FAA legal
16 for enforcement action or consideration of enforcement action. He
17 testified that he reached out to the attorney who wrote the letter
18 to provide additional documentation to prove the allegations were
19 false. Respondent identified Exhibit R-13 as the letter of
20 investigation that the FAA had sent him. His attorney asked him a
21 question on direct examination, that if he understood that the FAA
22 was alleging that he, the Respondent, did not respond to the
23 letter of investigation. Mr. Tushin testified he did respond
24 through his attorney, Mr. Fox. Respondent then provided a
25 somewhat confused statement about what information was provided to

1 the FAA. The Respondent attempted to have an exhibit introduced
2 relative to the testimony, which was not successful because it was
3 not signed, had documents attached to it that contained multiple
4 hearsay, and there's no indication that he wrote the letter.

5 Respondent was shown A-10, which is a letter from his
6 attorney, Mr. Fox, which Respondent claimed was the identical
7 letter to the exhibit that was just rejected, which clearly the
8 letter was not -- it had no attachment, and this letter was signed
9 by the attorney, Mr. Fox. It's a different letter. I found
10 Mr. Tushin's testimony about the supposed identical letter to be,
11 in the end, irrelevant and devoid of credibility relative to the
12 issues in this case. Respondent appeared to argue that
13 information was provided so they could convince the Administrator
14 not to bring the revocation case. That argument is irrelevant to
15 my role here. My role is only to determine whether or not the
16 Administrator can prove the case that they did bring, not whether
17 or not they should have brought it to begin with. I have no
18 authority or jurisdiction over that.

19 Respondent then testified that he took a drug test on May 31,
20 2021. And again, that is not relevant to this case. What is
21 relevant is what was occurring August 31, 2018 and August 8, 2019,
22 not what is happening or what is occurring on May 31, 2021.
23 Respondent testified that he was attempting to provide the
24 Administrator with more information, again, so that the
25 Administrator would not bring the action against him. He

1 testified he cooperated with the Administrator and underwent the
2 evaluation he was required to take.

3 Finally, he testified that he did not believe that the
4 medical records in this case were accurate. He testified he never
5 signed a release for the records and, as he had testified, he said
6 he did not know how some of those entries came to be in the
7 record. He didn't make certain calls, he didn't make certain
8 statements to his primary physician, and he rarely calls the
9 office. So that was the extent of his complaint about the medical
10 records.

11 All right. That completed the direct testimony. On cross-
12 examination, the Respondent stated again that he has an ATP, air
13 transport pilot certificate. He is a flight instructor, certified
14 flight instructor, certified flight instructor for instruments.
15 He had passed all of the written and practical examinations
16 required for all of those certificates. He testified that the
17 medical records in this case were from his primary care physician,
18 Dr. Anmangandla. He testified that his physician had been his
19 physician in 2016, he agreed had been his physician in 2017, had
20 been his physician in 2018 and '19 and 2020. And that's where he
21 ended his testimony about Dr. Anmangandla being his primary care
22 physician.

23 Respondent was then asked about his medical record at A-4,
24 page 2, relative to the visit on June 7, 2016. He testified that
25 the record indicated that he was diagnosed with anxiety disorder;

1 however, he testified that he had no idea that he had been
2 diagnosed with anxiety disorder. He testified he had taken
3 medication for anxiety called Xanax before for anxiety just before
4 he had to undergo back surgery, but that was not diagnosed as an
5 anxiety disorder. He testified that page 7 of the record
6 indicates that he was suffering from back pain and agreed that he
7 was taking medications for that back pain.

8 He was shown A-4, page 22, and agreed that a drug test he had
9 taken in 2020 was positive for Benadryl. He testified he takes
10 Benadryl 10 to 15 times a year. He said he started using it in
11 August 2020. Again, a drug test taking place in 2020 is
12 irrelevant to the issues I have to address in this case.

13 Mr. Tushin was asked about an entry on page 32 of the record
14 which indicated that PT, or patient, now flying full-time, reports
15 aviation medical examiner signed off on flying while taking
16 chronic narcotics. He was asked if he recalled telling his airman
17 medical examiner about the pain medications he was taking, and
18 Mr. Tushin responded he did not recall if actually he told his
19 airman medical examiner he was taking these medications.

20 He testified that he was using tramadol acutely, one or two
21 times every month. He testified he did not recall using
22 medications for pain, but he agreed that he had filled the
23 prescriptions for tramadol that was provided to him. Respondent
24 testified that he did not discuss his job as a pilot with his
25 primary care physician. He testified he did not know how the

1 doctor's office found out he was a pilot or he had opened a flight
2 school. He testified he thought that he was not the source of
3 that information, that the information may have come from the
4 office staff or he really had no indication of where it came from.

5 Respondent was asked about the record on page 36, which
6 indicated he was using tramadol for pain three times a day.
7 Respondent testified he did not recall when he was taking
8 medication during 2018. 2018 is the year he filled out his
9 medical application form, on August 31, 2018. He testified he was
10 not taking tramadol three times a day. He testified he used the
11 medication when his back flared up, but his back never flared up
12 during his flying, he said.

13 I found that the Respondent's response to this question was
14 very evasive. He provided a great deal of information in his
15 answer, but that information was not related to the questions
16 being asked. I found it to be evasive. In one instant he said he
17 doesn't remember what medications he was taking during 2018, and
18 then he argues that he was not taking tramadol three times a day
19 and never takes it when he's flying. So either he remembers or he
20 doesn't.

21 Again, he received a prescription for clonazepam and filled
22 the prescription, as noted on page 37 of the medical record.
23 Respondent testified he did not remember receiving any
24 instructions from his doctor about what the medication was for.
25 He testified he received the instructions from the pharmacy, and

1 again, he testified that his partner picks up the prescriptions
2 from the pharmacy. He testified he does not read the leaflets in
3 the medication nor reads about possible effects. The leaflets, of
4 course, for the medication would indicate what it's for. If
5 clonazepam is, as indicated by Dr. Holmes and the records, for
6 anxiety, it would indicate on the leaflets that Mr. Tushin's
7 decided he did not want to read.

8 Again, Respondent testified he did not remember ever being
9 diagnosed with anxiety as indicated in the medical records. He
10 testified he did not, again, call his primary care physician about
11 his kidney stones. He agreed that he had been to Los Robles
12 hospital emergency department for pain, but he testified he was
13 not told what was causing the pain, that no one told him why he
14 was experiencing the pain. He was tested and given pain
15 medication and told to follow up with his doctor. Respondent
16 testified that he thought he was suffering from pain of his
17 gallbladder; however, he testified that he understood that his
18 gallbladder had been removed a year earlier and his gallbladder
19 was no longer a part of his body.

