

SERVED: August 23, 2021

NTSB Order No. EA-5904

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 23 day of August, 2021

_____)	
STEPHEN M. DICKSON ¹ ,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Docket SE-30347
)	
KEVIN R. JOHNSON,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

I. Background

Respondent appeals the oral initial decision of Administrative Law Judge William R. Mullins, issued on August 28, 2018.² By that decision, the law judge determined the Administrator proved respondent violated 14 C.F.R. § 67.403(a)(1).³ The law judge ordered

¹ The original caption for this matter was Michael P. Huerta, Administrator, Federal Aviation Administration v. Kevin R. Johnson.

² A copy of the initial decision, an excerpt from the hearing transcript, is attached.

³ 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.

revocation of respondent's airline transport pilot (ATP) certificate, flight instructor certificate, airman medical certificate, and any other airman certificates that respondent might hold based upon the violation of § 67.403(a)(1) and in accordance with 14 C.F.R. § 67.403(b)⁴ and (c).⁵ Respondent timely appealed. For the reasons set forth below, we deny respondent's appeal and affirm the law judge's decision.

A. Facts

Respondent visited his primary care provider, Hardie V. Sorrels, M.D., on four occasions between 2003 and 2007.⁶ Specifically, on February 21, 2003, respondent visited Dr. Sorrels for intermittent nausea and occasional headaches from the nausea.⁷ On December 14, 2004, respondent visited Dr. Sorrels for tinnitus in his right ear and sinusitis with sinus pressure.⁸ On March 27, 2006, respondent visited Dr. Sorrels for a possible migraine headache, triggered by allergies.⁹ Finally, on January 26, 2007, respondent visited Dr. Sorrels for a possible migraine headache from sinusitis.¹⁰ Respondent failed to report these visits on six medical certificate applications dated October 13, 2003; October 18, 2004; October 25, 2005; October 17, 2006; October 23, 2007; and July 23, 2009, as he answered "No" in response to Item 19 on these

⁴ 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.

⁵ 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.

⁶ Amended Compl. at ¶ 24; Amended Answer at ¶ 24.

⁷ Exh. R-15 at 1; Tr. 211.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

applications.¹¹ On all of these applications, respondent certified that all statement and answers were complete and true.¹²

Dr. Sorrels also prescribed respondent sertraline on the following dates: January 22, 2007; March 29, 2007; and May 23, 2007.¹³ Respondent used the sertraline for several months and then discontinued it on his own.¹⁴ He did not disclose his sertraline use on 12 medical certificate applications dated from August 29, 2002, to July 14, 2014.¹⁵

In 2014, respondent was involved in a workplace incident during a simulator training session at Southwest Airlines (Southwest), which prompted Southwest to order respondent to undergo a mental health evaluation by Edward R. Davidson, Ph.D.¹⁶ In September 2014, Dr. Davidson conducted his evaluation of respondent, which included a clinical interview; a Multimodal Life History Inventory (MLHI);¹⁷ and four tests – the Mini-Mental State Examination (MMSE; cognitive impairment screening), the Shipley-2 (cognitive functioning

¹¹ Exh. A-2 at 177-215. Item 19. on the FAA’s medical application asks the applicant to list “Visits to Health Professionals Within the Last 3 Years” and to include the date, name, address, type of health professional consulted, and reason. According to the instructions, the only permissible exclusions are routine dental, eye, and FAA periodic medical examinations and consultations with employer-sponsored employee assistance programs. *See* Exh. A-12 at 2.

¹² Amended Compl. at ¶ 26; Amended Answer at ¶ 26.

¹³ Exh. R-3 at 1; Exh. R-1 at 1; Exh. R-2 at 1; R-11 at 1; Tr. 25-26, 29, 212. Although both parties acknowledged at the hearing that the documents exhibited at R-3 and R-11 were not clearly legible, the Acting Administrator did not object to either respondent’s or Dr. Sorrels’s testimonies regarding their contents (Tr. 29, 212-214).

¹⁴ *See* Exh. R-1 and Exh. R-2.

¹⁵ Compl. at ¶¶ 4-17. The Complaint states that there are thirteen medical certificate applications that contain the false answer but lists only twelve (*See* ¶¶ 4-15).

¹⁶ *See* Tr. at 86; Exh. A-1 at 15, 134-137. Although Exhibit A-1 is not reflected in the list of exhibits, it was properly admitted into the record at the hearing (Tr. 39, 228).

¹⁷ The MLHI requests an individual to answer a set of questions, including general information, personal and social history, presenting problems and symptoms, and interpersonal relationships to obtain a comprehensive picture of the individual’s background.

screening), Symptom Checklist (SCL; self-reported symptoms), and the Minnesota Multiphasic Personality Inventory (MMPI; assessment of psychopathology, interpersonal style, and treatment considerations).¹⁸

During the clinical interview with respondent, Dr. Davidson took notes on an Intake Assessment form.¹⁹ In relevant part, Dr. Davidson noted various dates for when respondent began taking sertraline: “100mg of sertraline daily for depression since July 2014;” circa 2011 [respondent] found sertraline medication ‘tremendously helpful;’ began taking sertraline “circa 2001;” and “restarted sertraline circa 2013/Feb.”²⁰ Respondent’s MLHI questionnaire revealed that respondent was anxious and suffered from feelings of depression.²¹ Likewise, respondent’s SCL showed excessive distress throughout the day on a regular basis, and the MMPI’s computer-generated profile revealed significant problems in the areas of mood and concentration, interpersonal relationships, and coping mechanisms.²² However, respondent’s MMSE and Shipley-2 results were negative, indicating respondent’s cognitive functioning was entirely normal,²³ and Dr. Davidson’s behavioral observation of respondent was also normal.²⁴ Based on the totality of his evaluation, Dr. Davidson diagnosed respondent with dysthymia or persistent depressive disorder of moderate severity.²⁵

¹⁸ Tr. at 48-50; Exh. A-1 at 22-24, 134-137.

¹⁹ See Exh. A-1 at 128-129.

²⁰ *Id.* at 29-30, 128-129, 135.

²¹ *Id.* at 164-180.

²² *Id.* at 148-149.

²³ *Id.* at 136.

²⁴ *Id.*

²⁵ *Id.* at 137; Tr. at 48-50.

Approximately one year later, in an attempt to obtain employment with Federal Express (FedEx) and “clear up” the simulator training incident at Southwest, respondent contacted the FAA senior airman medical examiner (AME), Dr. John Byrns.²⁶ Dr. Byrns advised respondent to undergo a fitness-for-duty evaluation by forensic psychiatrist, Stephen Montgomery, M.D.²⁷ Respondent underwent the evaluation by Dr. Montgomery in September 2015.²⁸ This evaluation revealed entirely normal results of the mental status examination and a normal Personal Assessment Inventory test.²⁹ Dr. Montgomery explained that respondent’s “profile was not consistent with any psychopathology and concluded that the evaluation revealed no significant psychiatric or substance abuse disorders.”³⁰

Subsequently, on a medical certificate application dated October 15, 2015, respondent answered “Yes” to Items 18.m. and 19.³¹ In the comments to Item 18.m., respondent reported Dr. Davidson’s diagnosis of dysthymia on September 26, 2014.³² In the comments to Item 19., respondent reported having seen the following physicians: Dr. Montgomery in September 2015, noting the visit was requested by Dr. Byrnes; Dr. Davidson in September 2014, noting this was a fitness for duty examination required by Southwest; and Dr. Brian Hughey in February 2015 for

²⁶ Tr. at 194.

²⁷ *Id.* at 194-195.

²⁸ *See* Exh. A-3.

²⁹ *Id.* at 1-2.

³⁰ *Id.* at 2.

³¹ Exh. A-2 at 4. Item 18.m. on the FAA’s medical application asks, “Have you ever in your life been diagnosed with, had, or presently have...[m]ental disorders of any sort: depression, anxiety, etc.”.

³² *Id.* at 5. Dysthymia is another term for persistent depressive disorder. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, diagnosis code 300.4 (5th ed. 2013).

toenail fungus treatment.³³ The information on this application prompted an investigation by the FAA.

In March 2016, Susan E. Northrup, M.D., a regional flight surgeon with the FAA's Southern Regional Medical Office, advised respondent that, based on the evaluations by Drs. Davidson and Montgomery, she was unable to establish his eligibility to hold an airman medical certificate and requested that respondent undergo a Human Intervention Motivation Study (HIMS) by a forensic psychiatrist, recommending Dr. Kenneth Tullis, M.D. as an evaluator located in Tennessee.³⁴ However, Dr. Tullis declined to perform the evaluation for lack of time, and respondent informed the FAA he had difficulty obtaining such an evaluation from another source.³⁵ In December 2016, Dr. Northrup sent a letter requesting that respondent surrender his medical certificate because he failed to provide the requested information.³⁶ In January 2017, Dr. Northrup sent respondent a letter informing him that he was under investigation for violating § 67.403(a)(1) for failure to report a history of depression with the use of sertraline on twelve airman medical certificate applications from August 23, 2001, through July 14, 2014.³⁷ On these applications, respondent answered "No" in response to Item 18.m.³⁸

B. Procedural History

On March 3, 2017, the Administrator issued an emergency order, which became the

³³ *Id.* at 4-5.

³⁴ Exh. A-5 at 1-2.

³⁵ Exh. A-2 at 41-42, 44.

³⁶ *Id.* at 33.

³⁷ Exh. A-9 at 1-2.

