

SERVED: February 4, 2013

NTSB Order No. EM-212

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 4th day of February, 2012

_____	)	
ROBERT J. PAPP, JR.,	)	
Commandant,	)	
United States Coast Guard,	)	
	)	
Appellee,	)	
	)	Docket ME-185
v.	)	
	)	
JAMES BRUCE HOCKING,	)	
	)	
Appellant.	)	
	)	
_____	)	

**OPINION AND ORDER**

**1. Background**

Appellant seeks review of the Vice Commandant's<sup>1</sup> decision on appeal (CDOA) 2698, dated April 25, 2012, which affirmed a decision and order (D&O) issued by Coast Guard Administrative Law Judge (ALJ) Michael J. Devine on January 4, 2011, following an evidentiary

<sup>1</sup> The Commandant has delegated to the Vice Commandant the authority to take final action in suspension and revocation proceedings. 33 C.F.R. § 1.01-40.

hearing held on September 23, 2010.<sup>2</sup> By that decision, the law judge denied appellant's appeal of the Coast Guard's March 23, 2010 complaint, which alleged appellant was "physically incompetent" and unfit to perform the duties associated with his mariner credentials under 46 C.F.R. § 5.31.<sup>3</sup> The law judge found appellant was not "medically competent" to hold his Merchant Mariner's License, which permitted him to serve as Master, but was permitted to continue to hold his Merchant Mariner's Document. The Vice Commandant affirmed the law judge's order in its entirety.<sup>4</sup> We deny appellant's appeal.<sup>5</sup>

A. *Facts*

The majority of the facts of this case are undisputed. Since 1973, appellant has been employed at the Woods Hole Steamship Authority, where he served as the senior captain aboard the M/V NANTUCKET, a motor vessel providing passenger ferry services in the Nantucket Sound. In March 1995, appellant suffered a ventricular tachycardia event, which indicated appellant's heart was weak. The record indicates ventricular tachycardia occurs when one of the ventricles of the heart beats on its own, instead of the normal process in which electrical pulses

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<sup>2</sup> Copies of the decisions of the Vice Commandant and law judge are attached.

<sup>3</sup> Section 5.31, entitled "[i]ncompetence," states as follows: "[i]ncompetence is the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof." The complaint also cites 46 U.S.C. § 7703(4) as statutory authority for revoking appellant's Merchant Mariner Document and License. Section 7703(4) provides: "[a] license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder ... (4) has committed an act of incompetence relating to the operation of a vessel."

<sup>4</sup> Both the Coast Guard and appellant appealed the law judge's decision. The Coast Guard argued the law judge abused his discretion in not ordering revocation of appellant's Merchant Mariner Document at the same time it revoked his Merchant Mariner License. The Vice Commandant did not grant the Coast Guard's appeal in this regard. The Coast Guard does not appeal the Vice Commandant's conclusion concerning appellant's merchant mariner license.

<sup>5</sup> Appellant requested oral argument under 49 C.F.R. § 825.25(a). We find the parties have fully briefed the issues in this case and oral argument on these issues is not necessary.

travel from the upper chamber of the heart to the lower chamber.<sup>6</sup> Shortly thereafter, appellant elected to receive an implantable cardioverter-defibrillator (ICD), a device designed to detect cardiac arrhythmia and correct it by delivering a jolt of electricity. D&O at 9. The Coast Guard typically considers applicants who have been diagnosed with ventricular tachycardia ineligible to hold a merchant mariner's license. In 1998, 2002, and 2007, however, appellant requested a waiver to allow him to hold his Master's License with a First Class Pilot endorsement, which the Coast Guard granted. In 2008, appellant submitted Coast Guard Form 719K, Report of Physical Examination, and underwent an annual physical, to receive a waiver again. The Coast Guard reviewed appellant's Form 719K, which contained the same information concerning his heart condition as on his previous 719Ks. On April 2, 2009, however, the Coast Guard's National Maritime Center (NMC) sent appellant a letter stating, "no waivers for ICD devices are currently being recommended for approval," due to risks of incapacitation.<sup>7</sup> The letter also stated, "[i]f a lethal rhythm develops, and the device fires, there is a risk of temporary incapacitation due to the sudden shock to the heart. Additionally, if the device fires, and fails to treat the rhythm, incapacitation or death may result."<sup>8</sup>

Appellant requested reconsideration of the Coast Guard's denial of waiver. The Coast Guard denied reconsideration in June 2009. Appellant then appealed to the Director of Prevention Policy, who upheld the NMC's decision. Appellant appealed this decision, and the case proceeded to hearing before the law judge.

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<sup>6</sup> Tr. 73.

<sup>7</sup> Exh. CG-3.

<sup>8</sup> Id.

At the hearing, the Coast Guard called Dr. Matthew Hall to testify. Dr. Hall, who is Board certified in occupational medicine, served as the Chief Medical Officer for the Coast Guard's 13<sup>th</sup> District, and, until July 2010, served as the Chief of the Medical Evaluation Division at the NMC. Dr. Hall explained, after the fatal ANDREW J. BARBERI accident, in which 11 people died and over 70 people sustained injuries, the NTSB made safety recommendations to the Coast Guard to review its medical evaluation processes to ensure consistency. As a result, the Coast Guard consolidated within the NMC all medical evaluation duties that 17 regional evaluation centers held. Specifically, Dr. Hall stated:

There were no trained medical staff people at the regional exam centers [REC] so that decisions about whether somebody was fit for duty was based upon regional exam centers' own judgments or vague medical guidelines that were in place at the time, or just patient advocacy statements provided by mariner physicians. As a result some REC's would approve physicals or waivers that other REC's might not. As you can imagine, it was a very inconsistent outcome, and the end result is that some [m]ariners were found fit who probably should not have been.<sup>9</sup>

In addition to consolidating the regional centers' medical review functions in the NMC, the Coast Guard also issued guidelines for evaluation of merchant mariners, via Navigation and Vessel Inspection Circular (NVIC) 04-08.<sup>10</sup> NVIC 04-08 includes an attached list entitled, "Medical Conditions Subject to Further Review," which contains several conditions the Coast Guard considers to render an applicant ineligible for a license, including "[a]nti-tachycardia devices or implantable defibrillators."<sup>11</sup> In developing NVIC 04-08, Dr. Hall testified the Coast Guard engaged in a comprehensive review of other transportation agencies' medical standards,

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<sup>9</sup> Tr. 49.

<sup>10</sup> NVIC No. 04-08, "Medical and Physical Evaluation Guidelines for Merchant Mariner Credentials," *available at* [http://www.uscg.mil/nmc/policy\\_letters/nvic/pdfs/NVIC\\_4\\_08\\_with\\_enclosures.pdf](http://www.uscg.mil/nmc/policy_letters/nvic/pdfs/NVIC_4_08_with_enclosures.pdf) (Sept. 15, 2008).