20 Respondent was asked about a follow-up visit with kidney
21 stones conducted on September 25, 2018, with his primary care
22 physician. He testified that he did not recall any of the entries
23 in the record regarding flank pain and references to Percocet.
24 Again, he testified no one ever told him he had kidney stones and
25 no one ever told him he had gall stones either. Respondent was

1 asked about the record at page 39, which included information
2 about a CT scan conducted at Los Robles and the prescription of
3 the use of Flomax and straining his urine. Respondent testified
4 he did not recall receiving a CT scan, screening his urine, or
5 using Flomax. He testified he never screened his urine. Again,
6 he testified no one ever told him what was causing the pain.

7 The Respondent was asked about the encounter on page 55 of
8 the record, which indicated that the patient is busy with work and
9 opened his own flight school. The record goes on to note the back
10 pain unchanged and well managed with tramadol, and for tramadol,
11 the FAA has cleared its use. Respondent denied telling his
12 physician that he had cleared the use of tramadol. He testified
13 he did not have much discussion with his doctor during the doctor
14 visits. He did not know how his doctor knew he opened the flight
15 school. He did not tell him and perhaps a member of his staff
16 heard it.

17 Respondent agreed that the record on page 68 indicated he was
18 prescribed tramadol. He testified that that record indicated he
19 had been prescribed tramadol in May of 2018, but he testified he
20 was not really sure if he picked up that prescription. When asked
21 why he would refill the prescription if he was not going to use
22 it, he testified he was going to keep filling the prescription
23 whether he needed to or not. He testified he did not inform the
24 doctor when he was not using the medication nor did he inform the
25 doctor he did not need a prescription with a smaller number of

1 medication. When asked if he received the July 23, 2019
2 prescription for 90 pills, Respondent responded evasively and
3 testified he's not sure if that prescription was picked up or
4 whether he took those medication.

5 Respondent was then asked about his entries on the August 8,
6 2019 medical application form. He testified he read and
7 understood question 17(a). He was shown a prescription record at
8 68 for the medical records, which indicated he received a
9 prescription for tramadol 2 weeks before filling out his August 8,
10 2019 medical application form. That record also indicates he
11 received another prescription 4 months after he had filled out the
12 application form. Respondent testified that just because he was
13 issued a prescription, that does not mean that he picked it up or
14 used the prescription. Respondent was shown each of the
15 prescriptions on page 68 of the record. He testified to each one
16 of the nine prescriptions which provided 2 refills each of 90
17 pills to each, and he testified he could not say if he picked up
18 the medication or used the medication. He also answered that if
19 his partner had picked up the medications, that did not mean that
20 he took the medication. I found his answers to these questions
21 very evasive and nonresponsive.

22 Respondent was then asked about his answers on the -- I'm
23 sorry, it's still the August 8, 2019 medical form. He testified
24 he answered no to question 18(j) regarding kidney stones because,
25 again, he never knew he had kidney stones, no one ever told him he

1 had kidney stones. The pain he thought he felt was for
2 gallbladder problems from a gallbladder that had been removed from
3 his body a year earlier. He testified that he answered that
4 question correctly because of the reasons he just stated. When
5 asked if he knew that he had admitted he had kidney stones in the
6 answer to the complaint, he indicated he did not know that.

7 To question 18(m), he testified that he read and understood
8 the question. He testified he answered no because he believed he
9 had not been diagnosed with an anxiety disorder. He did not know
10 that the medical records included numerous entries indicating that
11 he had an anxiety disorder. He testified he believed the question
12 to mean that you only need to answer yes if you were diagnosed
13 with a mental disorder, and he admitted that while he had an acute
14 anxiety before surgery and was prescribed Xanax, he did not
15 consider that worthy -- not worthy, but he did not, in his
16 interpretation of the question, did not feel he needed to answer
17 yes to that question.

18 He disagreed the answer to question to 18(m) was false.
19 Respondent disagreed with the statement that his answer to
20 questions 17 and 18 was false because he was not taking medication
21 on the date he filled out the medical application. The
22 Administrator alleges that he was taking medication at the time he
23 filled out the application forms for the August 8, 2019 medical
24 application form and the August 31, 2018 medical application form.

25 He again testified that his answer to 18(j) was correct

1 because no one ever told him he had kidney stones. He thought the
2 pain was experienced when he went to Los Robles hospital was
3 gallbladder pain; however, he previously testified he knew his
4 gallbladder had been removed a year earlier. Respondent disagreed
5 that his answers to question 18(m) was incorrect. Again, he
6 testified he did not know he had been diagnosed with anxiety
7 disorder.

8 On redirect, in response to questions from Mr. Tushin's
9 lawyer, Mr. Tushin testified that he cannot remember on a random
10 date when he was taking medication. He testified he remembered
11 when he was not taking medication because it involved a special
12 event, such as flying or filling out a medical application form.
13 He was asked about the entry at A-4, page 55, which states,
14 advised to clear any new medication with his employer, reports
15 stimulant drugs banned by the FAA, but Provigil allowed. He was
16 asked if he understood or how he believed that found its way into
17 the record. He testified that may have been one of the doctors or
18 nurses or the assistant, but certainly he did not make that
19 statement.

20 He testified on redirect relative to the prescription list at
21 page 68 of A-4. Again, he testified he cannot say if each of
22 those prescriptions would be picked up, and even if they have been
23 picked up by him or his partner, that did not mean that he took
24 the medication. He testified that when he filled out these
25 medical application forms in this case he was not taking any

1 medication within the time frame of those applications.

2 He again testified on redirect that he understood question
3 18(m) to mean he only had to report if he was actually diagnosed
4 with a mental disorder. He did not know he had been diagnosed
5 with anxiety disorder and so he answered no. Again, he testified
6 that he was unaware he had kidney stones so he answered no to
7 question 18(j).

8 As to question 18(w), again he testified he believed the
9 conviction no longer existed. He testified he did not read the
10 instructions because the question was straightforward and he did
11 not have to look at the instructions to answer the question. He
12 understood from his discussion with his attorney that he would not
13 have to disclose any local, state, or federal application form,
14 there was no question.

15 Recross -- let's say that -- it is now 3:40. Let's take a
16 10-minute break and we'll come back 3:50. Thank you.

17 (Off the record at 3:39 p.m.)

18 (On the record at 3:51 p.m.)

19 JUDGE MONTAÑO: We're back on the record.

20 As I mentioned there was no recross of Mr. Tushin. I had
21 some questions to ask Mr. Tushin, as I mentioned to him that the
22 regulations allow me to ask questions that I feel I need to for my
23 clarification, my understanding of the issues. I am required to
24 make a determination in this case as to credibility, and
25 essentially to find credibility of the witnesses to determine how

1 to decide this case. So I asked Mr. Tushin some questions.