³⁸ *See* Exh. A-2 at 99-104, 111-146, 169-243.

complaint in this case, revoking respondent's airman and medical certificates.³⁹ The complaint alleged respondent violated 14 C.F.R. § 67.403(a)(1) by intentionally falsifying his answers to Items 18.m. and 20. on twelve medical certificate applications dated from August 29, 2002, to July 14, 2014, when he failed to report a history of depression with the use of sertraline.⁴⁰ Additionally, on December 21, 2017, the Administrator filed an amended complaint, alleging that respondent violated 14 C.F.R. § 67.403(a)(1) by intentionally falsifying his answers to Item 19. on six medical certificate applications dated from October 13, 2003, to July 23, 2009, when he failed to report his four visits to Dr. Sorrels between 2003 and 2007.⁴¹ The complaint and the amended complaint indicated that a violation of 14 C.F.R. § 61.403(a) was a basis for revoking all airman and medical certificates, and that an incorrect statement upon which the FAA relied was a basis for revocation or suspension of a medical certificate under 14 C.F.R. § 61.403(c).⁴²

Respondent timely filed his answer to the complaint on March 15, 2017, admitting that he possessed the certificates and submitted the twelve applications listed in the complaint, but denying that he had received medical treatment for depression since 2001; that he took sertraline for depression from 2001 to 2004; and that his answers to Item 18.m. were fraudulent or intentionally false.⁴³ In his January 23, 2018, answer to the amended complaint, respondent admitted that he visited Dr. Sorrels on four occasions between 2003 and 2007 and that he

³⁹ Compl. at 3-4.

⁴⁰ Compl. at ¶¶ 4-17.

⁴¹ Amended Compl. at ¶¶ 24-28.

⁴² Compl. at 3.

⁴³ Answer at ¶¶ 1-2.

answered “No” in response to Item 19. on six medical certificate applications dated from October 2003 to July 2009 but denied that he intentionally falsified his answers.⁴⁴

The law judge conducted a hearing on February 27-28, 2018, and issued an oral initial decision on August 28, 2018. At the hearing, the Administrator called Dr. Northrup and Dr. Sorrels as witnesses.⁴⁵ In addition, the deposition of Dr. Davidson was read into the record.⁴⁶ Respondent testified on his own behalf and called the following witnesses: Donna Epes, a personal friend; William B. Mann, Jr., a friend and former coworker; Reggie Jones, a personal friend; and Dr. Montgomery, the forensic psychiatrist who conducted respondent’s September 2015 psychiatric evaluation.⁴⁷

1. Testimony of Hardie V. Sorrels, M.D.

Dr. Sorrels testified that he had been an internal medicine physician since 1989 and had treated respondent since February 2003.⁴⁸ Referring to a letter he wrote in May 2016, Dr. Sorrels testified that he prescribed sertraline to respondent for a brief period of time in early 2007 for premature ejaculation, which required only a brief conversation to establish a diagnosis without any need for testing.⁴⁹ Dr. Sorrels also testified he could have prescribed the medication based on a conversation alone, without an in-person visit.⁵⁰ On cross-examination, Dr. Sorrels reviewed

⁴⁴ Amended Answer at ¶¶ 27-28.

⁴⁵ Tr. 21, 96.

⁴⁶ *Id.* 30.

⁴⁷ *Id.* 154, 168, 178, 183, 194.

⁴⁸ *Id.* 21, 25

⁴⁹ *Id.* 25-26; *See* Exh. R-2.

⁵⁰ Tr. 25-26.

respondent's sertraline prescription record and confirmed that the prescriptions were from 2007, which coincided with the dates in Dr. Sorrel's 2016 letter and affidavit.⁵¹

2. *Deposition of Edward R. Davidson, Ph.D.*⁵²

Dr. Davidson was engaged by Southwest to perform a fitness for duty psychological evaluation of respondent in September 2014 to determine his mental condition following an incident in his transition training.⁵³ Dr. Davidson testified that he had performed approximately 20-22 such evaluations for Southwest since 2005.⁵⁴ Dr. Davidson stated that he interviewed respondent about his medical history; during the interview, Dr. Davidson stated that respondent reported being depressed his "whole life" and had fluctuating symptoms, but that, to his recollection, respondent had not sought treatment.⁵⁵ Dr. Davidson testified that a number of the symptoms respondent endorsed – feeling inadequate and conflicted; feeling like "a nobody"; having memory, concentration, and sleep problems; and experiencing tension, inability to relax, and fatigue – could be indications of depression.⁵⁶ Dr. Davidson stated that he gave respondent a diagnosis of depression based on the clinical interview, the written history respondent presented, and the results of four tests he administered: the MMSE, Shipley-2, SCL, and MMPI.⁵⁷

On questioning by respondent's attorney, Dr. Davidson stated that he received a telephone referral from Southwest and the pilot's union to examine respondent, but did not recall the

⁵¹ *Id.* 29; *See* Exhs. R1-R-3.

⁵² The relevant portions of Dr. Davidson's deposition were read into the record at the hearing (*See* Tr. 32-95).

⁵³ Tr. 86; Exh. A-1 at 15, 134.

⁵⁴ Tr. 86-87; Exh. A-1 at 15.

⁵⁵ Tr. 44-46; Exh. A-1 at 18-20.

⁵⁶ Tr. 58-60; Exh. A-1 at 32-33.

⁵⁷ Tr. 48- 50; Exh. A-1 at 22-24.

specifics of that conversation or take notes about it.⁵⁸ Dr. Davidson indicated that the purpose of the evaluation was to determine respondent's mental condition at the time of the evaluation.⁵⁹ In describing respondent's background, Dr. Davidson wrote that respondent had minimal relationship with his siblings, because they "grew apart."⁶⁰ When Dr. Davidson was asked to identify where the quote "we grew apart" came from, he responded that it perhaps was "stuck in [his] head because it was such a poignant description."⁶¹ Respondent actually indicated in the MLHI questionnaire that he and his siblings "grew up apart."⁶² Dr. Davidson explained that he took notes during his face-to-face interview with respondent, but they were not verbatim notes.⁶³

Dr. Davidson was then questioned about the definition of depression. He explained that the most common source of the definition is the Diagnostic and Statistics Manual (DSM), 5th edition, and that "depression" is "a series of symptoms where a person either through testing or a self-report describes some number of symptoms sufficient to meet the categorization, and those symptoms create impairment in their social, personal, occupational, educational functioning."⁶⁴ Dr. Davidson agreed that a layperson might have a different definition of the word "depression" than a psychologist or psychiatrist.⁶⁵ When asked how long the evaluation lasted, he responded

⁵⁸ Tr. 66-68; Exh. A-1 at 43-44.

⁵⁹ Tr. 69-70; Exh. A-1 at 47-48.

⁶⁰ Exh. A-1 at 135.

⁶¹ Tr. 70-71; Exh. A-1 at 49-50, 135.

⁶² Exh. A-1 at 166.

⁶³ Tr. 71; Exh. A-1 at 51.

⁶⁴ Tr. 72; Exh. A-1 at 54-55.

⁶⁵ Tr. 73; Exh. A-1 at 55-56.

that the first day was three hours and the second day was four hours, but did not recall how much of that time was spent in the face-to-face interview.⁶⁶

Dr. Davidson was also questioned about the tests that respondent completed as part of the evaluation. Although he could not recall definitively, he indicated that respondent completed the MLHI between the appointments, presumably in his hotel, and that he completed the MMPI, which has 565 questions, most likely in the office because this was the doctor's standard practice.⁶⁷ Dr. Davidson also confirmed that the results of all the tests and findings, such as respondent experiencing stress and feeling depressed and angry, represented levels of functioning at the time of the testing.⁶⁸

In addition, Dr. Davidson confirmed that, when he indicated respondent's mood was complicated by worry and uncertainty about the future, he understood that respondent was talking about his job status at Southwest, among other things.⁶⁹ Dr. Davidson further indicated that the MMPI interpretive report, including the finding that respondent could be experiencing a great deal of stress, was not written by Dr. Davidson, but instead represented computer-generated narrative conclusions for someone with respondent's scores and taken under the same or similar conditions.⁷⁰ Dr. Davidson also confirmed that these pages were not transmitted to Southwest or the pilot's union, but the fitness for duty evaluation was influenced by these pages.⁷¹ When asked whether the interpretive report's statement that respondent's "clinical profile is probably valid"

⁶⁶ Tr. 74-75; Exh. A-1 at 57.

⁶⁷ Tr. 76-77; Exh. A-1 at 62-64.

⁶⁸ Tr. 77-78; Exh. A-1 at 64-67.

⁶⁹ Tr. 78; Exh. A-1 at 67.

⁷⁰ Tr. 79-85; *See* Exh. A-1 at 148-150.

⁷¹ Tr. 83; Exh. A-1 at 73.

meant that it may not be valid, Dr. Davidson responded he did not know what “probably” meant.⁷² Dr. Davidson further stated he did not know what the report referenced in the following statement: “[t]he personality descriptions, inferences, and recommendations contained herein need to be verified by other sources of clinical information because individual clients may not fully match the prototype.”⁷³

3. *Testimony of Susan Northrup, M.D.*

Dr. Northrup was designated as an expert witness in aerospace medicine and testified regarding the airmen medical certification process and its importance to aviation safety. She testified she first became familiar with respondent when he called her in March 2015, telling her that his company and union were “after him” and forced him to go to an evaluation that found a diagnosis he did not agree with.⁷⁴ Dr. Northrup testified she advised respondent to obtain a copy of the evaluation performed by Dr. Davidson, take it to a psychiatrist for an evaluation that would directly reference Dr. Davidson’s report; however, respondent did not do so.⁷⁵ She testified that she subsequently requested copies of the AME’s October 2015 examination and sent a letter to respondent on March 18, 2016, requesting a HIMS evaluation by a forensic psychiatrist.⁷⁶

Dr. Northrup explained that she had received both Dr. Davidson’s and Dr. Montgomery’s reports containing opposing conclusions, and subsequently consulted with the Federal Air Surgeon’s chief psychiatrist, who agreed that a third evaluation by a forensic psychiatrist should

⁷² Tr. 83-84; Exh. A-1 at 74-75, 148.