<sup>11</sup> Exh. CG-2 at 7 (stating implanted ICDs are "[g]enerally not waivable. Contact NMC for guidance").

and set forth standards in NVIC 04-08 consistent with those standards. Dr. Hall stated, with regard to each condition listed in NVIC 04-08, “[s]udden incapacitation was a concern for every single condition.”<sup>12</sup>

On reconsideration, Dr. Hall reviewed appellant’s entire medical file. Dr. Hall stated the records indicated appellant continued to experience “ventricular arrhythmias.” He defined ventricular arrhythmia as an irregular heartbeat, related to the ventricle, which is “the bottom portion of the heart.”<sup>13</sup> The records also indicated appellant had an ejection fraction below 40 percent.<sup>14</sup> Dr. Hall explained an ejection fraction is a measurement of the amount of blood that proceeds through the heart. Tr. 77. The Coast Guard considers an ejection fraction below 40 percent to be disqualifying. Tr. 87. Dr. Hall noted, “when you have an ejection fraction [below 40 percent], the heart muscle is thick, and it can develop these bad ventricular arrhythmias also resulting in incapacitation or even death.” Tr. 89-90. On cross-examination, Dr. Hall stated other agencies—in particular, the Federal Motor Carrier Safety Administration (FMCSA)—utilize 40 percent as the cut-off measurement for safety-sensitive employees’ ejection fraction, even though he was unaware of any medical literature that supported 40 percent as the cut-off. Tr. 117. Dr. Hall explained appellant was at risk of sudden cardiac death because he had “ischemic cardiomyopathy.”<sup>15</sup> Dr. Hall also stated appellant’s records indicate he had an episode of ventricular tachycardia (to which the record also refers as a “heart attack”),

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<sup>12</sup> Tr. 53.

<sup>13</sup> Tr. 57, 72.

<sup>14</sup> Tr. 72. 87-88.

<sup>15</sup> Dr. Hall described this condition as follows: “a cardiomyopathy is a weakening of the heart muscles, and the ischemic part of that terminology means that that cardiomyopathy was caused by a lack of blood flow to the heart muscle.” Tr. 59.

which most likely resulted from an artery spasm.<sup>16</sup> Furthermore, Dr. Hall expressed concern that appellant was prescribed Tikosyn, a medication that could cause ventricular arrhythmia as a side effect.

With regard to appellant's ICD, Dr. Hall stated an ICD is designed to detect abnormal rhythms of the heart, and then provide an electrical shock to correct the rhythms. Dr. Hall testified the ICD does not function as treatment for any other condition, such as appellant's ischemic cardiomyopathy. Dr. Hall stated appellant's ICD delivers a shock to the heart to regulate abnormal rhythm, and the shock "can cause an incapacitating event in and of itself."<sup>17</sup> Dr. Hall further stated that, if the ICD "fails to fire," then the "heart rate could result in incapacitation or even death. So the device may not even work."<sup>18</sup> Dr. Hall also surmised ICDs "are subject to electrical and magnetic interference by shipboard electrical devices."<sup>19</sup> Dr. Hall testified the ICD alone presented several concerns, but, when reviewing a Form 719K that indicates an applicant has an ICD, the Coast Guard is primarily concerned with the underlying condition that requires implantation of an ICD. Dr. Hall stated a patient with an ICD has an impending risk of cardiac death.

Dr. Hall concluded his testimony by opining appellant was not fit to serve on a vessel, and stating whether appellant can perform daily functions was a different consideration from the risk he presented to maritime and public safety. Dr. Hall based his determination that appellant

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<sup>16</sup> Tr. 78-79. In addition, although not mentioned in the law judge's findings of fact, the CDOA states appellant suffered additional episodes of ventricular tachycardia in 1995 and in 2000. CDOA at 2 n.1.

<sup>17</sup> Tr. 62.

<sup>18</sup> Id.

<sup>19</sup> Id.

was not fit for duty on finding appellant presented an unacceptable risk to maritime and public safety.

In response to the Coast Guard's case, appellant provided the testimony of colleagues and the Director of Human Resources for the Woods Hole Steamship Authority, all of whom testified appellant had an excellent performance record and was able to complete all his duties. Appellant also testified on his own behalf, and verified he had never been incapacitated, despite the risks his heart condition and ICD present. Appellant contended he could perform all the necessary functions his job required, and always exceeds the safety requirements when leaving or arriving in port, because he ensured at least three people were on the bridge during those times. He stated he also ensures four people are on the bridge when fog or heavy traffic presented additional risks. Appellant testified his colleagues knew of his condition, and would be able to ensure the safety of the vessel if he were to lose capacity to operate the vessel.

Appellant stated, prior to 2009, no one had ever indicated he was incompetent. Appellant opined he had the same abilities at the time of the hearing as when he obtained waivers for his condition in 1998, 2002, and 2007. Appellant also testified his ICD had never affected the performance of any equipment on the vessel's bridge. Despite his unblemished history, appellant stated he would accept a restrictive endorsement on his license, due to his condition.

#### *B. The Law Judge's D&O*

The law judge's D&O included a detailed summary of the evidence and affirmed the Coast Guard's complaint, with the exception that the law judge permitted appellant to continue to hold his Merchant Mariner Document.<sup>20</sup> The law judge cited the Coast Guard's requirement

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<sup>20</sup> As we stated in Commandant v. Shine, NTSB Order No. EM-209 (2011), the Coast Guard's authorizing statute states, "[a] license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder ... (4) has committed an act of

that every mariner who holds a license or endorsement allowing operation of a vessel of 1,600 gross tons or more must undergo a “thorough physical examination each year.”<sup>21</sup> The law judge determined appellant had committed an act of incompetence when he served as Master aboard the M/V NANTUCKET on May 18 and 31, 2009, even though the Coast Guard had sent appellant a certified letter, dated April 2, 2009, stating appellant was not medically fit for mariner duties.

The law judge summarized appellant’s diagnosis of ventricular tachycardia, and stated it can occur at any time independent of exertion and presents a risk of sudden cardiac death and incapacitation. The law judge stated the evidence established appellant had suffered episodes of ventricular tachycardia in 1995 and again in November 2000. The law judge also summarized the evidence establishing appellant’s history of ischemic cardiomyopathy, his reduced ejection fraction, and risk of ventricular arrhythmias. In addition, the law judge cited testimony at the hearing concerning the risks an ICD presented. The law judge determined, “[b]ased on the underlying heart condition documented in [appellant’s] medical record, including the 2008 Form 719K there is sufficient information to support the Coast Guard’s finding that appellant was not fit for duty.” D&O at 9. The law judge stated appellant’s ICD, as well as his underlying cardiac condition, “render him physically incompetent and unfit for merchant mariner duties associated with his Coast Guard-issued Merchant Mariner’s License.” D&O at 24. The law judge based the majority of his determinations on Dr. Hall’s testimony, which he found was probative.

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(.continued)

incompetence relating to the operation of a vessel.” 46 U.S.C. § 7703(4). The Coast Guard’s regulations consider both merchant mariner documents and mariner licenses to be “credentials” subject to enforcement action. 46 C.F.R. § 10.107. A document typically exhibits a seaman’s general authority to work on board a vessel, while a license exhibits a mariner’s specific authority to participate in operation of a vessel.

<sup>21</sup> 46 C.F.R. § 11.709(b).

*C. The Commandant's Decision on Appeal*

In accordance with Coast Guard procedures, appellant appealed the law judge's D&O. The Vice Commandant affirmed the law judge's decision in the CDOA, and specifically rejected the issues appellant raised on appeal. First, appellant argued the law judge inappropriately credited Dr. Hall's testimony, because Dr. Hall relied on an irrelevant journal article in determining appellant was incompetent. The CDOA states Dr. Hall used several journal articles in determining appellant was incompetent, including one panel's recommendations to the FMCSA concerning cardiovascular disease and commercial motor vehicle safety. The Vice Commandant concluded Dr. Hall's use of an expert panel's recommendations to the FMCSA, which stated commercial motor vehicle operators must not have an ejection fraction below 40 percent, was neither improper nor prejudicial, as Dr. Hall did not exclusively base his expert opinion on the FMCSA information.<sup>22</sup>

In addition, the Vice Commandant found appellant neglected to provide any evidence to show the law judge's conclusions were not supported by substantial evidence. The Vice Commandant noted appellant did not provide any evidence or arguments challenging the merit of Dr. Hall's statements or conclusions, but instead focused on the fact that Dr. Hall was not a cardiologist.