2 I first asked him if I understood his testimony, that he had
3 indicated he was not ashamed of the fact that he had been
4 convicted for bank fraud. He testified he was not ashamed of his
5 conviction. He testified he learned from the event. He testified
6 that he is not ashamed of the conviction at all and is willing to
7 talk to anyone about it. When I noted he did not want to talk
8 about it on the medical application forms in issue in this case,
9 he responded that those were one word answers. He testified he
10 was arrested but he could not remember if a conviction was based
11 on a jury trial, a bench trial or a plea agreement. His answers
12 were very evasive, nonresponsive. I would have expected him to be
13 more forthcoming and remember more events about an event that he
14 was not ashamed of and willing to talk to anyone about. I also
15 found it hard to believe that Mr. Tushin is not ashamed of his
16 conviction and willing to talk about to anyone. If that is the
17 case, why did he have the conviction expunged and vacated, and
18 further, why has he gone to such great lengths to make sure that
19 there wasn't FBI or state record of it. Clearly, he's testified
20 that he has not mentioned his conviction in any form that he's
21 filled out since he had the expungement effectuated.

22 When I asked him who was his current primary care physician,
23 he testified that that was Dr. Anmangandla. He is the same doctor
24 that had treated the Respondent since 2016. I found it surprising
25 because we were talking about Dr. Anmangandla's medical records

1 throughout this case, talking about entries in the records,
2 entries about the disorders in this case, kidney stones, and so I
3 was surprised to hear that. When I asked him why Dr. Anmangandla
4 did not testify in this case because his primary care physician
5 could clear up all of the questions about what medications he
6 used, where the entries about kidney stones and anxiety disorders
7 came to be in the record, and he could tell us who made the
8 statements about the FAA clearing the use of certain prohibited
9 medication, Mr. Tushin responded he was relying on the advice of
10 counsel. He testified he had not talked to Dr. Anmangandla or
11 seen him since the emergency revocation was issued.

12 He agreed that he had experienced acute anxiety in the past
13 and had taken Xanax for the condition. I asked him why he did not
14 report that on the medical application form, and again, he
15 testified that his interpretation was that the question was asking
16 for information from individuals who had been diagnosed with
17 anxiety disorder and were being treated for the disorder on an
18 ongoing basis. Again, he testified he did not believe that that
19 description fit him, while if you look at the medical records in
20 this case, that describes him perfectly. He was diagnosed with
21 anxiety disorder, he was given medication for it, and he's been
22 treated for it over a period of time. Anxiety disorder and
23 treatment of it is mentioned throughout the record.

24 He agreed that he came up with the interpretation of the
25 question. He testified he did not ask an AME how that question

1 should be interpreted. He decided that that was the
2 interpretation he was going to apply to the question. When I
3 tried to read with him the instructions as to this question, have
4 you ever in your life ever been diagnosed, had, or currently have
5 any of these conditions, his answers were unhelpful. Again,
6 question 18(m) makes no mention of established mental disorders
7 that require ongoing care. And again, Mr. Tushin came up with
8 that interpretation on his own with no help from an AME or anyone
9 else.

10 He agreed that he had testified that he was relying on his
11 attorney, what his attorney told him about the expungement and the
12 fact that his conviction was vacated, and he was also relying on
13 the court order itself not to disclose his conviction on the two
14 medical applications in this case. In response to my question
15 when he had received the advice of his counsel, because I was
16 under the impression or I appeared to be led to believe that he
17 had asked his attorney about the questions on the medical
18 application form before he answered, but that's not the case. He
19 testified that he received that advice from his counsel in 2014.
20 At that time that was even before Respondent started flying.
21 Respondent testified he did not specifically ask this lawyer or
22 any lawyer about disclosing a conviction in a FAA medical
23 application form. There is no affidavit from his attorney
24 indicating that this is what specifically he told Mr. Tushin, that
25 he did not have to report a conviction in any state, local, or

1 federal application. Certainly his lawyer did not testify in this
2 case to corroborate Mr. Tushin's assertions.

3 I asked if Dr. Anmangandla is an AME or a physician -- AME
4 being an airman medical examiner -- or a physician who specializes
5 in aviation medicine. The Respondent stated he was not. But
6 again, he testified he did not make the comments about the FAA
7 clearance as to the medications he was using and that were noted
8 in the medical records, he didn't know how those got there.

9 The Respondent testified that he had taken a number of drug
10 tests around the times when he filled out his medical application
11 forms. He was asked if those drug tests would show that he was
12 using tramadol and clonazepam. However, when I asked if the
13 Respondent provided any of the drug test results to corroborate
14 his testimony under oath, the Respondent testified there were
15 some, but he did not know if they had been filed; he was not sure.
16 His answers again were evasive and nonresponsive.

17 I asked if he believed that his primary care physician would
18 be able to provide the answers to the issues of anxiety, kidney
19 stones, and other issues in this case. His lawyer objected to the
20 question, that I was asking for protected attorney-client
21 decisions. I explained I was not asking him to divulge attorney-
22 client information. I wanted to know his personal opinion so I
23 could gauge his credibility, so I could gauge his character for
24 truth and honesty about what Dr. Anmangandla could testify about.
25 Mr. Tushin testified he did not know what Dr. Anmangandla knew.

1 As to the issues of whether he called his doctor's office to
2 indicate that he had been diagnosed with kidney stones, he had
3 testified he did not make the calls and had no idea who had. He
4 testified he signed a consent form to send the records from Los
5 Robles emergency department to his treating physician. I believe
6 I asked him if he had proof of that and he indicated he did not.
7 When I asked whether he was told about the cause of his pain in
8 the emergency department of Los Robles, he testified he was not
9 told what caused the pain. He was given pain medication and told
10 to follow up with his primary care physician. When I asked him,
11 he testified he could not recall if he made arrangements or ever
12 had a follow-up with the doctor regarding the pains he was
13 suffering from in the emergency department at Los Robles.

14 I asked Mr. Tushin a number of questions to determine if he
15 could actually recall when he was not taking his medication. He
16 testified that he was sure he was not taking any medication the
17 day he filled out the medical application forms in issue in this
18 case. But in asking him questions as to when he was and was not
19 taking his medications, I'm not convinced his memory is as
20 accurate as he claims. Another example of his memory is I asked
21 him when the last time he had flown was and he testified it was
22 May of 2021. After a break he came back and corrected himself and
23 indicated it was not in the last 3 months, but instead was in the
24 fall of the previous year. Clearly I cannot rely on Mr. Tushin's
25 memory nor his claim as to when or when he was not taking

1 medication.

2 I must note that I asked Mr. Tushin if clonazepam and
3 tramadol were prohibited drugs by the FAA. He testified he didn't
4 know. If indeed he did not know if they were prohibited drugs,
5 why would he stop taking the medication when he filled out the
6 application forms?