⁷³ Tr. 85; Exh. A-1 at 84-85, 159.

⁷⁴ Tr. 102.

⁷⁵ *Id.* 102.

⁷⁶ *Id.* 102-103.

be obtained.⁷⁷ She testified that, in the March 18, 2016 letter, she recommended to respondent that he undergo such an evaluation with Dr. Tullis, a forensic psychiatrist in respondent's area, but never received the evaluation she requested.⁷⁸ She testified that she had several reasons for requesting this additional forensic evaluation: she believed respondent had been taking sertraline, per Dr. Davidson's report; respondent presumably had some appointments associated with the prescription of this medication; and she believed at the time respondent had a history of depression.⁷⁹ She further explained that use of sertraline in and of itself was disqualifying, unless an airman was a part of a selective serotonin reuptake inhibitor program, which is independent of the HIMS program, and had a referral for alcohol and drug abuse.⁸⁰

Dr. Northrup then testified to the process for completing medical certificate applications. She testified that any doctor visit within three years prior to a medical certificate application submission would have to be reported, unless it was a routine dental, eye, or FAA periodic medical examination.⁸¹ If an airman answered "Yes" to Item 18.m., Dr. Northrup testified that she would request additional documentation to determine the severity of the diagnosis and what effect it has on the airman – a process that is important because several mental disorders could cause errors in judgment, such as in incidents involving individuals with depression flying airplanes into the sides of mountains.⁸² She also clarified that the information about doctor visits was necessary to the safety of the national airspace, and the questions contained in Item 19. were

⁷⁷ *Id.* 103-104.

⁷⁸ *Id.* 107.

⁷⁹ *Id.* 108.

⁸⁰ *Id.* 108-109.

⁸¹ Tr. 122.

⁸² *Id.* 124-125.

asked to ensure that an airman was fit to be in an aircraft and met the qualifications to hold a medical certificate.⁸³ While she “[didn’t] know about the sertraline,” Dr. Northrup testified she believed respondent violated the Federal Aviation Regulations by failing to admit to his doctors’ visits, and that pursuant to the FAA’s table of sanctions, the appropriate sanction was revocation of all certificates.⁸⁴

On cross-examination, Dr. Northrup confirmed that she believed revocation was appropriate because respondent did not list the four visits to Dr. Sorrels between February 21, 2003, and January 26, 2007, on the six medical certificate applications dated from October 13, 2003, to July 23, 2009.⁸⁵ However, she stated, “[a]t this point I’m not sure what to believe with respect to 18m and whether he had a history of depression.⁸⁶ She explained that, while she believed Dr. Davidson wrote down what respondent had told him, she was “not 100 percent sure” respondent had a history of depression.⁸⁷ She also explained that she requested a forensic psychiatry evaluation because a forensic psychiatrist would have the skills to do all the necessary investigation to make a determination and request all the records associated with all of respondent’s treatment going back to 2001.⁸⁸ Dr. Northrup was then asked to review a report signed by Dr. Montgomery as the Director of Vanderbilt Forensic Psychiatry, and agreed that she had no evidence to believe that Dr. Montgomery was not a forensic psychiatrist.⁸⁹ Dr. Northrup

⁸³ *Id.* 125-126.

⁸⁴ *Id.* 126-128; *See* Ex. A-14.

⁸⁵ Tr. 134-135.

⁸⁶ *Id.* 135.

⁸⁷ *Id.* 135-136.

⁸⁸ *Id.* 136-137.

⁸⁹ *Id.* 137-139; Exh. A-3.

confirmed she was not a psychiatrist or psychologist.⁹⁰ Dr. Northrup testified that the FAA did not define “mental disorders,” “depression,” or “anxiety” in its instructions and that it would be up to the applicant to determine what he was diagnosed with, although he could ask his AME.⁹¹

Further, Dr. Northrup confirmed that, on his October 14, 2015 medical certificate application, respondent indicated “Yes” in response to Item 18.m. because of Dr. Davidson’s report. Dr. Northrup testified that, the FAA had no evidence that respondent had ever been diagnosed as depressed until Dr. Davidson’s report.⁹² Dr. Northrup testified that the FAA relied entirely and exclusively on Dr. Davidson’s statements in support of the allegations in the complaint that respondent had been depressed since 2001.⁹³ Dr. Northrup confirmed that the FAA did not have any additional evidence that respondent had a prescription for sertraline other than in 2007, or evidence that respondent had received medical treatment for depression from a medical provider.⁹⁴

Dr. Northrup testified that, in paragraphs 1-2 of the original complaint, the FAA relied on the evidence from Dr. Davidson that respondent took sertraline between 2001 and 2004 and then from February 2013 to September of 2014.⁹⁵ Dr. Northrup confirmed that her definition of “depression,” without looking at DSM-5, is “depressed mood, anhedonia, meaning they don’t like to do things that previously gave them pleasure, they don’t go out enjoying life.”⁹⁶ She also

⁹⁰ Tr. 19.

⁹¹ *Id.* 140-142.

⁹² *Id.* 142-143.

⁹³ *Id.* 143.

⁹⁴ *Id.* 144-145.

⁹⁵ *Id.* 147-148.

⁹⁶ *Id.* 149.

testified that the DSM-5 definition gives eight or nine different points, which is more than the definition she gave.⁹⁷ She agreed it was possible that, when he said he had been depressed, respondent had some definition of depression that did not fit the medical term of depression, just like the definition she gave.⁹⁸

4. *Testimony of Donna Epes*

Ms. Epes testified on behalf of respondent. She testified she had known respondent for over 17 years, had a background as a teacher for 30 years, and has held the following licenses: single engine, commercial flight instructor, and 121 air carrier dispatcher.⁹⁹ Ms. Epes further testified that she was working for the Department of Defense, Aeronautical Division, creating safety of flight materials for the military, and had a top secret security clearance.¹⁰⁰ She indicated she had known respondent personally and professionally, because he had flown with her and helped her get “checked out in airplanes,” and over the years they frequently connected for advice or to have dinner with him and his wife.¹⁰¹ When asked about her opinion as to respondent’s honesty and integrity, she stated that his integrity was “the highest,” he was very kind and genuine, and she had never known him to lie to anybody.¹⁰²

Ms. Epes also testified that, if a doctor wrote that respondent said something and respondent denied it, she would believe respondent.¹⁰³ She indicated that, in her own experience

⁹⁷ *Id.* 150.

⁹⁸ *Id.*

⁹⁹ *Id.* 155-156.

¹⁰⁰ *Id.* 157.

¹⁰¹ *Id.* 158-159.

¹⁰² *Id.* 159.

¹⁰³ *Id.* 159-160.

with doctors, they make mistakes.¹⁰⁴ Ms. Epes further testified that she has never witnessed respondent experience excessive weight loss, sudden loss of energy, or a mournful approach to life.¹⁰⁵ She stated that respondent had a sense of humor and was very upbeat.¹⁰⁶ She concluded by testifying that, apart from the incident with Southwest, she was unaware of any work difficulties respondent had as a result of his moods.¹⁰⁷

5. *Testimony of William B. Mann, Jr.*

Mr. Mann testified that he had a career as a pilot for AirTran from 1968 to 1991 and then opened a private airline business that was later acquired by AirTran, where he worked as a pilot and a director of training for approximately 20 years.¹⁰⁸ Mr. Mann testified he met respondent in AirTran's training division, when respondent worked in the computer division side and Mr. Mann worked in the simulator side, and they interacted three to four times a week for approximately three to four years.¹⁰⁹ Mr. Mann explained that they interacted professionally, because he performed several of respondent's check rides and was on respondent's jump seat for some line checks.¹¹⁰ In addition, they had lunches together at work and dinners when staying in a hotel on a business trip.¹¹¹ Mr. Mann testified that, in his opinion, respondent was very honest, with a lot of integrity, and one who went "above and beyond."¹¹² He explained that respondent

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* 160.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* 168-172.

¹⁰⁹ *Id.* 172-175.

¹¹⁰ *Id.* 174.

¹¹¹ *Id.*

¹¹² *Id.* 175.

many times stayed in the office to complete work that was beyond what was probably expected of him.¹¹³ Mr. Mann also testified he never noticed respondent to have any significant weight loss or any significant mood or irritability; respondent was always upbeat and a cheerleader.¹¹⁴

6. *Testimony of Reggie Jones*

Mr. Jones testified that he worked as a healthcare integration consultant and met respondent in 1981 when they both were in a musical group in college.¹¹⁵ Mr. Jones stated that he was respondent's best man at his wedding; they vacationed together; and that their friendship had lasted for 35-38 years.¹¹⁶ Mr. Jones testified that, in his opinion, respondent's integrity was beyond reproach, and that he has not noticed any significant change in respondent's mood in the last 10 years.¹¹⁷ Mr. Jones described respondent as being fairly upbeat.¹¹⁸ Mr. Jones was also asked how long it took him to get to the hearing to testify, and he responded that the drive took seven or eight hours.¹¹⁹

¹¹³ *Id.*

¹¹⁴ *Id.* 175-176.

¹¹⁵ *Id.* 180.

¹¹⁶ *Id.*

¹¹⁷ *Id.* 181.

¹¹⁸ *Id.*

¹¹⁹ *Id.* 181-182.

7. *Testimony of Stephen A. Montgomery, M.D.*

Dr. Montgomery testified that he was a director of the forensic psychiatry division as well as a treating psychiatrist at Vanderbilt University Medical Center, where he had worked for 15 years.¹²⁰ Dr. Montgomery further confirmed that becoming a forensic psychiatrist required an additional year of fellowship training and certification under a different board process every 10 years.¹²¹ Although he had not undergone any special aerospace training, he had done some fitness for duty evaluations for FAA and security clearance applicants and some of his clients were pilots.¹²²

Dr. Montgomery testified that he examined respondent on September 30, 2015, for the purposes of his employment, and this examination included a thorough psychiatric evaluation, a review of respondent's history, an evaluation of any psychiatric symptoms he was having, and a psychological test that screened for most psychiatric disorders.¹²³ Dr. Montgomery did not review respondent's airman medical file.¹²⁴ Dr. Montgomery indicated that respondent did not report or display any symptoms of current mental illness during the examination and that the psychological testing showed that he was honest in the way that he approached the test.¹²⁵ Dr. Montgomery stated that respondent "was not overly defensive, as some people do, trying to say they have no problems at all. So the test was interpretable but did not reveal any significant

¹²⁰ *Id.* 183.