The CDOA also includes an analysis of two Coast Guard decisions concerning incompetence. In Appeal Decision 2547 (PICCIOLO), the appellant, who suffered from diabetes, argued he had satisfactory control over his condition, and thereby was not incompetent. The Commandant remanded the case to the law judge, with instructions to determine whether the appellant's monitoring of his condition would interfere with the performance of his duties, and

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<sup>22</sup> CDOA at 11; Exh. CG-12 (Expert Panel Recommendations: Cardiovascular Disease and Commercial Motor Vehicle Driver Safety, Apr. 10, 2007).

would suffice to ensure he was not a risk to safety. The Vice Commandant's decision in this case states Picciolo "supports the proposition that a mariner's medical competence must be determined ... by reference to competent medical testimony concerning the individual's condition and necessary treatment, and the risks they present."<sup>23</sup>

The CDOA also summarized Appeal Decision 2664 (SHEA), in which the appellant suffered from a mental disorder that put him at risk for a future "mental breakdown."<sup>24</sup> The Vice Commandant, in the case *sub judice*, states Shea indicates "medical incompetence is not restricted to a determination based on apparent fitness for duty at the present moment."<sup>25</sup> Instead, the Vice Commandant states an analysis of the risk an appellant presents to maritime safety is a component of the incompetence analysis. In Shea, the law judge reversed a physician's finding that the appellant was fit for duty, as the appellant's physician could not state with reasonable certainty the appellant "would remain asymptomatic even if he continued taking his medication," and "the prescription drug [the appellant] was taking had the *potential* to impair his judgment and motor skills."<sup>26</sup>

In his appeal of the law judge's decision in the case at issue, appellant argued the law judge's reliance on Shea was misplaced, because considering the potential for risks to safety that a condition presents is reserved for cases involving severe psychiatric disorders. The Vice Commandant resolved this issue by agreeing fitness for duty determinations should not be based upon uninformed speculation, but, in this case, the law judge carefully considered the evidence

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<sup>23</sup> CDOA at 14.

<sup>24</sup> Id.

<sup>25</sup> CDOA at 15.

<sup>26</sup> Shea at 10 (emphasis added).

and determined the Coast Guard had proven appellant to be incompetent, based on the risk of sudden incapacitation. The Vice Commandant's decision on appeal expressly states the risk appellant could become suddenly incapacitated in the future is "too great to ignore," and, "any other holding would be inconsistent with the safety and security of the maritime environment."<sup>27</sup>

The Vice Commandant's decision also addressed appellant's argument that the "Rehabilitation Act of 1974"<sup>28</sup> required an individualized review of appellant's request for a waiver. The Vice Commandant asserted the existence of evidence showing appellant is incompetent disposes of the case. Therefore, she found the issue of whether appellant should have received an individualized review of his request for a waiver was moot. In particular, she stated, "[a]lthough the ALJ discussed the waiver in his D&O, there is ample independent basis in the evidence before him for his finding that [appellant] is medically incompetent."<sup>29</sup>

The CDOA concluded with a denial of the Coast Guard's appeal concerning the law judge's finding that appellant was still eligible to hold his Merchant Mariner Document. The Coast Guard did not appeal this denial to us.

#### *D. Appellant's Appeal to the Board*

On appeal to this Board, appellant reiterates primarily the same arguments he made to the Commandant. Appellant contends the law judge erred in determining appellant was "medically incompetent," because no regulation or statute provides a cause of action for "medical incompetence." As a result, appellant argues the Coast Guard did not meet its burden of proof concerning the incompetence charge, because the Coast Guard has not shown appellant is

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<sup>27</sup> CDOA at 16.

<sup>28</sup> Rehabilitation Act of 1973, Pub. L. 93-112; 87 Stat. 394, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516; 88 Stat. 1617 (codified at 29 U.S.C. § 701 *et seq.*).

<sup>29</sup> CDOA at 17.

presently unable to perform his required duties due to a physical disability. Appellant also argues no precedent supports a finding of incompetence when the finding is based on “speculative evidence of future risk.”<sup>30</sup>

Appellant claims the Vice Commandant’s decision was based on assessment of the risk to maritime safety, rather than the language of 46 U.S.C. § 7703(4) and 46 C.F.R. § 5.31. In particular, appellant states the plain language of both the statute and the regulation concerning incompetence includes neither the phrase “fitness for duty” nor “medical incompetence,” both of which the law judge and Vice Commandant included in their decisions. Appellant argues the Coast Guard may not “invent or construct new causes of action” when the Vice Commandant determines, as she did in the case at hand, “the risk is too great to ignore.”<sup>31</sup>

## **2. Decision**

In reviewing Coast Guard actions against a mariner’s license, document, or other credential, we determine whether substantial evidence supports the action.<sup>32</sup> The Commandant’s decision on appeal should only reverse the law judge’s decision if the law judge’s findings are arbitrary and capricious.<sup>33</sup> In addition, Commandants’ decisions on appeal should defer to Coast

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<sup>30</sup> Appeal Br. at 2.

<sup>31</sup> Id. at 9.

<sup>32</sup> See generally Commandant v. Moore, NTSB Order No. EM-201 at 7 (2005); see also Appeal Decision 2685 (MATT) (stating, “[o]n appeal, a party may challenge whether each finding of fact rests on substantial evidence, whether each conclusion of law accords with applicable law, precedent, and public policy, and whether the ALJ committed any abuses of discretion” and citing 46 C.F.R. § 5.701 and 33 C.F.R. § 20.1001).

<sup>33</sup> Commandant v. Harris, NTSB Order No. EM-182 (1996).

Guard law judges' credibility determinations.<sup>34</sup>

*A. Interpretation of 46 C.F.R. § 5.31*

Appellant has not shown the law judge's decision was arbitrary and capricious. The record indicates substantial evidence supports the law judge's and the Commandant's conclusions, and appellant does not refute the evidence, but instead argues the law judge and the Commandant misinterpreted 46 C.F.R. § 5.31. In this case, the law judge defined the term "incompetence" as a condition that could be based on a medical diagnosis. We find the law judge's decision was not erroneous, as it is consistent with previous Coast Guard decisions on appeal concerning incompetence, discussed further below.

First, the plain language of 46 C.F.R. § 5.31 defines the term "incompetence" as "the inability ... to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof." Appellant takes issue with the fact that the law judge and the Vice Commandant both referred to appellant's condition as one that rendered him "unfit for duty" and "medically incompetent." We do not find the use of such terminology contrary to the language of the regulation. Instead, it functions as the Coast Guard's interpretation of § 5.31, to which we defer.<sup>35</sup>

*1. Appeal Decision 2547 (PICCIOLO)*

The Coast Guard contends appellant is unable to perform his required duties due to his physical condition, which includes having an ICD implanted. This interpretation of § 5.31 is not

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<sup>34</sup> Commandant v. Moore, NTSB Order No. EM-201 at 8-9 (2005); Commandant v. Purser, 5 NTSB 2597, 2598 (1986).