7 Follow-up questions, Respondent's counsel again asked about
8 the drug tests that Respondent claimed he had undergone
9 successfully. Again, Respondent and his counsel offered no
10 corroboration for this assertion. The other follow-up questions
11 were regarding the same ground already covered. In follow-up by
12 the Administrator the Respondent was directed to Exhibit A-10, and
13 he identified and confirmed that he had signed the release of his
14 medical records to the FAA. Again, there was no medical records
15 as to the pharmacies that Mr. Tushin indicated he may or may not
16 have filled his prescriptions because that information was
17 requested of him from the FAA and apparently he did not provide
18 that.

19 That completed the testimony in this case. And I do have to
20 note that I do not usually make comments about credibility during
21 my description of a witness's testimony. I did not do that with
22 Dr. Holmes and Ms. Horner. I found Ms. Horner and Dr. Holmes to
23 be credible witnesses, both on direct and cross and in all aspects
24 of their testimony. Their answers were straightforward,
25 non-evasive, and they responded to the questions that they were

1 asked. With Mr. Tushin, there were so many instances where I had
2 some concerns about his credibility and his answers that I feel
3 that I needed to discuss some of them as part of my description of
4 his testimony because I won't have the time to talk about them all
5 in the decision portion of this case. All right. So I just
6 wanted to clarify that.

7 So that completes the summary of the testimony of the
8 evidence in this case. Now I will address how I applied the
9 evidence to make the decisions in this case.

10 As noted at the beginning of this hearing, the Board has
11 adhered to a three-prong standard to prove a falsification claim.
12 The Administrator must prove by a preponderance of reliable,
13 probative, and credible evidence that an airman made a false
14 representation, one; two, in reference to a material fact; and
15 three, with knowledge of the falsity of that fact. The three-part
16 test, again, was derived from the case *Hart v. McLucas*.

17 The Board has held that a statement is false concerning a
18 material fact under this standard if the alleged false fact could
19 influence the Administrator's decision concerning the issuance of
20 a certificate or compliance with the regulations. The Board has
21 also held the three-prong test can be proven by circumstantial
22 evidence. The Board has also held in case law, as the
23 Administrator points out, that a person of ordinary intelligence
24 would be able to understand the questions on the medical
25 application form. Board precedent firmly establishes that even

1 one intentional falsification compels the conclusion that the
2 falsifier lacks the necessary care, judgment, and responsibility
3 required to hold an airman certificate.

4 First, I will address the Respondent's allegation that he had
5 not provided consent to the FAA to obtain and use his medical
6 records that are included in this case at A-4. Respondent also
7 argues that the medical records are not accurate and that the
8 records contain entries regarding telephone calls he did not make
9 to his physician's office, contains diagnoses of kidney stones and
10 anxiety disorder that he was never told he had. The records
11 indicate information regarding FAA signing off on approval of the
12 use of narcotic drugs. He testified he doesn't understand or know
13 where those entries came from.

14 The Respondent was shown by questioning by the
15 Administrator's counsel, he was shown Exhibit 18, page 187. And
16 he testified under oath that that exhibit did indicate that there
17 was a release for the provision of his medical records to the FAA
18 in this matter. He testified under oath that he signed a release,
19 thus the medical records in this case were properly obtained with
20 the consent of the Respondent.

21 As to Respondent's contention that the records are
22 inaccurate, the Administrator has pointed out the Respondent does
23 not complain of any other portions of the medical records as being
24 inaccurate or fabricated or made by someone coming off the street
25 other than those entries that show that the Respondent made false

1 entries on his medical application form. I must come to the same
2 conclusion. Respondent provides no other evidence other than his
3 assertions that the records are inaccurate. The only evidence I
4 have that they are inaccurate are his assertions. He argues that
5 he does not know how the records most damaging to his case came to
6 be in those records. He asserts he made no phone calls to the
7 office, rarely talks to his doctor, never talks about his personal
8 life or the fact that he is a pilot. The medical record is
9 replete with entries indicating that the patient reports facts
10 about his conditions. He suffers from a number of conditions.
11 Those medical records are clear that he sees his doctor
12 frequently. His primary care physician is not an airman medical
13 examiner and does not specialize in aviation medicine, yet there
14 are references to FAA signing off on the Respondent's use of
15 narcotic medication. I can only conclude that that information
16 found its way into the medical record because the Respondent
17 provided that information. Again there's no corroboration for the
18 complaint that these documents are not reliable or are not
19 accurate.

20 I do not find the Respondent's argument as to the accuracy of
21 the medical records to be convincing. I find them to be without
22 merit. I find Respondent's assertion he did not make statements
23 or telephone calls documented in the medical record not to be
24 credible. The preponderance of the evidence establishes that the
25 medical records are accurate and reliable and Respondent provided

1 written consent to the Administrator to obtain his records,
2 therefore, I can rely on those records in making my decision in
3 this case.

4 I will now address the first prong of the *Hart v. McLucas*
5 test. The first question I must address is whether the Respondent
6 made false representation in his medical application forms dated
7 August 31, 2018 and August 8, 2019. I note that the Administrator
8 alleges that the Respondent made the same false representation in
9 both medical application forms. Those representations are
10 relevant to questions 17(a), 18(j), 18(m), and 18(w).

11 In Respondent's answer to the complaint, he admitted in his
12 answer to the allegation regarding question 18(j), he admitted
13 that there was a history of kidney stones, he admitted that his
14 entry about not having a history of kidney stones was not correct.
15 He also admitted that the answer to 18(j) was false, and that is
16 in the answer to the complaint. He also admitted in his answer to
17 the complaint regarding question 18(m) relative to his history of
18 anxiety disorder, he admitted that his entry of a "no" answer as
19 to that question was incorrect and admitted that it was false.

20 Respondent denies he knew that the answers to 18(j) and 18(m)
21 were false at the time he answered those questions. So he admits
22 he had kidney stones and he admits the answer to that question is
23 false. He admits that he had an anxiety disorder and the answer
24 to that question was incorrect, and he also indicates that it's
25 false. But here the Respondent denies that he knew the answer to

1 18(j) and 18(m) were false at the time he answered those
2 questions, which is one of the requirements of the *Hart v. McLucas*
3 test.