¹²¹ *Id.* 183-184.

¹²² *Id.* 190.

¹²³ *Id.* 185.

¹²⁴ *Id.* 189.

¹²⁵ *Id.* 185.

elevations of any kind of psychiatric conditions.”¹²⁶ Dr. Montgomery further indicated that respondent did not report symptoms of depression, did not appear to be depressed, and did not have tearful affect or reduced emotions that would suggest he was depressed.¹²⁷

Dr. Montgomery was then questioned about the definition of depression. He testified that a diagnosis of depression required several symptoms to be present every day for at least a two-week, continuous period.¹²⁸ Specifically, the diagnosis required feeling down/sad nearly every day or losing all interest in most activities, as well as at least four of the following symptoms: significant changes in sleep, fatigue or low energy, changes in appetite, inability to experience joy or pleasure, thoughts of death or wishing one was dead or suicide, guilty feelings, or feelings of worthlessness.¹²⁹ Dr. Montgomery also added that, in some situations, the symptoms could be psychotic, such as delusions or hallucinations.¹³⁰ When asked whether these symptoms could be observable by others, Dr. Montgomery responded that they oftentimes could be, such as being glum, tearful, having psychomotor retardation manifesting itself in appearing sluggish, having psychomotor agitation where a person is restless or fidgety, or having problems with concentration.¹³¹ Dr. Montgomery testified that, along with these symptoms, a person would have a significant impairment in functioning either in ability to work or in relationships at home, causing significant personal distress.¹³²

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* 186.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* 186-187.

¹³² *Id.* 187.

On cross-examination, Dr. Montgomery confirmed that his report stated the psychiatric evaluation was part of respondent's application for a position with FedEx and that he was not aware at the time respondent had already taken a fitness for duty evaluation by his employer, Southwest.¹³³ Dr. Montgomery also admitted that, if he knew the purpose of this evaluation was to controvert another psychiatric evaluation, he would want to see that prior evaluation.¹³⁴ Moreover, he admitted that if his evaluation was needed to specifically address another evaluation, he may have included other details necessary to address the other report.¹³⁵ While respondent did not tell Dr. Montgomery about his pre-existing fitness for duty evaluation, Dr. Montgomery testified that he believed he asked respondent only whether respondent was ever treated for any kind of mental condition, not whether respondent had this type of evaluation before.¹³⁶ Dr. Montgomery further testified that he obtained respondent's prior work history and that he took detailed notes during the evaluation.¹³⁷ He explained that he only included the summary findings in his report, because employers normally want the main conclusions and not personal details out of concern for breach of privacy or confidentiality.¹³⁸

8. Testimony of respondent

Respondent has been working in aviation since 1985 as a 727 pilot with major airlines; developing training programs; as a ground, simulator, and flight instructor; and as an FAA-

¹³³ *Id.* 188.

¹³⁴ *Id.* 189.

¹³⁵ *Id.* 192.

¹³⁶ *Id.* 189-190.

¹³⁷ *Id.* 191.

¹³⁸ *Id.* 191-192.

designated examiner.¹³⁹ He testified that, during his transition from AirTran to Southwest, he was required to undergo simulator training, which contained six training sessions.¹⁴⁰ He testified that he left the first simulator session due to dental pain.¹⁴¹ He testified that, after he completed sessions two through six, each of which increased in difficulty he had to complete the first session, aimed at basic tasks, with a different instructor.¹⁴² Respondent testified that, after the instructor for the first session unreasonably increased the complexity of the tasks and forced respondent to fly by himself for four hours, he complained to Southwest's director of training, left the training, and took time off work.¹⁴³ He further testified that he still had his unopened uniform at home, and that Dr. Davidson's statement that respondent had left his uniform at Southwest with a note for another pilot to take it was untrue.¹⁴⁴ He testified that he had no intention to return to Southwest and that he was then hired at FedEx.¹⁴⁵

Respondent was then questioned about the evaluation by Dr. Davidson. He testified that his interviews were videotaped and that, despite making a request for the tape, he never received it.¹⁴⁶ Respondent testified he did not know the medical or psychiatric definition of depression, and that he never told Dr. Davidson he had been depressed his whole life, had been taking sertraline for depression, or that he took the medication in 2011 for a period of several years.¹⁴⁷

¹³⁹ *Id.* at 196-202.

¹⁴⁰ *Id.* 202.

¹⁴¹ *Id.* 202-203.

¹⁴² *Id.* 203-205.

¹⁴³ *Id.* 206-208.

¹⁴⁴ *Id.* 209.

¹⁴⁵ *Id.* 194.

¹⁴⁶ *Id.* 209-210.

¹⁴⁷ *Id.* 210-211.

Respondent clarified that he did tell Dr. Davidson that he found sertraline beneficial, but that it was beneficial for premature ejaculation.¹⁴⁸ When questioned about the subsequent evaluation by Dr. Montgomery, respondent testified that Dr. Byrns advised him not to contact Dr. Montgomery in advance so as not to prejudice him in any way.¹⁴⁹

Respondent testified he had a total of three prescriptions filled for sertraline by Dr. Sorrels in 2007.¹⁵⁰ He confirmed that he had visited Dr. Sorrels on four dates – February 21, 2003; December 14, 2004; March 27, 2006; and January 26, 2007.¹⁵¹ He testified that his personal calendar from 2007 showed three sertraline prescription dates: January 22, March 19, and May 23.¹⁵² Respondent further testified that the calendar reflected an FAA pilot proficiency check on February 9th, which he passed; his last date flying for Midwest on February 19th; his first day at AirTran on April 13th; and his first actual flight for AirTran on June 19th.¹⁵³ Respondent explained that he did not start the January 22nd prescription right away because he was still flying.¹⁵⁴ Respondent also added that he did not take all the pills, because he “just couldn’t take that stuff,” and that, by the time of the October 23 physical with Dr. Sorrels, he had not used the medication in months.¹⁵⁵

¹⁴⁸ *Id.* 211.

¹⁴⁹ *Id.* 195.

¹⁵⁰ *Id.* 211.

¹⁵¹ *Id.* 212. *See* Exh. R-11.

¹⁵² Tr. 213; Exh. R-11.

¹⁵³ Tr. 213-214.

¹⁵⁴ *Id.* 214.

¹⁵⁵ *Id.* 215.

Respondent was then questioned about the timeline he created for the hearing listing his visits with Dr. Sorrels.¹⁵⁶ He testified that he used the FAA's blue ribbon file to verify the dates for the AME visits and that he pulled the dates for his visits with Dr. Sorrels from the amended complaint.¹⁵⁷ Respondent testified that the FAA medical dates at the top of the form indicate the dates he visited the AME following a visit to Dr. Sorrels.¹⁵⁸ Respondent further explained that the number of days, such as 315 days or 270 days, indicated the period of time that had elapsed between the date he saw Dr. Sorrels and the date of the next visit with an AME.¹⁵⁹ When asked why he did not reference the visits to Dr. Sorrels on his medical certificate applications, respondent testified that he simply forgot.¹⁶⁰ He testified that he did not keep records of the visits with Dr. Sorrels and that he had no reason not to reveal this information.¹⁶¹

Respondent was then questioned about his alleged migraines. He testified he was never diagnosed with migraines and that use of the word "migraine" on the form listing his visits with Dr. Sorrels was his terminology.¹⁶² He described having allergies that occasionally caused a headache, which felt more like sinus, eye, and tooth pressure.¹⁶³ Respondent also testified that the note at the bottom of the form about a carbon monoxide leak referred to an instance when he experienced a severe headaches as a result of a leak at his home.¹⁶⁴

¹⁵⁶ See Exh. R-15.

¹⁵⁷ Tr. 216.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* 217-218.

¹⁶⁰ *Id.* 217.

¹⁶¹ *Id.* 217-218.

¹⁶² *Id.* 218.

¹⁶³ *Id.* 219.

¹⁶⁴ *Id.* 218-220; Exh. R-15.

Respondent further testified that in his pilot career he took close to 60 check rides, without failing or having to repeat one.¹⁶⁵ He confirmed that this spanned the entire period that Dr. Davidson referenced in his letter when he claimed respondent was depressed.¹⁶⁶ Respondent denied that he had any significant weight loss or gain or any lapses in energy, and further refuted experiencing any of the symptoms that Dr. Montgomery listed in his testimony from 2001 through the present day.¹⁶⁷ He also denied he was currently depressed.¹⁶⁸ Respondent stated that it would not be possible for him to work at the high level he did while being depressed and that it was not possible for someone to pass a Part 121 pilot-in-command type-rating check ride and be depressed.¹⁶⁹ Respondent explained that, if he was depressed, he could not keep doing 2-D or 3-D vector graphics with hundreds of independent engineered paths.¹⁷⁰

C. Law Judge's Oral Initial Decision

The law judge issued an oral initial decision on August 28, 2018. The law judge determined that the Administrator proved the regulatory violation of 14 C.F.R. § 67.403(a)(1) as alleged by a preponderance of reliable and probative evidence.¹⁷¹ In making this determination, the law judge summarized the regulatory violations alleged in the complaint; noted respondent's admissions and denials in his answer; noted the admitted exhibits; summarized witness testimony; and assessed the credibility of the witnesses and respondent.