<sup>35</sup> See Commandant v. Nitkin, NTSB Order No. EM-194 at 1 n.1 (2002) (order denying reconsideration) (indicating our statutory authority to review Coast Guard decisions "embodies the principles of deference that the courts employ in their review of agency decision making," but stating the issue of deference does not arise where the Coast Guard "essentially promotes a judgment that the rule should apply notwithstanding its literal terms").

unreasonable, especially in light of previous Coast Guard cases. In Picciolo, on which appellant relies, the Commandant's Decision on Appeal defined "incompetence" as follows:

"[i]ncompetence, including by reason of physical disability, is the inability to perform required duties."<sup>36</sup> In the case at issue, the evidence shows appellant is unable to perform his required duties, as he may become incapacitated at any time, without warning.<sup>37</sup>

The Picciolo case is also factually different from the case *sub judice*. First, the appellant in Picciolo had diabetes, which the law judge determined he had the ability to control. The appellant's control over his condition improved to allow him to become able to hold his merchant mariner document. Here, however, appellant has no control over his heart condition. After considering the options available to him, he elected to have an ICD implanted. The ICD and combination of medications, in addition to appellant's underlying condition of heart disease (as his lower than normal ejection fraction establishes), indicates appellant may become incapacitated at any time, without warning. Therefore, appellant has no ability to control the circumstance of incapacitation due to his heart condition. We recognize the decision on appeal in Picciolo includes the statement, "the ultimate issue is whether [a]ppellant can perform the functions expected of him." While in the case at hand, appellant may have been able to perform his duties as pilot of the M/V NANTUCKET with an exemplary record at the Steamship Authority, the Coast Guard has nevertheless shown that the activity of appellant's ICD is unreliable in that it may fail to activate when needed, or the activation itself may render appellant incapacitated.<sup>38</sup> The record also shows appellant has already had at least two heart attacks.<sup>39</sup>

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<sup>36</sup> Picciolo at 3.

<sup>37</sup> Tr. 61-62, 97.

<sup>38</sup> Tr. 61-62.

These facts show appellant's lack of control over his condition, which is distinguishable from the circumstances the appellant faced in Picciolo. We further note the Commandant's disposition of the Picciolo case was to remand it to the law judge to determine "[w]hether the medical program prescribed to monitor Appellant's ability to satisfactorily control his blood sugar level is compatible with [appellant's] ... expected duties."<sup>40</sup> We view this instruction in the remand order to consider a seaman's ability to control his condition as a principal component in determining whether the Coast Guard has proven incompetence under § 5.31. The Commandant's remand order in Picciolo analyzed the issue of control over one's condition, and we affirm that analysis here.

2. *Appeal Decision 2664 (SHEA)*

As for the parties' references to Shea, which is also similar to the case at hand, we affirm the Vice Commandant's analysis. First, we note in Shea, the Commandant summarized Picciolo as requiring the Coast Guard to analyze the risk a seaman presents as a result of his medical condition. The Commandant's CDOA in Shea states, "[f]ollowing Mr. Picciolo's appeal, the Commandant remanded the case to the ALJ because the record lacked evidence of ... the level of risk that Mr. Picciolo would pose to fellow crewmembers and a ship at sea if he failed to follow a prescribed medical program."<sup>41</sup> The risk assessment the Commandant engages in in Shea is contrary to appellant's assertion that a showing of incompetence should not involve an assessment of risk.

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(..continued)

<sup>39</sup> Tr. 78, 86; see also Exh. CG-6.

<sup>40</sup> Picciolo at 5-6.

<sup>41</sup> Shea at 7-8.

In addition, the CDOA in Shea holds the appellant was incompetent because his continued service at sea presented considerable risks. In Shea, the appellant suffered from bipolar disorder and had a psychiatric breakdown while at sea. The Commandant determined, notwithstanding the appellant's seeming control over his condition, his condition nevertheless presented too great a risk. The Commandant deferred to the law judge's determination that the appellant "*currently* suffers from a psychiatric condition that would adversely affect his ability to serve at sea."<sup>42</sup> The Commandant determined the diagnosis of the condition in and of itself rendered the appellant incompetent, regardless of a physician's determination that the appellant was fit for duty.

In Shea, the Commandant also cited the Burke decision, which the Board upheld.<sup>43</sup> In Burke, the appellant suffered from a mental illness. The Board determined, although the mariner's current mental status was satisfactory, the appellant's history of "emotional difficulties" caused him to present a risk of a "future 'emotional difficulty' that disqualified him for work in a supervisory capacity."<sup>44</sup> The Board stated the record contained substantial evidence to support the law judge's conclusion that the appellant's return to sea in a supervisory capacity was too risky.<sup>45</sup> However, the Board found the appellant could serve as an "unlicensed

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<sup>42</sup> Id. at 12 (emphasis in original CDOA).

<sup>43</sup> Commandant v. Burke, NTSB Order No. EM-83, 3 N.T.S.B. 4441 (1980).

<sup>44</sup> Id. at 4446.

<sup>45</sup> The Commandant's Decision on Appeal stated as follows concerning the assessment of risk:

[T]he risk that Appellant will again suffer another debilitating "psychotic episode" is of such significance as to preclude a finding that Appellant can be expected to perform duties aboard a merchant vessel of the United States without substantially endangering the lives of those aboard, and the vessel itself.

seaman,” because the appellant’s “emotional disorder has not been found to constitute a permanent disability and there is no showing that appellant is prone to violence.”<sup>46</sup> Thus, the Board in Burke affirmed the Coast Guard’s consideration of the risks the appellant presented in determining whether the Coast Guard met the burden of proof on the charge of incompetence.

As a result, we find the law judge’s and Commandant’s interpretation of 46 C.F.R. § 5.31 in the case at issue was not arbitrary and capricious. Appellant’s underlying heart condition, coupled with his ICD, leads us to find he could become incapacitated at any time. Appellant has not challenged Dr. Hall’s opinion on this point. Instead, appellant emphasized a legal argument that the Coast Guard’s interpretation of section 5.31 was contrary to the plain language of the regulation. We are not persuaded by this argument, as a review of the precedent indicates a diagnosis of a certain condition may render a seaman incompetent. These previous cases also contemplate the Coast Guard may assess the risk a seaman might present to marine safety when reviewing the seaman’s Form 719K in light of the issue of competence.

### 3. *Applicability of NVIC 04-08*

Appellant challenges the Coast Guard’s reliance on NVIC 04-08. As described above, the publication lists several conditions the Coast Guard considers to render an applicant ineligible for a license, including appellant’s ICD. Appellant argues this publication is a significant change to Coast Guard medical review standards, yet the Coast Guard has not altered section 5.31 to reflect the change.<sup>47</sup>

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<sup>46</sup> 3 N.T.S.B. at 4446.

<sup>47</sup> Appeal Br. at 9.

We do not find this argument persuasive, as the Coast Guard published notice of the availability of a draft version of NVIC 04-08 in the Federal Register and invited comments.<sup>48</sup>

Subsequently, the Coast Guard published a final notice indicating the commencement of application of the standards in NVIC 04-08.<sup>49</sup> Courts have upheld agencies' implementations of binding guidance when agencies have engaged in the informal rulemaking procedure set forth by the Administrative Procedure Act.<sup>50</sup> Therefore, even if viewed as "significant" agency guidance

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<sup>48</sup> 71 Fed. Reg. 56998 (Sept. 28, 2006). In this initial notice, the Coast Guard stated it was replacing a previous NVIC with the new NVIC 04-08 for two principal reasons. First, it stated the statutes and regulations through which the Coast Guard approved applications and evaluated eligibility to hold merchant mariner credentials lacked specificity and "led to confusion and unnecessary delays in processing credential applications as well as inconsistent evaluations by medical practitioners conducting examinations of credential applicants." Second, the Coast Guard's notice explained risks to public safety motivated the agency to evaluate the medical eligibility standards, as current risks "associated with some medical and physical conditions, particularly when these conditions may result in the sudden incapacitation of mariners on vessels[,] could have serious consequences. *Id.* The Coast Guard's initial notice also described how NVIC 04-08 was different from the NVIC it was replacing.

<sup>49</sup> 73 Fed. Reg. 56600 (Sept. 29, 2008). The final notification of NVIC 04-08 advised the public NVIC 04-08 was available and applicable. This notification stated the Coast Guard received comments from: "46 mariners, 15 shipping companies, 6 pilots and pilot organizations, 2 government agencies, 8 advocacy groups, and 4 maritime unions," and made numerous changes to the original draft NVIC in response to the comments. *Id.* at 56601. The final notification indicated the NVIC 04-08 standards would become effective on October 29, 2008.