4 As to question 17(a), do you currently use any medication,
5 Respondent maintains he answered this question correctly on both
6 his medical applications because he was not taking any of his
7 prescribed medications on August 31, 2018 or August 8, 2019. The
8 Administrator presented evidence that the Respondent had
9 prescriptions for his medications prior to and another
10 prescription after he had completed these medical application
11 forms. Respondent asserts that simply because he was prescribed
12 medication does not mean he picked up the prescription, nor did it
13 mean he actually took the medication. He asserts that he does not
14 always take his medication, and presented photos of unused
15 medication photographs in Exhibit R-25. Again, one of those
16 photos indicates a bottle with a prescription date of 2017. He
17 testified his partner picks up his prescription and once a year
18 collects and discards any unused medications. When asked why a
19 medication container from 2017 is included in one of these
20 photographs, Respondent replied his partner used the 2017 pill
21 bottle to collect all unused medications before he disposes of
22 them. If Respondent's assertions are to be believed, then the
23 unused medications that would appear relevant to this case between
24 2018 and 2019 would have been destroyed long before this hearing.

25 Respondent provided no corroborating testimony from his

1 partner as to the supposed practice of destroying pills or to
2 corroborate the fact that he does not fill the prescriptions, or
3 even if he fills this prescription, that he doesn't take the
4 medications. Again, there's no corroborating testimony about
5 this.

6 As I previously stated, Respondent's Exhibit R-25 proves
7 nothing and I found its presentation in this case highly
8 suspicious. I further find that the Respondent's testimony that
9 he does not always take his medication not to be credible. I
10 don't find that credible at all. Nor do I find his testimony he
11 was not taking medication on the days he completed his medical
12 application forms to be credible either. He testified he
13 specifically would not take his prescribed medication that day but
14 did not explain why. He testified he didn't know if that
15 prescription medication was a prohibited drug, but yet he
16 refrained from taking it.

17 When I asked questions to test his memory as to when he takes
18 his medication and when he does not take his medication, I found
19 his answers unconvincing and not credible. Further evidence of
20 this unreliability in remembering dates, in his response to my
21 question as to when he last flew, his response was, I flew in May
22 of 2021, less than 3 months ago. He changed his testimony within
23 minutes, testified the last time he flew an aircraft was in the
24 fall of last year.

25 I do not find Respondent's testimony he was not taking the

1 medication on the day he filled out his medical application forms
2 in this case, in 2018 or 2019 -- I find his testimony unconvincing
3 and I find his testimony about this to be wholly without
4 credibility. Further, thus, I find by a preponderance of the
5 evidence, the preponderance of the evidence established that the
6 Respondent made false representations as to question 17(a) when he
7 answered no. I further find that based on the evidence before me,
8 that at the time the Respondent falsely answered question 17(a),
9 he did so with knowledge of the falsity of that fact. So I
10 specifically find at this point that the Respondent made a false
11 statement in his applications in 2018 and 2019, and I further find
12 that the preponderance of the evidence establishes that his answer
13 to question 17(a) in both of his applications were made with
14 knowledge of the falsity of that fact.

15 As to question 18(w), Respondent admits that he had a prior
16 criminal conviction. He maintains his answer no to question 18(w)
17 is correct, as his conviction was expunged and vacated. He
18 further testified that on the advice of counsel, that he did not
19 have to disclose his conviction in any state, local, or federal
20 form. He testified that he did not read the instructions relative
21 to question 18(w) because he did not need to. During Respondent's
22 testimony it clearly appeared to me that he was attempting to give
23 the impression that he had been actually advised by his attorney
24 regarding the two medical application forms in this case. I was
25 certainly left with the impression that he had talked to his

1 attorney about his entries in this case. However, that was wrong.
2 He later testified in response to my questions that he did not
3 consult his attorney nor received directions from any attorney as
4 to how to respond to question 18(w) on his medical application
5 forms in issue in this case. In fact, Respondent testified that
6 the advice of counsel occurred in 2014, before the Respondent even
7 began his flight training.

8 The Respondent provides no corroborating evidence that his
9 attorney actually told him what he claims his attorney told him,
10 that he did not have to disclose the conviction in filling out any
11 federal or other state forms. His lawyer did not testify nor
12 provide a sworn statement to corroborate Mr. Tushin. I find the
13 Respondent's testimony is not credible and is not corroborated as
14 to the testimony he's asserted to under oath. Respondent asserts
15 that he also relied on the court's order vacating the conviction.
16 The Washington State court order is devoid of any reference to the
17 application to federal law. Respondent presents no authority that
18 the state order supersedes federal law.

19 The Administrator provided the expert testimony of Dr. Joye
20 Holmes, who was qualified as an expert in airman medical
21 applications. She testified that nontraffic convictions must be
22 reported even if the conviction is expunged or vacated. She
23 testified the applicant is instructed to do so in the dropdown
24 specifically provided for that question. On cross-examination,
25 she provided the basis for the requirement in reporting all

1 convictions that are vacated or expunged. That's part of Part 67
2 of the Federal Aviation Regulations.

3 I find the preponderance of the evidence establishes the
4 Respondent should have answered yes to question 18(w). He had a
5 prior nontraffic conviction. He testified he knew at the time he
6 answered question 18(w) on the two medical application forms in
7 this case, that he had a nontraffic-related criminal conviction.
8 Respondent did not read the instructions before answering the
9 questions, but instead relied on his own uncorroborated belief
10 that he did not have to answer yes to question 18(w), which is a
11 federal form. I do not find the Respondent credible relative to
12 his uncorroborated testimony relative to this question.

13 I find that the preponderance of the evidence established
14 that the Respondent made a false representation when he answered
15 question 18(w). And based on all the evidence in this case and
16 his testimony, I further find that the preponderance of the
17 evidence establishes that at the time he answered question 18(w)
18 he knew his answer was false. He made a false statement with
19 knowledge of the falsity of that fact.

20 Based on the evidence before me, I find that the Respondent
21 has made false representations as to questions in Exhibit 17(a),
22 18(j), 18(m), and 18(w) on his August 31, 2018 and August 8, 2019
23 medical application forms. I now turn to the issue of whether or
24 not the Respondent's false representations were in reference to a
25 material fact.

1 The Board has held that a statement is false concerning a
2 material fact under this standard if the alleged fact would
3 influence the Administrator's decision concerning a certificate or
4 compliance with the regulations. Board case precedent also holds
5 that every question on the medical application form is material.

6 Dr. Joye Holmes testified as an expert in this case, and she
7 testified that each and every one of the answers to the questions
8 in issue in this case could influence the Administrator's decision
9 as to whether to issue an airman medical certificate or not. She
10 testified if the Respondent would have answered yes to any of the
11 questions -- 17(a), 18(j), 18(m) or 18(w) -- on either of his
12 medical application forms, the airman medical examiner would have
13 requested additional information at the very least. The airman
14 medical examiner could have deferred the issuance of the medical
15 certificate to obtain additional information about the
16 circumstances surrounding the yes answer to the questions in the
17 form. I believe she testified that the airman medical examiner
18 could also refer this matter to the FAA for further evaluation.