¹⁶⁵ Tr. 220-221, 223.

¹⁶⁶ *Id.* 221.

¹⁶⁷ *Id.* 221-222.

¹⁶⁸ *Id.* 222.

¹⁶⁹ *Id.* 222-223.

¹⁷⁰ *Id.* 223.

¹⁷¹ Oral Initial Decision at 250.

In assessing credibility, the law judge found the deposition and the report of Dr. Davidson not credible, noting the diagnosis of depression contradicted the tests Dr. Davidson administered to respondent, Dr. Davidson's failure to include a record of his conversation with respondent in his evaluation, and respondent's denial of making the statements about depression to Dr. Davidson.¹⁷² Further, although the law judge indicated the testimony of Dr. Northrup was credible, he found it "not helpful" because it relied on Dr. Davidson's report, which was not credible.¹⁷³ The law judge found respondent's testimony and all the remaining witnesses – Ms. Epes, Mr. Mann, Mr. Jones, Dr. Sorrels, and Dr. Montgomery – credible. The law judge explained that he assessed the testimony of all the character witnesses as credible based on their demeanor, the fact that none had anything to gain by testifying, having known respondent for a very long time, and having observed him in a social as well as professional arenas. The law judge found Dr. Sorrels's testimony credible because it was reasonable and consistent with respondent's testimony, and Dr. Montgomery's testimony credible, because it was consistent with his evaluation report and respondent's testimony.¹⁷⁴ Finally, the law judge found respondent's testimony credible, noting his demeanor was straightforward and his testimony was consistent with that of the character witnesses and Drs. Sorrels and Montgomery.¹⁷⁵

The law judge found that respondent took sertraline for premature ejaculation between 2001 and 2014; that he failed to report "these several visits to Dr. Sorrels" on his FAA medical application; the application for a medical certificate did not contain a definition of depression; the only doctor that suggested respondent had depression was Dr. Davidson, which respondent

¹⁷² *Id.* 243-244.

¹⁷³ *Id.* 244.

¹⁷⁴ *Id.* 247.

¹⁷⁵ *Id.* 248.

reported on his October 15, 2015, medical application; and Dr. Davidson suggested that the condition of depression was not supported by his subsequent evaluations or the psychological test.¹⁷⁶ The law judge then cited the three-prong *Hart v. McLucas* intentional falsification standard and found that, in regards to the twelve medical certificate applications dated from August 29, 2002, to July 14, 2014, respondent's answer to Item 18.m. regarding whether he had been diagnosed or had a mental disorder of any type "was not false, and certainly not intentionally false."¹⁷⁷ With respect to the six applications dated from October 13, 2003, to July 23, 2009, however, the law judge found respondent failed to reveal four visits to Dr. Sorrels for premature ejaculation issues; his statements that all answers on these applications are true were intentionally false; the answers of "No" in response to Item 19. on these applications were material and false; and respondent knew that these answers were false."¹⁷⁸

D. Issues on Appeal

Neither party appealed the law judge's finding that respondent did not intentionally falsify his responses to Item 18.m. on twelve medical certificate applications dated from August 29, 2002, to July 14, 2014.¹⁷⁹ On appeal, respondent instead argues that the law judge's finding that he intentionally falsified the answers to Item 19. on six medical certificate applications dated from October 13, 2013, to July 23, 2009, is not supported by a preponderance of reliable, probative, and substantial evidence and is not in accordance with the law, precedent, and policy.¹⁸⁰ In short, respondent argues that the law judge's credibility determination was deficient

¹⁷⁶ *Id.* 248-249.

¹⁷⁷ *Id.* 249.

¹⁷⁸ *Id.*

¹⁷⁹ Oral Initial Decision at 249. *See* Appeal Br. at 1-18; Reply Br. at 1-14.

¹⁸⁰ Appeal Br. at 10.

on the issue of intentional falsification of his responses to Item 19.¹⁸¹ 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,¹⁸² we review the law judge's decision *de novo*.¹⁸³

A. *Respondent's Motion to File Limited Response to the Administrator's Reply Brief*

Respondent filed an appeal brief on October 29, 2018. The Administrator filed a reply brief on December 19, 2018. On January 9, 2019, respondent submitted a motion to file a limited response to the Administrator's reply brief under the authority of 49 CFR § 821.48. On January 29, 2019, the Administrator submitted a reply to respondent's motion to file a limited response. Upon careful review of the law and respondent's arguments in the limited response, we deny respondent's motion.

The regulation is clear that, once the appeal and reply briefs are filed, the parties may only file citations identifying new and relevant legal authority; no other submissions are permitted except "by leave of the Board, upon a showing of good cause."¹⁸⁴ In the motion, respondent contends that good cause exists because the Administrator's reply brief "misrepresents and mischaracterizes portions of the record and the issues on appeal." Therefore, respondent's claim of good cause centers on the contents of the Administrator's reply brief, and

¹⁸¹ Appeal Br. at 10-16.

¹⁸² *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).

¹⁸³ *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).

¹⁸⁴ 49 C.F.R. § 821.48(d).

his limited response essentially serves as a reply to the reply brief. However, we have previously indicated that the “good cause” standard under § 821.48(d) is a narrow one, involving concerns such as newly discovered evidence¹⁸⁵ or the impossibility of submitting new evidence prior to the law judge’s decision.¹⁸⁶ In other words, to serve as a good cause for a supplemental filing, there must be a reason outside of the contents of the opposing party’s reply brief. Because respondent provides no such evidence, and his limited response only serves to address the arguments in the Administrator’s reply brief, respondent’s motion is denied.

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.¹⁸⁷ In the appeal brief, respondent acknowledges that his responses of “No” to Item 19. on six medical certificate applications dated from October 2003 to July 2009 were false and were made in reference to a material fact.¹⁸⁸ Respondent’s acknowledgment is consistent with the record, since the evidence reflects and all parties agree that respondent made visits to his primary care provider, Dr. Sorrels, on four occasions between

¹⁸⁵ See *Administrator v. Guy America Airways Inc.*, 4 NTSB 888 n.2 (1983) (denying the respondent’s motion to supplement the appeal brief and stating that the documents the respondent sought to introduce were not “newly discovered evidence” simply because the respondent’s counsel did not know of them at the time of the hearing).

¹⁸⁶ See *Petition of Paul Haden Cooper*, NTSB Order No. EA-5491 at 6-7 (2009) (given that the petitioner’s follow-up appointment on laboratory tests was scheduled on the day that was five days after the issuance of the law judge’s *sua sponte* decision, petitioner established good cause for submitting supplemental information in the form of a letter from his doctor stating he was eligible for a medical certificate).

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

¹⁸⁸ Appeal Br. at 10.

2003 and 2007 for nausea, headaches, migraines, tinnitus, sinusitis, and allergies.¹⁸⁹ Further, the Board's precedent is clear that responses to questions on medical certificate applications are material because the FAA relies on these entries when determining whether to issue a certificate to an airman.¹⁹⁰ Thus, the law judge correctly found that the Acting Administrator met his burden of proof regarding the first two prongs of the *Hart v. McLucas* test.

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.¹⁹¹ The law judge's credibility findings of the witnesses are essential in intentional falsification cases¹⁹² and should be based explicitly on factual findings in the record.¹⁹³ We will not overturn a law judge's credibility determination unless a party can establish the determination was arbitrary and capricious,¹⁹⁴ and the Board will not

¹⁸⁹ Exh. R-15 at 1; Tr. 211.

¹⁹⁰ *Administrator v. Byrd*, NTSB Order No. EA-5782 at 78 (2016). *See, e.g., Administrator v. Tseng*, NTSB Order No. EA-5817 (2017) (citing *Administrator v. Taylor*, NTSB Order No. EA-5611 at 4 (2012), *aff'd sub nom. Taylor v. Huerta*, 723 F.3d 210 (D.C. Cir. 2013)). *See also Administrator v. Burbank*, NTSB Order No. EA-5860 (2019).

¹⁹¹ *Olsen v. NTSB*, 13 F.3d 471, 475 (9th Cir. 1994); *Erickson v. NTSB*, 758 F.2d 285, 288 (8th Cir. 1985).

¹⁹² *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);

¹⁹³ *See Dillmon v. NTSB*, 588 F.3d 1085, 1094 (D.C. Cir. 2009); *Administrator v. Reynolds*, NTSB Order No. EA-5641 at 8 (2012).

¹⁹⁴ *Porco*, NTSB Order No. EA-5591 at 20-21.

withhold deference to a law judge's credibility findings simply because other evidence in the record could have been given greater weight.¹⁹⁵

First, we disagree with respondent that the law judge's credibility determination of respondent's testimony was factually unsupported and inconsistent with all other credibility determinations. In evaluating respondent's credibility, the law judge discussed respondent's testimony about his various visits to Dr. Sorrels over the years, obtaining sertraline prescriptions from Dr. Sorrels for premature ejaculation, undergoing an examination after refusing to perform a makeup simulator session, never having told Dr. Davidson about being depressed, and the ambiguity of his comment about the purpose of taking sertraline.¹⁹⁶ Based on these facts, the law judge determined that respondent's testimony was credible, explaining that he had a straightforward demeanor and the testimony was consistent with that of the character witnesses, Dr. Sorrels, and Dr. Montgomery, whom he also found credible.¹⁹⁷ As such, respondent's assertion the law judge's credibility finding was without factual support and inconsistent with the other credibility determinations is without merit.

While we agree with respondent that the law judge made an erroneous factual finding, this error does not invalidate the law judge's credibility determination to the degree that it renders the determination arbitrary and capricious. The law judge mistakenly indicated that Dr. Sorrels prescribed sertraline to respondent for premature ejaculation between 2001 and 2014. In making factual findings, the Board is not bound by the law judge's findings.¹⁹⁸ Dr. Davidson's

¹⁹⁵ *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).