<sup>50</sup> See generally Natural Resources Defense Council, Inc. v. EPA, 22 F.3d 1125, 1147 (D.C. Cir. 1994) (affirming EPA's use of informal rulemaking procedure under Administrative Procedure Act, rather than informal guidance proceedings, to set forth performance standards for basic state vehicle inspection and maintenance); cf. Gen. Elec. Co. v. EPA, 290 F.3d 377 (D.C. Cir. 2002) (striking down PCB risk assessment guidance as legislative rule requiring notice and comment); Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000) (striking down emissions monitoring guidance as legislative rule requiring notice and comment); Chamber of Commerce v. Dep't of Labor, 174 F.3d 206 (D.C. Cir. 1999) (striking down OSHA Directive as legislative rule requiring notice and comment).

binding on individuals, the Coast Guard fulfilled the notice-and-comment requirements concerning agency guidance.<sup>51</sup>

*B. Act of Incompetence*

The law judge and the Commandant determined appellant committed an act of incompetence when he operated the M/V NANTUCKET while incompetent, and after he received notification from the Coast Guard that the agency considered him incompetent, in May 2009. Once again, appellant does not refute Dr. Hall's testimony nor does he contend he failed to receive the April 2, 2009 letter from the Coast Guard, which stated it determined him to be incompetent because he had an ICD. Appellant also does not dispute he operated the M/V NANTUCKET shortly after receiving the letter, on May 18 and 31, 2009.

At the hearing, appellant stated he presumed he could continue to operate the M/V NANTUCKET after receiving the Coast Guard's letter, under 46 C.F.R. § 5.521.<sup>52</sup> Section 5.521 states an appellant must physically surrender his or her credential to the law judge at the commencement of a hearing. Section 5.521(b) then requires the law judge to return the credential to the appellant when the hearing is continued or delayed "unless a prima facie case has been established that the [appellant] committed an act or offense which shows that the [appellant's] service on a vessel would constitute a definite danger to public health, interest or safety at sea." At the hearing, the Coast Guard simply argued appellant committed an act of incompetence because he operated the M/V NANTUCKET when he had an ICD. On appeal, the

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<sup>51</sup> In general, when an agency seeks to implement a binding requirement on any individual or set forth a rule, it must publish notice of the intended rule and accept comments concerning it. 5 U.S.C. § 553(b). Agencies should also engage in this process if issuing binding "guidance." See OMB Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3437-3438 (Jan. 25, 2007).

<sup>52</sup> Tr. 288, 292.

Coast Guard did not provide an interpretation of section 5.521 and does not argue appellant should be subject to an additional sanction because he operated the M/V NANTUCKET in May 2009. In addition, the Coast Guard responded to appellant's request for reconsideration following his receipt of the April 2, 2009 letter, by reaffirming its position that appellant was not competent.<sup>53</sup>

As indicated above, we find under section 5.31 and NVIC 04-08 appellant is not competent to hold a Merchant Mariner License. Therefore, we need not reach the issue of whether appellant's operation of the M/V NANTUCKET after receiving the Coast Guard's April 2009 letter was an act of incompetence.

*C. Rehabilitation Act of 1974*

Finally, appellant contends the Rehabilitation Act prohibits the Coast Guard from disqualifying appellant from serving as a merchant mariner. In this regard, the Act states, “[n]o *otherwise qualified individual* ... shall solely by reason of his or her disability be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under ... any program or activity conducted by any Executive Agency.”<sup>54</sup> The Coast Guard argues the Rehabilitation Act does not apply to appellant because he has not shown he is qualified for the protection of the Act. The term “otherwise qualified individual,” as stated in the Act, is defined as a person who is able to meet all a program's requirements in spite of his or her disability.<sup>55</sup> In the case at issue here, appellant is not an “otherwise qualified individual.” According to the Court of Appeals for the District of Columbia Circuit, the Rehabilitation Act does not apply to

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<sup>53</sup> Tr. 265, 268.

<sup>54</sup> 29 U.S.C. § 794 (emphasis added). Later, through the Americans with Disabilities Act in 1990, Congress required all public entities to refrain from discrimination. 42 U.S.C. § 12132.

<sup>55</sup> Buck v. U.S. Dept. of Transportation, 56 F.3d 1406, 1408 (D.C. Cir. 1995).

preclude agencies from applying a “general rule” of exclusion when an individual simply does not fulfill a certain safety standard. In this regard, the Court of Appeals has stated:

Where the agency has established a certain safety standard ... and there is no way in which an individual with a certain handicap can meet that standard, the law does not require the pointless exercise of allowing him to try. In this case the agency has reasonably determined—at least until it is presented with evidence to the contrary—that in order to operate a vehicle safely a driver must be able to hear with a certain acuity.<sup>56</sup>

In light of this opinion in Buck, we affirm the Commandant’s conclusion that appellant is not a qualified individual under the Rehabilitation Act. Appellant does not dispute he has an ICD, nor does he dispute the evidence Dr. Hall summarized, in detail, contained in his medical record showing he has a serious heart condition. Appellant also does not dispute NVIC 04-08 specifically lists his condition as one that precludes a waiver.

Based on the foregoing, we find the Commandant did not err in affirming the law judge’s conclusions.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Appellant’s appeal is denied; and
2. The Vice Commandant’s appeal decision affirming the law judge’s decision and order is affirmed.

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

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<sup>56</sup> Id.

**UNITED STATES OF AMERICA**  
**DEPARTMENT OF HOMELAND SECURITY**  
**UNITED STATES COAST GUARD**

UNITED STATES OF AMERICA	:	DECISION OF THE
UNITED STATES COAST GUARD	:	
	:	VICE COMMANDANT
v.	:	
	:	ON APPEAL
MERCHANT MARINER LICENSE	:	
&	:	NO. 2698
MERCHANT MARINER DOCUMENT	:	
	:	
	:	
<u>Issued to: JAMES BRUCE HOCKING</u>	:	

This appeal is taken in accordance with 46 U.S.C. § 7701, *et seq.*, 46 C.F.R. Part 5, and the procedures set forth in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter “D&O”) dated January 4, 2011, Michael J. Devine, an Administrative Law Judge (hereinafter “ALJ”) of the United States Coast Guard, ordered the revocation of the Merchant Mariner License of Mr. James Bruce Hocking (hereinafter “Respondent”) upon finding proved one charge of *incompetence*.

The specification found proved alleged that, after Respondent submitted a completed Merchant Mariner Physical Examination Report (Form CG-719K) to the Coast Guard on December 4, 2008, the National Maritime Center (hereinafter “NMC”), on April 2, 2009, informed Respondent that he was not medically fit for merchant mariner duties due to a heart condition and the placement of an Implantable Cardioverter Defibrillator (hereinafter “ICD”). Thereafter, on multiple occasions between May 18, 2009, and May 31, 2009, Respondent served as Master of the M/V NANTUCKET, a Coast Guard-inspected passenger ferry, upon the waters of Nantucket Sound. The specification alleges that by so operating the vessel while not medically fit to do so, Respondent committed an act of *incompetence*.

**FACTS**

The following facts are taken from the ALJ's Findings of Fact.