19 Dr. Holmes' qualifications were not challenged by the
20 Respondent. Therefore, I find that based on all of the evidence
21 before me and case law, that Respondent's false representation in
22 his answers to questions 17(a), 18(j), 18(m), 18(w) on his August
23 31, 2018 and August 8, 2019 medical application forms are
24 material.

25 Now I turn to the third prong of the *Hart v. McLucas* test, as

1 to whether or not at the time the Respondent made the false
2 representations he made those false representations with knowledge
3 of the falsity of that fact. In determining whether or not made
4 these false entries with knowledge of the falsity of their fact,
5 the most critical concern for me and most useful in deciding this
6 issue is the Respondent's credibility. I have listened to and
7 observed the Respondent during his testimony throughout the
8 hearing in this case on direct and cross-examination. I also
9 asked him questions. After careful consideration, I find that I
10 do not find the Respondent's testimony generally in this case to
11 be in any way credible.

12 During direct examination he answered yes or no to leading
13 questions which suggested the answer. That was not a problem. On
14 cross-examination, Respondent was evasive, nonresponsive. When
15 questions were asked of him, he refused to answer questions with a
16 requested yes or no answer, but instead provided lengthy answers
17 with irrelevant information that in the end did not answer the
18 question. For example, when asked a question about kidney stones,
19 his response included his gallbladder removal and the problems
20 that his doctor had in diagnosing his appendicitis. Again, this
21 type of a response was nonresponsive. This happened more than
22 once throughout the course of his testimony. In short, I'm
23 convinced his answers were intended to evade, confuse, or to avoid
24 answering the request.

25 He changed his sworn testimony during the course of the

1 hearing, testifying at one point he first saw the medical record
2 when the EIR was received by he and his counsel, but then later
3 testified the first time he saw it was last Friday, the Friday
4 before the beginning of this hearing. At one point he testified,
5 when asked if he knew all of the FAA prohibited medication, he
6 testified he had a list of the prohibited medications. And in
7 response to my question, he testified he did not testify that he
8 had any list of FAA prohibited medications.

9 I administered the oath and swore in the Respondent more than
10 once during the course of this hearing so that I could impress
11 upon him the importance and the legal requirement under penalty of
12 perjury to provide truthful testimony. That did not work.

13 Respondent is wholly without credibility. I give his testimony no
14 weight. He is completely unbelievable. I have difficulty even
15 saying this, that I have difficulty believing anything he says.

16 As to the specific allegations as to his false answers to the
17 questions in issue in this case, I found in previous discussions
18 to the questions 17(a) and 18(w) in both medical applications in
19 this case, that the Respondent's answer to those questions were
20 false. I further found that, in that discussion, that based upon
21 the preponderance of the evidence that when Respondent made the
22 false representations to question 17(a) and 18(w) in both of his
23 medical applications in this case, that he made those false
24 representations with knowledge of falsity of that fact. I have
25 also found that his false answers to question 17(a) and 18(w) on

1 the two applications in this case were material.

2 As to Respondent's false representation as to question 18(j),
3 Respondent admitted in his answer to the complaint that his answer
4 to 18(j) was incorrect and false. At hearing, Respondent
5 maintains that he answered no to question 18(j) because he never
6 knew he suffered from kidney stones. He maintains he was never
7 diagnosed with kidney stones in the emergency room at the
8 hospital. He denied that he called his doctor's office to inform
9 the doctor that he went to the emergency department for pain and
10 was diagnosed with kidney stones. He has no idea how that entry
11 found its way into the record. He testified he was not told at
12 the Lost Robles emergency department that he had kidney stones,
13 they only provided him with narcotic medication for pain and told
14 him to follow up with his primary care physician.

15 When I asked if he followed up, Mr. Tushin answered in the
16 form of the answer that I heard numerous times, is "I do not
17 recall." He denied he made any follow-up visits to his primary
18 care physician, as indicated in the record, and denied during his
19 annual physical that he informed his primary care physician that
20 he had passed a kidney stone. Mr. Tushin claims that he
21 understood that the pain he was feeling when he went to the
22 emergency department at Los Robles was because of his gallbladder.
23 Again, Mr. Tushin admitted under cross-examination that his
24 gallbladder had been removed a year earlier and was not a part of
25 his body.

1 Respondent provides no corroborating witness or evidence as
2 to his belief that he never had kidney stones, was never told he
3 had kidney stones. The medical records clearly document that the
4 Respondent was diagnosed and treated for kidney stone. The only
5 evidence he provides is his self-serving, uncorroborated
6 testimony, which again I find wholly to be without credibility. I
7 find this defense offered by the Respondent to be, in a word,
8 preposterous. Based on the preponderance of the evidence in this
9 case, I find that the Respondent had knowledge of the falsity of
10 the fact when he answered no to question 18(j) on both of his
11 medical application forms in this case.

12 As to question 18(m), Respondent presented the same form of
13 defense as to why he answered no to the previous question. He
14 answered no to question 18(m), which reads: Have you ever in your
15 life been diagnosed or had or do you now have mental disorder of
16 any sort, depression, anxiety, etc. Respondent maintains he was
17 never told he had been diagnosed with an anxiety disorder;
18 therefore, because he didn't know he had been diagnosed with an
19 anxiety disorder, his answer to question 18(m) was correct. He
20 testified that he had experienced anxiety prior to surgery and was
21 prescribed Xanax, but again, he did not report that incident
22 because he felt that that's not the information that the FAA was
23 looking for. He testified that he understood or his
24 interpretation of the question was that the FAA wanted a yes
25 answer from individuals that had a specific diagnosis of anxiety

1 or depression and were undergoing continued treatment. When asked
2 if he had any support for this interpretation in the question
3 itself or from any other source, the AME or someone else, he
4 testified that he did not. He testified that he was relying on
5 the evaluation of Dr. Feldman in 2007, which indicated while
6 Respondent had many features of mental problems, he did not fit
7 neatly into the DSM-V diagnosis codes.

8 The record in this case clearly establishes that Respondent
9 was diagnosed with anxiety. He prescribed clonazepam by his
10 primary care physician for anxiety as well as insomnia. The
11 record is replete with visits by the Respondent to his primary
12 care physician for a number of medical problems, including back
13 pain, for which he was prescribed the narcotic drug tramadol. It
14 is unfathomable that the Respondent's primary care physician, who
15 Respondent has seen since 2006 and continues to see him to this
16 very day, did not tell the Respondent that he had been diagnosed
17 with an anxiety disorder. It is also unfathomable that the
18 Respondent's primary care physician, who the Respondent has seen
19 since 2006 and continues to see him to this very day, did not tell
20 the Respondent or discuss with the Respondent that he had been
21 diagnosed with kidney stone.