¹⁹⁶ Tr. 247-248.

¹⁹⁷ *Id.* 243, 246-248.

¹⁹⁸ *Administrator v. Schneider*, 1 N.T.S.B. 1550 (1972).

report and testimony served as the only sources for the determination respondent took sertraline for premature ejaculation between 2001 and 2014. The law judge properly found Dr. Davidson's testimony to be not credible, given the inconsistencies in Dr. Davidson's notes regarding the date respondent started taking sertraline.¹⁹⁹ Thus, based on the evidence submitted by respondent, we find that respondent's prescription for sertraline was limited to 2007.²⁰⁰ We note that this finding is only relevant to the issue of whether respondent intentionally falsified responses to Item 18.m. on applications dated from August 29, 2002, to July 14, 2014, which is not on appeal in this case. This finding does not impact the current issue before the Board of whether respondent intentionally falsified his responses to Item 19. on the applications dated from October 13, 2003, to July 23, 2009, when he failed to report the four visits to Dr. Sorrels.

Second, while we uphold the law judge's finding that respondent's testimony is credible, we find that respondent did not meet his evidentiary burden to prove his affirmative defense by a preponderance of the evidence.²⁰¹ Respondent testified that he did not report the four visits he made to Dr. Sorrels between 2003 and 2007 on the medical certificate applications dated from October 13, 2003, to July 23, 2009, because he simply forgot.²⁰² The only evidence he provided was a timeline created in anticipation of the hearing showing that approximately six to ten months had passed between each visit to Dr. Sorrels and the medical certificate application that

¹⁹⁹ See Tr. 244; Exh. A-1 at 29-30, 58-59, 128, 135.

²⁰⁰ See Exh. R-3 at 1; Exh. R-1 at 1; Exh. R-2 at 1; R-11 at 1; Tr. 25-26, 29, 212.

²⁰¹ See *Miranda v. NTSB*, 866 F.2d. 805, 806 (5th. Cir. 1989) (once the FAA establishes a *prima facie* case, the burden shifts to a respondent to prove the validity of any affirmative defense he or she may have).

²⁰² Tr. 217.

followed such visit.²⁰³ He also testified that he did not keep the records from these visits and had no reasons not to report them.²⁰⁴

We have previously suggested that forgetting about hospitalizations or visits to other health professionals could negate a claim of intentional falsification.²⁰⁵ However, uncorroborated testimony by respondent is not sufficient to establish such an affirmative defense.²⁰⁶ Here, more than respondent's mere statement that he forgot is needed to prove forgetfulness. Respondent's explanation that between six to ten months passed between a visit to Dr. Sorrels and the following medical certificate application is not convincing. The record shows respondent reported a cardiology check-up in August 2011 on a medical certificate application he submitted in December 2012, which was 16 months after the check-up.²⁰⁷ Therefore, the evidence of the timeline submitted by respondent does not support his claim of forgetfulness. Respondent's testimony that he forgot to list the visits to Dr. Sorrels because he did not keep the records from the visits is also unconvincing given his ability during the hearing to clearly recollect the timing and purpose of each visit.

By failing to list the visits to his primary care provider for his health concerns, respondent deprived the AME of critical information upon which to make an informed decision about whether respondent was medically qualified to hold the certificate. Respondent indicated that his

²⁰³ See Exh. R-15.

²⁰⁴ Tr. 217-218.

²⁰⁵ See *Administrator v. McGonegal*, NTSB Order No. EA-5224 at 10-11 (2006) (finding that, because the respondent did not claim that he misread Items 18 and 19 or that he forgot about the hospitalizations or visits to other health care professionals, "he essentially admitted that he knew the answers to those questions were false").

²⁰⁶ See *Miranda*, 866 F.2d. at 809.

²⁰⁷ See Exh. A-2 at 221.

visits to Dr. Sorrels on March 27, 2006, and on January 26, 2007, were for possible migraine headaches.²⁰⁸ A report of a migraine headache on a medical certificate application is particularly significant, as it may preclude a certification by an AME and require special evaluation and consideration.²⁰⁹ Therefore, we uphold the law judge's decision that respondent's failure to report the visits to Dr. Sorrels on February 21, 2003; December 14, 2004; March 27, 2006, and January 26, 2007, in response to Item 19. on medical certificate applications dated from October 13, 2003, to July 23, 2009, constitutes intentional falsification.

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 any and all airman certificates held by respondent is affirmed.

HOMENDY, Chair; LANDSBERG, Vice Chairman; GRAHAM

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

²⁰⁸ Exh. R-15.

²⁰⁹ See FAA's Guide for Aviation Medical Examiners at 147 (2021).

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

* * * * *

In the matter of:

MICHAEL P. HUERTA,
ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

KEVIN R. JOHNSON,

Respondent.

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* Docket No.: SE-30347
* JUDGE MULLINS

Via Conference Call

Tuesday,
August 28, 2018

The above-entitled matter came on for hearing, pursuant to notice at 10:00 a.m. Central Daylight Time.

BEFORE: WILLIAM R. MULLINS
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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I N D E X

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P R O C E E D I N G S

(10:01 a.m. CDT)

ORAL INITIAL DECISION AND ORDER

1
2
3
4 JUDGE MULLINS: This was a hearing before the National
5 Transportation Safety Board held in Nashville, Tennessee, on
6 February 27th and February 28th of this year, 2018. The
7 Administrator of the Federal Aviation Administration was present
8 at all times, and represented by counsel, Mr. Robert B. Dixon,
9 Esquire, who is with the FAA Enforcement Division, Southern Team.
10 And the Respondent was present at all times, and represented by
11 his counsel, Mr. Stuart A. Goldstein, Esquire, of Miami, Florida.

12 This matter came on for hearing on an Emergency Order of
13 Revocation, which had revoked all of Respondent's certificates,
14 including his airline transport pilot certificate, flight
15 instructor certificate, and any class of airman medical
16 certificate. The Emergency Order of Revocation served as a
17 complaint in our proceedings, and was filed on behalf of the
18 Administrator through the Enforcement Division of the Southern
19 Team. Respondent waived the time provisions applicable to the
20 emergency proceedings.

21 The matter was before me, William R. Mullins, and I am an
22 administrative law judge for the National Transportation Safety
23 Board. The matter came on for hearing pursuant to notice to the
24 parties, and the parties were afforded a full opportunity to
25 offer evidence, call and examine and cross-examine witnesses. And

1 subsequent to the hearing date, the parties were given an
2 opportunity to file briefs in support of their positions.

3 COMPLAINT

4 In the complaint, the Administrator alleges that:

5 1. At all times material herein you were and are now the
6 holder of (a) Airline Transport Pilot Certificate Number 3609041;
7 (b) Flight Instructor Certificate Number 3609041; and (c) Airman
8 Medical Certificate issued on October 15, 2015.

9 2. Since at least 2001, you have received medical treatment
10 for depression.

11 3. From 2001 to approximately 2004, you took the medication
12 sertraline for the treatment of depression.

13 4. On or about August 29, 2002, you applied for and were
14 issued a First Class Medical Certificate.

15 5. On or about October 13th you applied for and were issued
16 a First Class Airman Medical Certificate.

17 6. On or about October 18, 2004, you applied for and were
18 issued a First Class Medical Certificate.

19 7. On or about October 25, 2005, you applied for and were
20 issued a First Class Airman Medical Certificate.

21 8. On or about October 17, 2006, you applied for and were
22 issued a First Class Airman Medical Certificate.

23 9. On or about October 23, 2007, you applied for and were
24 issued a First Class Airman Medical Certificate.

25 10. On or about July 23, 2009, you applied for and were

1 issued a First Class Airman Medical Certificate.

2 11. On or about January 25, 2011, you applied for and were
3 issued a First Class Airman Medical Certificate.

4 12. On or about January 10, 2012, you applied for and were
5 issued a First Class Airman Medical Certificate.

6 13. On or about July 30, 2013, you applied for and were
7 issued a First Class Airman Medical Certificate.

8 14. (a) On or about January 22, 2014, you applied for a First
9 Class Airman Medical Certificate; and (b) on or about January 27,
10 2014, you were issued a First Class Airman Medical Certificate.

11 15. (a) On or about July 23, 2014, you applied for and were
12 issued a First Class Airman Medical Certificate; and (b) on or
13 about July 14, 2014, you were issued a First Class Airman Medical
14 Certificate.

15 16. On all of the 13 medical certificate applications
16 referenced above, you answered no to Item 18(m) regarding whether
17 you ever in your life had been diagnosed with, had, or do you
18 presently have mental disorders of any sort, depression, anxiety,
19 et cetera.

20 17. On all of the 13 medical certificate applications
21 referenced above, you certified in Item 20 that all the statements
22 and answers you had provided on the applications were complete and
23 true.

24 18. You made these certifications when you knew your answers
25 to Item 18(m) on all of the medical certificate applications

1 referenced above were false.

2 19. Your certification on each of the 13 medical certificate
3 applications referenced above was fraudulent or intentionally
4 false.

5 20. Your answer to Item 18(m) on each of the 13 medical
6 applications referenced above was fraudulent or intentionally
7 false.

8 21. The FAA relied upon your answers to Item 18(m) on each of
9 the 13 medical certificate applications referenced above to
10 determine whether you were qualified to hold medical certificates.

11 22. Your answer to Item 18(m) on each of the 13 medical
12 certificate applications referenced above was material in that an
13 airman medical certificate was issued to you each time without
14 consideration of the facts in paragraph 2.

15 To this the Respondent answered and admitted paragraphs 1 and
16 4 through 17. He denied the allegations in paragraphs 2, 3, 18,
17 19 and 20, and he did not admit or deny the allegations in
18 paragraph 21 and 22. And then further denied that he had violated
19 the alleged regulatory violations, which were 14 C.F.R.
20 67.403(a) (1), and 14 C.F.R. 67.403(b) and (c).