At all times relevant herein, Respondent was the holder of the Coast Guard-issued credentials at issue in this proceeding. [D&O at 8]

Every mariner holding a license or endorsement as a first-class pilot is required to have a thorough medical examination each year. [D&O at 9; 46 C.F.R. § 11.709] The results of this medical examination are recorded on a "Merchant Mariner Physical Examination Report" (Form CG 719K). [D&O at 9] On December 4, 2008, Respondent submitted his yearly Form 719K to the Coast Guard. [D&O at 8] On April 2, 2009, via letter, the Coast Guard NMC informed Respondent that he was found to be not medically fit for merchant mariner duties due to the fact that he had a heart condition and an ICD. [D&O at 24; Coast Guard Exhibit (hereinafter "CG Ex.") 3] Respondent nevertheless served as Master of an inspected passenger ferry, the M/V NANTUCKET, on various occasions between May 18, 2009, and May 31, 2009. [D&O at 9, 24]

In March 1995, Respondent suffered an episode of ventricular tachycardia.<sup>1</sup> [D&O at 8; Transcript of the Proceedings (hereinafter "Tr.") at 73-74, 251-52] When ventricular tachycardia occurs, one of the ventricles of the heart beats on its own, whereas normally, electrical impulses travel from the upper chamber of the heart to the lower chamber. [D&O at 8; Tr. at 73] Ventricular tachycardia can occur at any time independent of exertion and presents a risk of sudden cardiac death and incapacitation. [D&O at 8-9; Tr. at 73, 80]

After Respondent's initial episodes of ventricular tachycardia occurred in 1995, it was determined that Respondent suffers from ischemic cardiomyopathy, a weakening of the heart muscles caused by lack of blood flow to the heart muscles. [D&O at 8; Tr. at 59]

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<sup>1</sup> He suffered additional episodes of ventricular tachycardia in 1995 and in November of 2000. [Tr. at 72-74, 81] These are not mentioned in the ALJ's Findings of Fact.

The term “ejection fraction” refers to the percentage of the blood volume that is ejected on each stroke or squeeze of the heart relative to the amount of blood that comes into the heart. [D&O at 8; Tr. at 77] A normal ejection fraction is typically in the 55 to 60 percent range. [*Id.*] An ejection fraction below the normal range is indicative of a heart that is not pumping as well as it should. [*Id.*] Respondent’s medical records show that his ejection fractions have been measured at 45 percent, 38 percent, 35 percent and 32 percent. [D&O at 8; Tr. at 78, 86-89, Coast Guard Exhibits (hereinafter “CG Ex.”) 6, 9]

People with ischemic cardiomyopathy or low ejection fractions are at risk of sudden cardiac death or incapacitation due to ventricular arrhythmias. [D&O at 8; Tr. at 59-60, 88-90, 97-99]

After experiencing ventricular tachycardia in 1995, Respondent had an ICD surgically placed. [D&O at 9; Tr. at 55-63, 254; CG Ex. 1] An ICD is akin to an electrical generator that is designed to detect abnormal rhythms and then provide an electrical shock to correct those rhythms; it is also designed to treat ventricular fibrillation. [D&O at 9; Tr. at 60-62] The placement of an ICD does not eliminate the underlying condition of ischemic cardiomyopathy or the associated risk for a potentially lethal arrhythmia. [D&O at 9; Tr. at 61-63] An ICD has the potential to cause incapacitation because the shock to the heart, if the ICD is in defibrillator mode, can cause an incapacitating event in and of itself. [D&O at 9; Tr. at 61-62] If the ICD fails to “fire,” the heart rate could result in incapacitation or even death. [*Id.*] Also, the electrical devices of an ICD may be subject to electrical and magnetic interference by shipboard electrical devices. [D&O at 9; Tr. at 62]

### **PROCEDURAL HISTORY**

On March 23, 2010, the Coast Guard filed a Complaint against Respondent’s Coast Guard-issued credentials, alleging that Respondent was physically incompetent and unfit to perform the duties associated with his mariner credentials due to his ICD and underlying cardiac condition. On April 9, 2010, Respondent filed an Answer to the Complaint wherein he admitted all jurisdictional allegations and admitted, in part, and denied, in part, the Complaint’s factual

allegations. Respondent denied that he was physically incompetent or unfit for merchant mariner duties.

The hearing in the matter convened on September 23, 2010, in Boston, Massachusetts. [D&O at 6] The Coast Guard was represented by Mr. Gary F. Ball and Investigating Officer Eric A. Bauer, of the Coast Guard Suspension and Revocation National Center of Expertise. [Id.] Mr. William Hewig, III, Esq. of Kopelman and Paige, P.C., appeared on behalf of Respondent. [Id.] The Coast Guard offered the testimony of one witness during its case-in-chief and fifteen exhibits that were entered into the record. [Id.] Respondent offered his own testimony and the testimony of five witnesses and offered forty-one exhibits that were entered into the record. [Id.]

The ALJ issued his D&O on January 4, 2011. Respondent filed his Notice of Appeal on January 4, 2011, and perfected his appeal by filing an Appellate Brief on March 4, 2011. The Coast Guard filed a Reply to Respondent's Appellate Brief on April 8, 2011. For its part, the Coast Guard filed a Notice of Appeal on January 31, 2011. The Agency perfected its appeal by filing an Appellate Brief on March 3, 2011. Accordingly, both appeals are properly before me.

### **BASES OF APPEAL**

Both Respondent and the Coast Guard appeal the ALJ's D&O. Respondent raises the following bases of appeal:

- I. *The ALJ's conclusion of Law No. 8 and related finding of fact No. 5 are not in accordance with applicable law, precedent, and public policy because they failed to meet the Coast Guard's Burden of Proof, it ignores Commandant Appeal Decision precedents and the plain language of 46 C.F.R. § 5.31, and violates law and public policy by unlawfully enlarging a regulation by judicial fiat;*
- II. *The ALJ's conclusion of law Nos. 5 and 8 are not in accordance with applicable law, precedent and public policy because the Commandant's Medical Waiver denial of February 15, 2010, upon which conclusion Nos. 5 and 8 is based, was concluded in violation of the Rehabilitation Act of 1974 and the Due Process provision of the Fifth Amendment of the United States Constitution;*

- III. *The ALJ's findings of fact no. 26 and subsidiary findings Nos. 8, 11, 12, 14, and 16 are not supported by substantial evidence because they relied on testimony that was uninformed, incomplete, unresponsive, incompetent and based upon a journal article that on its face was irrelevant and did not apply to Captain Hocking's situation; and*
- IV. *Because it relies for support on facts, unsupported by substantial evidence and conclusions of law not in accord with law, precedent and public policy, the ALJ's Decision and Order is an abuse of discretion, arbitrary and capricious.*

The Coast Guard simultaneously appeals and raises the following basis of appeal:

*The ALJ abused his discretion by making the revocation Order applicable to one, but not all, of Respondent's credentials. In so doing the ALJ failed to follow the plain language of 46 C.F.R. § 5.567(b), and the Commandant's clear guidance on the interpretation and application of this regulatory language.*

## OPINION

### RESPONDENT'S APPEAL

#### I.

*The ALJ's findings of fact no. 26 and subsidiary findings Nos. 8, 11, 12, 14, and 16 are not supported by substantial evidence because they relied on testimony that was uninformed, incomplete, unresponsive, incompetent and based upon a journal article that on its face was irrelevant and did not apply to Captain Hocking's situation.*

I first address Respondent's third basis of appeal because it attacks the expert testimony that is fundamental to the case. I consider the fourth basis of appeal at the same time, as it is an extension of the third. In summary, Respondent complains that the ALJ's Findings of Fact 8, 11, 12, 14, 16, and 26 and Ultimate Findings and Conclusions 5 and 8 are not supported by substantial evidence, particularly in that the Coast Guard's medical witness based his testimony upon an irrelevant journal article.

The ALJ found, in Finding of Fact number 26, "Based on the underlying heart condition documented in Respondent James Bruce Hocking's medical record, including the 2008 719K there is sufficient information to support the Coast Guard's Finding that Respondent was not fit for duty." [D&O at 9]

The ALJ made other Findings of Fact that Respondent characterizes as Subsidiary.