22 Contrary to Respondent's arguments, I found the medical
23 records to be reliable and accurate relative to the issues in this
24 case. On the other side of the scale, I found the uncorroborated
25 testimony of the Respondent to be without a scintilla of

1 credibility. I found it to be self-serving. I further find that
2 his personal interpretation of these questions, and all of the
3 questions in issue in this case, to be unreasonable, and his
4 testimony relative to those interpretations are not credible. He
5 relied on no one. He relied on no information. He simply made it
6 up. When asked if he made inquiries of the AME regarding his
7 interpretations of the questions, he responded that he did not
8 recall if he did. Another instance of "I don't recall, Judge." I
9 therefore, find that the preponderance of the evidence establishes
10 that at the time the Respondent provided false responses to
11 question 18(m), he answered the question with knowledge of the
12 falsity of that fact.

13 The Respondent makes much about his motivations to have this
14 hearing so that he can -- it's not because he wants to keep his
15 airman certificates, which an airline transport pilot is the
16 highest certificate that can be achieved and the most difficult to
17 achieve and the most expensive to achieve. Yet, the Respondent
18 stated that he does not want to have anything to do with flying
19 anymore, that his motivation isn't to keep his certificates, but
20 his motivation is to secure his reputation that he didn't make
21 falsifications in a public document. I did not even find this
22 representation credible. I believe he is fully motivated to
23 misstate facts, to falsify documents, and to essentially be
24 dishonest during these proceedings in his testimony, even for the
25 reason he wants me to believe that he wants to preserve his

1 reputation. I simply do not find the Respondent credible.

2 That completes the analysis of the *Hart v. McLucas* test. I
3 find that the Administrator has proven by a preponderance of the
4 evidence that the Respondent made false representations in his
5 August 31, 2018 and August 8, 2019 medical applications which were
6 material and the Respondent made those false representations with
7 knowledge of the falsity of the fact.

8 Having found the Administrator has proven all of the elements
9 of the *Hart v. McLucas* test, I now turn to the Respondent's
10 affirmative defenses. As his first affirmative defense,
11 Respondent indicates he was not using any medication when he
12 answered question 17(a) on the FAA Form 8500-8 application form.
13 As I've indicated, I find that the preponderance of the evidence
14 does not support this affirmative defense and I'm not convinced by
15 anything that the Respondent has said about his answer to question
16 17(a) that would convince me that this affirmative defense has
17 been proven by a preponderance of the evidence.

18 As a second affirmative defense, the Respondent testified he
19 reasonably relied on the King County Superior Court order dated
20 May 7th, titled, Order Vacating Conviction Under RCW 9.94A.60
21 along with his attorney's advice regarding expungement/vacation of
22 his criminal record when he answered items 18(j) and 18(w) on the
23 FAA Form 8500-8. Respondent, therefore, maintained that he did
24 not need to disclose his criminal conviction because they had been
25 expunged and vacated. I went into great detail about that and I

1 must find that the Respondent has not proven this affirmative
2 defense by a preponderance of the evidence.

3 The third affirmative defense has not been proven by a
4 preponderance of the evidence either. That is where he maintained
5 that he is not aware he had a history of kidney stones, and thus
6 he believed his answer to 18(m) was correct.

7 As his fourth affirmative defense Respondent asserts that he
8 reasonably believed that the information provided on FAA Form
9 8500-8, the applications in issue in this case, were reasonable
10 and that he reasonably believed that they were correct. I have
11 found otherwise, and clearly I have found that his interpretation
12 of what these questions were seeking to obtain from the airman is
13 not reasonable, and therefore he has not proven this affirmative
14 defense.

15 Having discussed the evidence and testimony in this case, I
16 now make findings of facts and conclusions of law, and to do that
17 I will use the Administrator's complaint. And specifically, I've
18 gone into great detail of why I made findings in this case, but I
19 will summarize them here.

20 Respondent admitted to the Emergency Order of Revocation
21 allegations dated June 10, 2021, he admitted the allegations in
22 paragraphs 1, 2, 3, and 4. Because he's admitted them, they are
23 considered established for the purposes of this hearing in this
24 case. He admits question 5. As to question 6, he also admits
25 that as to question (d), which reads: Your response to question

1 17(a) was not correct because you used the following medication;
2 clonazepam and tramadol. He denied question 8 and question 9, 10,
3 and 11. I have gone through these issues in great detail during
4 my discussion of the evidence in this case. I find that the
5 Administrator has proven the allegations in paragraphs 7, 8, 9, 10
6 and 11, has proven these allegations by a preponderance of the
7 evidence.

8 As to question 12, the Administrator [sic.] admits that. The
9 Respondent admits question 13, your response to item 18(j) was not
10 correct because you have a history of diagnosis of kidney stones;
11 he admitted that allegation. Denied the allegation in paragraph
12 14. I find the Administrator has proven that allegation by a
13 preponderance of the evidence. As to the allegation in paragraph
14 15, the Respondent admits that in his response of no to item 18(j)
15 was false; he admits that. As far as paragraph 16 and 17, I find
16 that the Administrator has proven those allegations by a
17 preponderance of the evidence.

18 Respondent admits paragraph 18 and 19. I find that the
19 Administrator has proven the allegations in paragraph 20. As to
20 paragraph 19 -- I'll have to step back a second. The Respondent
21 admits paragraph 19, which reads, your response to item 18(m) was
22 not correct because you have a history of a diagnosis of anxiety,
23 and he admitted that allegation. Allegation 20, as I said, was
24 proven by a preponderance of the evidence. The allegation in
25 paragraph 21 was admitted by the Respondent; he admitted that the

1 response of no to item 18(m) was false. Respondent denied
2 paragraph 22 and 23. I find the Administrator has proven those
3 allegations by a preponderance of the evidence. To paragraph 24,
4 he admits those allegations. Paragraph 25, 26, 27, 28 and 29, I
5 find that the Administrator has proven those allegations by a
6 preponderance of the evidence.

7 Specifically, as to item 20, I find that the Respondent's
8 certification that all the items were correct in the medical
9 application forms that are in issue in this case were not correct
10 and that he falsified his certification to item 20.

11 Respondent admits paragraph 31, 32. He denies paragraphs 33
12 and 34 of the complaint. I find that the Administrator has proven
13 those by a preponderance of the evidence, as well as the
14 allegations in paragraph 36 and 37. As to paragraph 38, he
15 admits. As to paragraph 39, he admitted. Paragraph 39 indicates,
16 in response to item 18(j), regarding the medical certificate that
17 was completed on August 31, 2018, your response to item 18(j) was
18 not correct because you have a history or a diagnosis of kidney
19 stones; he admitted that allegation.

20 He denied paragraph 40, which I find the Administrator has
21 proven by a preponderance of the evidence. As to paragraph 41,
22 your response of no to item 18(j) regarding your diagnosis of
23 kidney stones is false, he admits that in his answer to the
24 complaint. As to paragraph 42, 43, 44, the Administrator has
25 proven those allegations by a preponderance of the evidence.