21 Now subsequent to this time the Administrator filed an
22 amended complaint, and the allegations that I've just read were
23 considered as Count 1, and then the following allegations were
24 made in the amended complaint under Count 2:

25 23. The answers to paragraphs 1 through 22 are incorporated

1 herein by reference.

2 24. On or about the following dates you visited
3 Dr. Hardie V. Sorrels, III, M.D. on: (a) February 21, 2003, (b)
4 December 14, 2004; (c) March 27, 2006; and (d) January 26, 2007.

5 25. On at least your following medical applications you
6 answered no to Item 19 regarding whether you visited a health
7 professional within the last three years of the date of your
8 medical certificate application: (a) October 13, 2003;
9 (b) October 28, 2004; (c) October 25, 2005; (d) October 17, 2006;
10 (e) October 23, 2007; and (f) July 23, 2009.

11 26. On your airman medical certificate applications
12 referenced above, you certified in Item 20 that all the statements
13 and answers you provided on the applications were complete and
14 true.

15 27. You made these certifications when you knew your answers
16 to Item 19 of the airman medical applications referenced above
17 were false.

18 28. Your certifications on your airman medical certificate
19 applications referenced above were fraudulent or intentionally
20 false.

21 29. Your answers to Item 19 on your airman medical
22 certificate applications referenced above were false.

23 30. The FAA relied upon your answers to Item 19 on your
24 airman medical certificate applications referenced above to
25 determine whether you qualify to hold a medical certificate.

1 31. Your answers to Item 19 on your airman medical
2 certificate applications referenced above were material in that an
3 airman medical certificate was issued to you each time without
4 consideration of the facts described in paragraph 24.

5 And then Part 3, it goes on to say that the second full
6 paragraph under determination of emergency is admitted and now
7 reads as follows:

8 You falsely certified on 13 separate medical applications for
9 airman medical certificates that you had not been diagnosed, had,
10 or presently have mental disorders of any sort, including
11 depression, anxiety, et cetera. In addition, on at least six
12 airman medical applications you falsely certified that you had not
13 visited any health professional in the last three years of the
14 date of the medical certificate applications.

15 Your false entries on the airman medical certificate
16 applications induced the FAA Medical Examiner (AME) in each case
17 to issue an airman medical certificate. Had you honestly and
18 correctly stated that you had been diagnosed with depression, and
19 had you honestly and correctly listed your visits to health
20 professionals, the AME would have had the opportunity to correctly
21 evaluate your medical status so as to determine if you met the
22 requirements of Part 67 to allow the issuance of an FAA airman
23 medical certificate.

24 All right. Those are the Counts 1 and 2 of the amendment.
25 I've already read the answers, the Respondent's answers. And in

1 his answer to the amended complaint, under Count 2, the answers to
2 paragraph 23. The answers to paragraph 1 through 22 are
3 incorporated herein by reference.

4 24. Respondent admits the allegations of paragraph 24(a) and
5 (b) through (d).

6 25. Respondent admits the allegations of paragraph 25(a)
7 through (f).

8 26. Respondent admits the allegations of paragraph 26.

9 27. Respondent denies the allegations of paragraph 27.

10 28. Respondent denies the allegations of paragraph 28.

11 29. Respondent admits the allegations in paragraph 29.

12 30. Respondent is unable to admit the allegations of
13 paragraph 30 and, therefore, denies the same and demands strict
14 proof.

15 31. Respondent is unable to admit the allegations of
16 paragraph 31 and, therefore, denies same, and demands strict
17 proof.

18 32. Respondent denies all remaining allegations of the
19 complaint and answers the complaint, and demands strict proof of
20 the same.

21 All right, that constitutes the Complaint and Count 1 and
22 Count 2 and the answers.

23 ISSUES

24 There are really just two issues involved in all of this
25 litigation. First is whether Respondent made an intentionally

1 fraudulent or false entry in the medical applications when he
2 replied no to question 18(m) regarding whether he had ever been
3 diagnosed with or had a mental disorder of any type, depression,
4 anxiety, et cetera. And the second issue would be whether
5 Respondent made an intentionally false entry in his answer to
6 question 19 when he failed to report his visits to and the
7 medications prescribed by Dr. Sorrels when he completed his
8 medical applications in 2003, '4, '5, '6, '7 and '9.

9 DISCUSSION

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

15 The Emergency Order of Revocation, which was waived, dated
16 March 3, 2017, was issued after an investigation revealed the
17 Respondent had allegedly given incorrect and intentionally
18 fraudulent or false answers to question 18(m) and 19 on several
19 airman medical applications. That is, Respondent denied ever
20 having being diagnosed with a mental disorder including
21 depression, anxiety, et cetera, and he failed to report visits to
22 health professionals within three years prior to filing those
23 applications.

24 ADMINISTRATOR'S EXHIBITS

25 The Administrator had the following exhibits:

1 A-1 was the deposition of Dr. Edward Davidson, and a
2 Deposition Exhibit 1 was the curriculum vitae of Dr. Edward
3 Davidson, and Deposition Exhibit 2 was Dr. Davidson's
4 report.

5 A-2 was the airman medical certificate for Respondent.

6 A-3 was the psychiatric evaluation by Stephen Anthony
7 Montgomery, M.D., of September 30, 2015.

8 A-4 was Dr. Susan Northrup's curriculum vitae.

9 A-5 was a letter of 3/18/16 from Dr. Northrup to
10 Respondent requesting a current evaluation administered by a
11 Human Intervention Motivation Study (HIMS) forensic psychiatrist.

12 A-9, letter of investigation of 1/12/17.

13 A-11 was the FAA Form 8500-A Instructions with the revision
14 of 3/99.

15 A-12 was FAA Form 8500-A Instructions with a revision of
16 9/08.

17 A-13 was FAA Form 8500-A Instructions.

18 A-14 was FAA Order 2150.3B, Appendix B, Table of Sanctions.

19 RESPONDENT'S EXHIBITS

20 Respondent had three exhibits:

21 R-1 was the affidavit of Hardie V. Sorrels, III, M.D., and
22 this appears to be his letter of 5/13/16, in the affidavit format.

23 R-2 was a letter by Dr. Hardie V. Sorrels, III, M.D., dated
24 5/13/16.

25 R-3 is a pharmacy record.

ADMINISTRATOR'S WITNESSES

1
2 The Administrator had three witnesses: First was Hardie V.
3 Sorrels, III, M.D.; the second was Dr. Edward Davidson's
4 deposition testimony read by FAA witness Dr. Susan Northrup; and
5 the third witness was Susan Northrup, M.D.

RESPONDENT'S WITNESSES

6
7 The Respondent had five witnesses: One was Donna Epes; two,
8 William B. Mann, Jr.; three, Reggie Jones; four, Stephen
9 Montgomery, M.D., Director of Forensic Psychiatry, Vanderbilt
10 University Medical Center; and five, the Respondent, Kevin
11 Johnson.

ADMINISTRATOR'S WITNESSES' TESTIMONY

12
13 Administrator's first witness was Dr. Hardie Sorrels, III,
14 M.D. Dr. Sorrels corroborated his signature on the letter of
15 5/13/16, which letter indicates Respondent consulted him because
16 of an issue with premature ejaculation, and that R-1, his
17 affidavit, was a copy of R-2, the letter of 5/13/16.

18 Dr. Sorrels then testified that after a consultation with the
19 Respondent and based on the Respondent's history, he reached a
20 conclusion and prescribed him sertraline. Moreover, he testified
21 that no test is required for a diagnosis of premature ejaculation,
22 and conceded that he may not have had Respondent come into this
23 office and might have prescribed sertraline based on a
24 conversation with the patient.

25 Last, he testified that the dates when Respondent obtained

1 sertraline from the pharmacy coincided with the dates on the
2 5/13/16 letter and affidavit.

3 I find Dr. Sorrels' testimony to be credible and reasonable
4 based on his recollection of his interaction with the Respondent,
5 and certainly consistent with the Respondent's testimony that I'll
6 describe later.

7 The Administrator's second witness was offered by deposition,
8 the testimony of Edward Davidson, M.D. [sic], a psychologist,
9 under a contract with Southwest Airlines, which deposition was
10 read by Susan Northrup, M.D. The deposition testimony indicates
11 that the Respondent underwent a fitness evaluation conducted by
12 Edward Davidson, a psychologist under contract with Southwest
13 Airlines.

14 Dr. Davidson's evaluation included a mini-mental status
15 examination where Respondent satisfactorily answered 28 out of 30
16 questions, which result placed him in the normal category. And
17 this was reflected in the transcript at page 63, lines 5 and 6.
18 And the Respondent did not exhibit any of the symptoms of
19 depression during the week prior to the examination nor did the
20 Respondent exhibit any of the personality characteristics,
21 psychopathologic symptoms. And Respondent's Shipley test results
22 showed a normal IQ.

23 Despite these findings, Dr. Davidson's deposition testimony
24 indicated that Respondent had talked about being depressed in 2000
25 and 2014, and Dr. Davidson's diagnostic impression was persistent

1 depressive disorder. That is, despite the Respondent's successful
2 completion of the various tests, Dr. Davidson's deposition
3 testimony was that Respondent was depressed.

4 I find the testimony of Dr. Davidson to be not credible to
5 the extent that his own administered test results contradict his
6 recollection. And also because at the time the conversations
7 presumably took place Dr. Davidson failed to include a record of
8 the conversation in his evaluation. And this, plus Respondent
9 denied making these alleged statements in his testimony.

10 The Administrator's third witness was Susan Northrup, M.D.,
11 the Administrator's expert witness. And Dr. Northrup is the
12 Regional Flight Surgeon for the Southern Region for the
13 Administrator.