The ALJ found in Finding of Fact number 8 that the Respondent “has a heart condition diagnosed as ischemic cardiomyopathy, which is a weakening of the heart muscles caused by lack of blood flow to the heart muscles.” [D&O at 8] He found in Finding of Fact number 11: “The term ‘ejection fraction’ refers to ‘the percentage of the blood volume that’s ejected on each stroke or each squeeze of the heart relative to the amount of blood that comes into the heart’” and that “[a]n ejection fraction below the normal range is indicative of a heart that is not pumping as well as it should.” [Id.] He found in Finding of Fact number 12: “Normal ejection fraction is typically in the 55 to 60 percent range.” [Id.] In Finding of Fact number 14, he found: “People with ischemic cardiomyopathy and/or low ejections fractions ‘are at a risk of sudden cardiac death due to ventricular arrhythmias’”, and in Finding of Fact number 16 that the “danger of ventricular tachycardia is that it ‘presents a risk for sudden cardiac death and incapacitation.’” [Id.]

Respondent argues in his third basis of appeal that these Findings of Fact are not supported by substantial evidence in the record.

The ALJ found further, as Ultimate Finding of Fact & Conclusion of Law number 5:

Respondent James Bruce Hocking’s Implantable Cardioverter Defibrillator (ICD) and underlying cardiac condition, as documented in the Physical Examination Report submitted on December 4, 2008, render him physically incompetent and unfit for merchant mariner duties associated with his Coast Guard-issued Merchant Mariner’s License.

[D&O at 24]

The ALJ found in Ultimate Finding of Fact & Conclusion of Law number 8 that Respondent operated a vessel at diverse times under the authority of his license while medically incompetent. [D&O at 24-25]

I note that the ALJ's Finding of Fact number 26, insofar as it addresses the Coast Guard's finding that Respondent was unfit, is not critical to this case. The Coast Guard's finding that Respondent was not fit for duty set in motion the events culminating in the charge and the proceeding herein, but it is not determinative of the question of whether Respondent committed an act of incompetence so as to be liable to revocation of his license.<sup>2</sup> The balance of Finding of Fact 26 relates directly to Ultimate Finding/Conclusion 5.

The testimony of the Coast Guard's expert, Dr. Hall, was the principal basis for Findings of Fact numbers 8, 11, 12, 14 and 16. [Tr. at 59-60, 73, 77, 88-90] Finding of Fact 8, as it relates to the existence of cardiomyopathy, is documented in an exhibit to whose admission Respondent did not object. [CG Ex. 1] The balance of the finding defines the condition, Finding of Fact 11 defines ejection fraction, and Finding of Fact 12 posits the normal range for the ejection fraction. Nowhere in the record or his brief does Respondent provide support for his summary assertion that these findings are not supported by substantial evidence and he appears to have equally relied on them. I conclude they are supported by substantial evidence. Findings of Fact 14 and 16 relate directly to Ultimate Finding/Conclusion 5 and are discussed below.

The Coast Guard's case turns on Dr. Hall's testimony in which he interprets the significance of the medical data concerning the Respondent and concludes that the risk of sudden cardiac death is substantial.

Dr. Hall was the Chief of the Medical Evaluation Division at the Coast Guard's National Maritime Center in 2009. [Tr. at 40] He is board-certified in occupational medicine. [Tr. at 44] Dr. Hall has "over 20 years of fitness for duty experience ranking from bus and truck drivers, to pilots, air traffic controllers, active duty members, DOD members, and more recently Merchant Mariners." [Tr. at 46] He has five years of experience with merchant mariner medical evaluations. [Tr. at 46] Occupational medical doctors like Dr. Hall "receive specific training and experience in fitness for duty determination examinations and return to work evaluations." [Tr. at 45]

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<sup>2</sup> Likewise, if I were to reverse revocation of Respondent's license for insufficient evidence, that action would not determine whether Respondent's license may be renewed when it expires.

The primary concern in a mariner's fitness for duty determination is risk to maritime and public safety. [Tr. at 45]

Assessing risk in this case began with reviewing Respondent's medical condition. Dr. Hall reviewed the factual information described at the beginning of this opinion. He also testified that the medications that Respondent is currently taking (Lipitor, Coreg, Tikosyn and Monopril) were significant to a fitness-for-duty evaluation. [Tr. at 56-58] Tikosyn was of particular concern because "it's used to treat ventricular arrhythmias, and those are serious issues, but the medication can actually cause ventricular arrhythmias, so it has to be used very carefully." [Tr. at 58] In addition to the 1995 instances of ventricular tachycardia, Dr. Hall testified that Respondent's medical records showed that he had an episode of ventricular tachycardia in November of 2000. [Tr. at 81; CG Ex. 7] This event was of concern to the doctor because "it indicates that he is still having ventricular tachycardia." [Tr. at 81] While Respondent's ejection fraction was reported to be 45% in 1995,<sup>3</sup> it declined to 38% according to a report in 2009. [Tr. at 77-78, 84-87; CG Ex. 6, 9] It was reported to have been 32% in 2007. [Tr. at 88-89, CG Ex. 9] In the doctor's words:

the low ejection fraction in and of itself can cause somebody to have less ability to exert themselves. It can result in shortness of breath; it can result in syncope on exertion. Additionally, when you have ejection fractions in that sort of range, the heart muscle is thick, and it can develop these bad ventricular arrhythmias also resulting in incapacitation or even death.

[Tr. at 89-90]

Dr. Hall concluded that the conditions that Respondent presents are significant and that they pose a risk of sufficient magnitude that they render him not fit for duty. He concluded that Respondent "has an underlying heart condition that in and of itself is disqualifying due to the ejection fraction." [Tr. at 97] Further, the doctor testified: "He's had an episode of ventricular tachycardia which is disqualifying in and of itself and then he has the ICD device which can also be associated with incapacitation which is also disqualifying." [Tr. at 98] Dr. Hall testified that

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<sup>3</sup> Dr. Hall's reference to a 45% ejection fraction was based on Exhibit 6 which dates from 1998. Exhibit 6 reflects that the fraction was reported during testing in connection with the implantation of the ICD in 1995.

Respondent's condition places him "at risk for incapacitation and sudden cardiac death even with the ICD." [Tr. at 97] Testifying that an ICD does not reduce the risk for development of a potentially lethal arrhythmia, but rather is just designed to treat them if they arise, Dr. Hall concluded that Respondent "represented a risk to maritime and public safety." [Tr. at 63] An additional concern for him was that the electrical devices of an ICD may be subject to electrical and magnetic interference by shipboard electrical devices. [Tr. at 62] He testified, "[T]his is not a borderline case at all," and "To me this represents a clear risk to maritime public safety due to his current condition." [Tr. at 98]

In looking at the fitness for duty of a person, the nature of the endorsement that the person holds would, Dr. Hall reasoned, factor into a determination as to fitness for duty because "we're worried about risk to maritime and public safety, so a pilot or a master would be of more concern than perhaps somebody who's working on the deck who's not in charge of vessel navigation." [Tr. at 66-67] Dr. Hall further testified that Respondent's present ability to perform the duties associated with his Merchant Mariner Credential would not change his mind as to Respondent's medical fitness. [Tr. at 97] Dr. Hall stated: "His ability to perform his daily functions is one consideration, but he needs to be able to do that without representing a risk to maritime and public safety. He has not been able to show that." [*Id.*] Moreover, Dr. Hall stated that Respondent is a risk because "[h]e's still at risk for incapacitation and sudden cardiac death even with the ICD." [*Id.*]

Respondent challenges Dr. Hall's testimony as *inter alia* incompetent and based upon a journal article that on its face was irrelevant and did not apply to Respondent's situation.