1 Again, paragraph 45 deals with anxiety. He admitted that
2 allegation and denied the allegation in 46. Admitted the
3 allegation in 47 and denied the allegation in 48 and 49. As to
4 the allegation in 50, he has admitted that allegation. He's
5 denied the allegations in 51 through 55, and in all of those
6 allegations I find the Administrator has proven these allegations
7 by a preponderance of the evidence. And again, I find that the
8 Respondent's certification in item 20 to also be false and proven
9 by a preponderance of the evidence by the Administrator.

10 I have covered all of these allegations during the course of
11 my decision and during the course of this hearing. So having made
12 those findings of fact and conclusions of law, I have to conclude
13 in this case that I find that the Administrator has proven by a
14 preponderance of the evidence that the Respondent violated 14 CFR
15 67.403(a)(1), 14 CFR 67.403(b), and 14 CFR 67.403(c). I further
16 find that the Administrator has proven by a preponderance of the
17 evidence that Mr. Tushin lacks the qualifications and the
18 trustworthiness necessary to hold an airline transport pilot
19 certificate or airman medical certificate, including his flight
20 instructor certificates and ground instructor certificate. Having
21 made this conclusion, I turn to the sanction aspect of this case.

22 The Pilot's Bill of Rights specifically strikes from 49 USC
23 44709 and 44710 language in cases involving amendments,
24 modifications, suspensions, or revocations of airman certificates
25 the Board is bound by all validly adopted interpretations of law

1 and regulations the Administrator carries out and written agency
2 policy guidance available to the public relating to sanctions to
3 be imposed under this section unless the Board finds an
4 interpretation is arbitrary, capricious, or otherwise not in
5 accordance with the law. What this means is I am no longer bound
6 to give deference to the FAA by statute; however, the agency is
7 entitled to judicial deference due all other federal
8 administrative agencies under the Supreme Court decision of *Martin*
9 *v. Occupational Safety and Health Review Commission, et al.*, 499
10 U.S. 144, 111 S. Ct. 1171. That's a 1991 case.

11 In applying the principles of judicial deference to the
12 interpretations of law, regulations, and policies that the FAA
13 Administrator carries out, I must analyze and weigh the facts and
14 circumstances in each case to determine if the sanction selected
15 by the Administrator is appropriate. I must note the
16 Administrator has cited the case of *Martin v. Occupational Safety*
17 *and Health Review Commission* and another case asking that I
18 provide deference to the Administrator.

19 In this case, the Administrator has moved, again, that I take
20 judicial notice of the sanction guidelines, and argues that those
21 sanction guidelines provide that revocation of all Respondent's
22 certificates is appropriate in this case. The Administrator
23 argues that, again, deference should be shown to the
24 Administrator's choice of sanction. The Respondent has not made
25 any specific arguments about mitigating factors that I should

1 consider in determining whether revocation is the appropriate
2 sanction other than arguing that his client did not make entries
3 that were false in the two medical applications in this case. In
4 weighing these competing interests, I find therefore that the
5 sanction sought by the Administrator is appropriate and warranted
6 in the public interest of air commerce and air safety. As I noted
7 before, the Board has ruled that even one falsification warrants
8 the revocation of an airman's certificates. Here we have four
9 falsifications in one medical application form and four more in a
10 separate medical application form. So therefore, I find that
11 clearly the sanction of revocation is called for in this case.

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ORDER

IT IS ORDERED:

1. That the Emergency Order of Revocation, the Complaint herein, be, and is hereby, affirmed.

2. The Respondent's Airline Transport Pilot Certificate No. 3991455, Flight Instructor Certificate No. 3991457, an Ground Instructor Certificate No. 3991457, and any class of airman medical certificate the Respondent holds are hereby revoked.

Entered on this 23rd day of July 2021, in Washington, D.C.

ALFONSO J. MONTAÑO

Chief Administrative Law Judge

APPEAL

1 JUDGE MONTAÑO: That ends my oral initial decision.

2 I have provided the parties with the appeal rights, and I
3 want to make sure again you have received those appeal rights,
4 Mr. Schneider?

5 MR. SCHNEIDER: Yes, Your Honor. I did receive those
6 yesterday via email.

7 JUDGE MONTAÑO: All right. Thank you.

8 Ms. Stokely?

9 MS. STOKELY: Yes, Your Honor, the FAA received the appeal
10 rights as well.

11 JUDGE MONTAÑO: All right. Then let me make a statement for
12 the record. Mr. Tushin, you have a right to appeal my decision.
13 My decision is the first level of review. This is the trial
14 court. If you appeal through your attorney, and I'm sure your
15 attorney will provide you the legal advice you need, you can
16 appeal my decision. And if your attorney believes that my
17 decision was arbitrary, capricious, and not in accordance with the
18 law or I misapplied the law, or whatever other basis he feels he
19 needs to, there will be an appeal to the full Board, which is an
20 appeal that is based on briefs. And the full Board review will
21 review my decision and the arguments submitted by the parties to
22 determine whether or not my decision should be affirmed, reversed,
23 or whether it should be remanded to me for further action. If
24 that's the case, we'll be all meeting again very soon.
25

1 And from there, there is an appeal to the circuit court of
2 appeals for either the District of Columbia or a circuit court of
3 appeals where you reside, Mr. Tushin. And from there, there is an
4 appeal, of course, to the Supreme Court on a writ of certiorari or
5 federal question if there is one. So this is just the beginning
6 of this process for you, Mr. Tushin, should you wish to appeal.

7 I am not infallible. Clearly the Board has told me that in
8 the past in reversing my decisions. So if you have a basis for
9 appeal or you believe you do, I would urge you to exercise that
10 right. That is the beauty of the American legal system, which
11 this administrative tribunal is a very small part of, but an
12 important part, because it relates to you and relates to air
13 safety. So that is the beauty of the system, is there is a right
14 to an appeal, and I would urge you to exercise your appeal if you
15 feel one is appropriate.

16 That is all I have. I appreciate the parties' patience with
17 me in going through this lengthy order -- excuse me, oral initial
18 decision. And thank you all very much for your time and I will go
19 off the record at this point. I will speak to the court reporter
20 later. If there's any questions you need from me, you can
21 certainly go through Mr. Combs to contact me or contact me
22 directly. All right. Thank you both very much.

23 Let's go off the record at this point.

24 (Whereupon, at 4:55 p.m. EST, the hearing in the above-
25 entitled matter was adjourned.)

CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: David Tushin
DOCKET NUMBER: SE-30989
PLACE: Via Zoom Videoconference
DATE: July 23, 2021

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.



Kyle Jenkins
Official Reporter