14 Dr. Northrup testified that she did not know the definition
15 of depression and that she had based her opinion solely on what
16 Respondent reportedly told Dr. Davidson about being depressed,
17 which testimony was contradicted by Respondent. That's the
18 transcript at pages 142 and 143. Furthermore, she conceded there
19 was never a formal diagnosis of depression prior to Respondent
20 submitting to an evaluation by Dr. Davidson. Dr. Northrup and
21 Respondent both testified that the airman application form does
22 not contain a definition of depression.

23 I find this witness's testimony credible, yet not helpful
24 because she relied on someone else's report, which I have
25 previously described as not being credible.

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RESPONDENT'S WITNESSES' TESTIMONY

Respondent's first witness was Donna Epes, who testified that she has known Respondent professionally and personally for roughly 17 years, has flown with him, socialized with him and his wife. She also testified that Respondent's integrity is the highest, that he is genuine. She has never known him to lie outright to anyone. Moreover, she stated that Respondent has a sense of humor, is upbeat, and has a funny laugh.

I find this witness' testimony credible because she has known Respondent a long time, has had many opportunities to observe him both professionally and socially, and she believes in him so much that she testified at the hearing despite having mobility difficulties resulting from surgery.

Respondent's second witness was William B. Mann, Jr., a retired airline captain with experience in 727s, Airbuses, L-1011s, and 717s. This witness testified he had met Respondent in 2011 when he was employed by AirTran and Respondent was hired. AirTran merged with ValuJet, and eventually Southwest bought AirTran. This witness also has known the Respondent for many years, and testified the Respondent is very honest, has a lot of integrity, and was always upbeat and ready to lend a hand.

I find his testimony credible and reliable as he had nothing to gain or lose by his testimony.

Respondent's third witness, Reggie Jones, who has known Respondent since their college years, and they became friends

1 while carpooling to rehearsals of a musical group locally referred
2 to as The Drum Corps. The witness and Respondent have been
3 friends for over 35 years. This witness testified that the
4 Respondent is one of the most honest people he ever met, that his
5 integrity is beyond reproach, and that he did not observe any mood
6 changes but, rather, that Respondent was always upbeat. This
7 witness has known Respondent long and well enough to render his
8 testimony about Respondent's character credible.

9 The testimony of all of Respondent's character witnesses who
10 have known the Respondent for a number of years was that
11 Respondent is honest, truthful, straightforward, and had never
12 exhibited any signs of depression such as the inability to
13 concentrate or low energy or inability to sleep. I find the
14 testimony of those witnesses credible based on their demeanor, the
15 fact that none had anything to gain by testifying, and they had
16 known Respondent a very long time and had observed him in a social
17 as well as a professional arena.

18 Respondent's fourth witness was Stephen Montgomery, M.D.,
19 Professor of Forensic Psychiatry at Vanderbilt University. And
20 Dr. Montgomery conducted a psychiatric evaluation of Respondent at
21 Vanderbilt University in September of 2015. That evaluation
22 included the Serial Sevens Test and the Personality Assessment
23 Inventory, which was interpreted by Kimberly P. Brown, Ph.D.

24 Dr. Montgomery testified that he performed a thorough
25 psychiatric evaluation of Respondent, reviewed his history and any

1 psychiatric symptoms, and that Respondent completed a
2 psychological test that screens for most major psychiatric
3 disorders. He further testified that Respondent did not report
4 nor display any symptoms of current mental illness, that the
5 psychological test showed that he was honest in his approach to
6 the test, that the test was interpretable, and that it did not
7 reveal any kind of psychiatric conditions.

8 Further, Dr. Montgomery testified that Respondent did not
9 report any symptoms of depression, did not appear to be depressed
10 or to have a reduced range of emotions, and did not show any signs
11 of concentration problems. This was at the transcript page 185.

12 Dr. Montgomery's psychiatric evaluation was thorough and
13 consistent with Respondent's normal mental state, and I find his
14 testimony credible based on his evaluation report, which he
15 thoroughly described at the hearing in which expert opinion
16 support Respondent's assertion that he took sertraline for reasons
17 unrelated to depression.

18 The last witness for the Respondent was the Respondent
19 himself, and he testified that he had seen Dr. Sorrels various
20 times over the years, and he had been prescribed sertraline for
21 premature ejaculation, a condition unrelated to depression, and
22 that he had been asked to undergo an examination after he refused
23 to perform a makeup simulator session. He specifically stated
24 that he never told Dr. Davidson that he had been depressed but,
25 rather, that he had told Dr. Davidson sertraline had been

1 tremendously helpful, and this comment was ambiguous as to whether
2 he was talking about premature ejaculation or another condition.
3 This is in the transcript at page 46 and 47.

4 I find the Respondent's testimony as credible. He appeared
5 straightforward. His demeanor on the stand was straightforward,
6 and his testimony was consistent with the other character
7 witnesses and with Dr. Sorrels' testimony, and also
8 Dr. Montgomery.

9 FINDINGS OF FACT

10 I make the following findings of fact:

- 11 1. The Administrator has the burden of proof regarding the
12 facts as alleged by a preponderance of reliable and probative
13 evidence.
- 14 2. Respondent took sertraline as described by Dr. Sorrels
15 for premature ejaculation between 2001 and 2014.
- 16 3. Respondent failed to report these several visits to
17 Dr. Sorrels on his FAA medical applications.
- 18 4. The application for a medical certificate does not
19 contain a definition of depression.
- 20 5. The only doctor that suggested the Respondent had
21 depression was Dr. Davidson, and after Dr. Davidson's evaluation
22 that mentioned depression, Respondent reported such findings on
23 his next medical application.
- 24 6. Dr. Davidson suggested that the condition of depression
25 was not supported by subsequent evaluations or by the

1 psychological test given by Dr. Davidson.

2 CONCLUSIONS OF LAW

3 *Hart v. McLucas*, 535 F.2d 516, 519 (1976) sets forth a three-
4 prong standard to prove intentional falsification. Those elements
5 of intentional falsification are: (1) a false representation; (2)
6 in reference to a material fact; and (3) made with knowledge of
7 its falsity. Thus, the Administrator must prove that Respondent
8 has made a false representation of a material fact with knowledge
9 that the representation was false.

10 I find that Respondent's answer to question 18(m) prior to
11 Dr. Davidson's evaluation regarding whether he had been diagnosed
12 or had a mental disorder of any type, was not false, and certainly
13 not intentionally false. However, I find that Respondent's
14 failure to reveal visits to Dr. Sorrels for premature ejaculation
15 issues, and his statement that all answers on the application are
16 true was intentionally false, and that the answer was material,
17 and it was false, and the Respondent knew that that answer was
18 false.

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ORDER

IT IS THEREFORE ORDERED that safety in air commerce and safety in air transportation, and a preponderance of reliable and probative evidence does not establish that Respondent's answer on the medical application under paragraph 18(m) concerning mental disorder was false or intentionally false, which was all contained in Count 1 of the complaint.

However, a preponderance of reliable and probative evidence does establish that Respondent's failure to report visits to Dr. Sorrels, which is Count 2 of the complaint, was intentionally false and, therefore, those allegations in Count 2 sustain a finding of a violation of 14 C.F.R. 67.403(a)(1).

And, therefore, all of the Respondent's certificates issued by the Administrator, including any airman certificates, are therefore revoked.

AND IT IS SO ORDERED.

WILLIAM R. MULLINS

Administrative Law Judge

APPEAL

1
2 JUDGE MULLINS: Now, Counsel, you may appeal this order
3 today, and you may appeal the order by filing a written Notice of
4 Appeal within 10 days after the date -- after this date.

5 An original and three copies of the Notice of Appeal must be
6 filed with the National Transportation Safety Board, Office of
7 Administrative Law Judges, Room 4704, at 498 L'Enfant Plaza East,
8 S.W., Washington, D.C. 20594. And the telephone there is area
9 code (202) 314-6150 or (800) 854-8758.

10 That party must also perfect the appeal by filing a brief in
11 support of the appeal within 50 days after the date on which this
12 initial decision was rendered. An original and one copy of the
13 brief must be filed directly with the National Transportation
14 Safety Board, Office of General Counsel, Room 6401, 498 L'Enfant
15 Plaza East, S.W., Washington, D.C. 20594. And their telephone
16 number is area code (202) 314-6080.

17 The Board may dismiss appeals on its own motion or the motion
18 of another party when a party who has filed a Notice of Appeal
19 fails to perfect the appeal by filing a timely appeal brief.

20 A brief in reply to the appeal brief may be filed by any
21 other party within 30 days after that party was served with the
22 appeal brief. An original and one copy of the reply brief must be
23 filed directly with the Office of General Counsel in Room 6401.

24 Note, copies of the Notice of Appeal and brief must also be
25 served on all other parties to this proceeding.

1 And, Counsel, I will direct the office in Washington to send
2 both of you copies of -- a written copy of this, your appellate
3 rights. I would also advise the parties that if there is an
4 appeal, a transcript of this decision will be provided to you at
5 no cost, and that transcript would probably be coming to you
6 within I would say 2 weeks. Certainly, it will probably come
7 after your time to appeal, but you'll receive it prior to any time
8 a brief needs to be submitted.

9 All right. Does the Administrator have any question about
10 the order today?

11 MR. DIXON: No, Your Honor.

12 JUDGE MULLINS: Mr. Goldstein, does the Respondent have any
13 questions?

14 MR. GOLDSTEIN: No, sir.

15 JUDGE MULLINS: All right. Thank you, gentlemen.

16 Madam Court Reporter, thank you.

17 And this terminates these proceedings.

18 (Whereupon, at 11:37 a.m., the hearing in the above-entitled
19 matter was adjourned.)

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CERTIFICATE

This is to certify that the attached proceeding before the
NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Kevin R. Johnson

DOCKET NUMBER: SE-30347

PLACE: Via Conference Call

DATE: August 28, 2018

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.



Chelsea Baranoski

Official Reporter