In assessing Respondent's condition, Dr. Hall reviewed NVIC 04-08, "Medical and Physical Evaluation Guidelines for Merchant Mariners," which was promulgated, in part, for public safety reasons in response to the findings of a National Transportation Safety Board investigation into a Staten Island ferry allision that occurred after the assistant captain passed out and became incapacitated. [Tr. at 50, 63-64; D&O at 13-14; *see* <http://www.nts.gov/doclib/reports/2005/MAR0501.pdf> at 55] NVIC 04-08 is not a standard or policy but a guideline for evaluation. [Tr. at 158] Dr. Hall testified that in addition to reading

Respondent's physical examination report, which he would have done in five to ten minutes, he conducted additional research for "probably several hours." [Tr. at 108] This research included researching Respondent's medications. [Tr. at 109.] He testified that there "are probably 100 articles" addressing drivers of commercial vehicles with ICDs, and said that at the time of his review of Respondent's record, he believed that he "reviewed some of the papers that were cited in the expert panel" reported in Exhibit 12. [Tr. at 147-149] The source for his opinion concerning potential interference of shipboard electrical devices with the ICD was "extensive review in the literature" and literature presented at a conference in March 2010. [Tr. at 104-105] Dr. Hall testified he would "regularly consult expert panel recommendations," and he responded in the affirmative when asked whether Exhibit 12 would be one of those documents the he would have normally reviewed. [Tr. at 93-94] Exhibit 12 is "Expert Panel Recommendations – Cardiovascular Disease and Commercial Motor Vehicle Driver Safety," Federal Motor Carrier Safety Administration, April 10, 2007.

Respondent asserts: "As a non-cardiologist, Dr. Hall's purported expertise on this subject obviously came in its entirety from the Federal Motor Carrier Safety Administration's [hereinafter "FMCSA"] Expert Panel Recommendations (I.O. Ex. 12), one article." [Respondent's Appellate Brief at 24] He contends Exhibit 12 is intended "to be guidelines for persons with cardiovascular disease." [*Id.* at 25] Dr. Hall testified that cardiovascular disease is "some condition to the coronary arteries causing a lack of blood flow," and conceded that while Respondent has cardiomyopathy, he did not know whether Respondent has cardiovascular disease. [Tr. at 133-134] Accordingly, Respondent contends that "the report is irrelevant to Capt. Hocking's medical condition." [Respondent's Appellate Brief at 38] Respondent ultimately concludes: "The testimony of a non-cardiologist, who based his cardiology opinion on the findings and recommendations of an irrelevant journal article that does not apply to Capt. Hocking's medical condition, is not substantial evidence." [*Id.* at 40] Therefore, Respondent contends that findings of fact based on such opinion must be reversed. [Respondent's Appellate Brief at 40] I do not agree.

Respondent has focused on Exhibit 12, so I will discuss it. Exhibit 12 has two principal parts: recommendations for changes to preexisting FMCSA guidelines concerning the fitness of

commercial vehicle drivers, and appendices that include a “Findings of Evidence Report.” Although the scope of some of the experts’ observations in Exhibit 12 reaches persons who may not have cardiovascular disease, most of Exhibit 12 does not appear to relate directly to somebody with Respondent’s conditions (e.g., while the experts discuss cardiomyopathy in one place, Respondent suffers from another form, according to Dr. Hall. [Tr. at 157]). However, the appendix containing the Findings of Evidence Report responded to questions from FMCSA about risk concerning different issues. In the appendix, Question 4 asked about “the risk of sudden incapacitation or sudden death following implantation of an ICD.” [CG Ex. 12 at 25] The experts report that the data in several studies were insufficient to determine whether crashes could be directly attributed to cardiovascular disease or implanted ICDs. Quantitative assessment of available data did suggest that approximately 6.3% of individuals with an ICD will experience an ICD discharge while driving. [CG Ex. 12 at 31] Dr. Hall testified that 6.3% is “huge in the public safety arena,” although he acknowledged that a discharge may or may not be debilitating. [Tr. at 141] Notwithstanding the appendix, the principal part of Exhibit 12 – recommended changes to guidelines – recommends retaining the preexisting guideline that flatly precluded *any* individual with an ICD from being certified to drive a commercial motor vehicle. That appears to support Dr. Hall’s testimony concerning ICD risk.

At one point in his testimony, when asked whether he would have come to the same conclusion regarding Respondent’s fitness, absent NVIC 04-08, Dr. Hall testified, “I would have just used The Federal Motor Carrier expert panel information.” [Tr. at 99] The context of the question and the answer was Dr. Hall’s initial evaluation of the file. I cannot conclude that Dr. Hall’s expert opinion, delivered at the hearing and on which the ALJ relied, was exclusively based on Exhibit 12. Rather, the totality of Dr. Hall’s detailed testimony, extending over 127 pages in the record, addressed a wide range of issues and suggests his opinion was based on more than that one exhibit.

While Dr. Hall is board-certified in occupational medicine, he is not a board-certified cardiologist and he did not consult with any cardiologist concerning this case. [Tr. at 101] Nevertheless, the ALJ credited Dr. Hall’s expertise, apparently finding Respondent’s cross examination inadequate to impeach him. Moreover, Respondent offered no evidence suggesting

that a physician with Dr. Hall's qualifications is incompetent to render an opinion concerning the matters to which he testified. Indeed, Respondent offered no expert medical or scientific testimony concerning this or, for that matter, the medical issues that are at the core of this case.

In Coast Guard Suspension and Revocation cases, the trier of fact is the judge of credibility and determines the weight to be given the evidence. Appeal Decision 2685 (MATT) (citing Appeal Decisions 2382 (NILSEN), 2365 (EASTMAN), 2302 (FRAPPIER), 2290 (DUGGINS), 2156 (EDWARDS) and 2017 (TROCHE)). "The Judge's findings of fact will only be altered if determined to have been arbitrary and capricious as a matter of law." Appeal Decision 2018 (GOODWIN).

In this case, after addressing at length the evidence presented through the testimony of Dr. Hall, the ALJ expressly stated: "Upon review of all testimony and evidence contained within the record, the court finds Dr. Hall's testimony concerning Respondent's medical condition to be persuasive." [D&O at 16] The fact that Dr. Hall was not a cardiologist does not impeach his qualifications based on his own medical training and experience. The record shows that the ALJ considered both the fact that Dr. Hall is board-certified in occupational medicine and the exhaustive nature of his testimony in finding that testimony to be credible. I therefore conclude that the record contains substantial evidence to support the ALJ's conclusion that Respondent, due to his current medical situation, poses a risk to maritime safety. The ALJ did not err in finding Dr. Hall's testimony to be both reliable and credible. Contrary to Respondent's assertions, the ALJ's Findings of Fact no. 26 and subsidiary findings Nos. 8, 11, 12, 14, and 16 are supported by substantial evidence in the record.

## II.

*The ALJ's conclusion of Law No. 8 and related finding of fact No. 5 are not in accordance with applicable law, precedent, and public policy because they failed to meet the Coast Guard's Burden of Proof, it ignores Commandant Appeal Decision precedents and the plain language of 46 C.F.R. § 5.31, and violates law and public policy by unlawfully enlarging a regulation by judicial fiat.*

Citing Appeal Decision 2547 (PICCIOLO), Respondent contends that in order for a mariner to be found incompetent, he must be shown to be presently incapable of performing the

duties associated with his mariner credential. Respondent argues: “The plain meaning of the words in the Coast Guard’s regulatory definition of incompetence, which state: ‘incompetence is the inability on the part of a person to perform required duties’ does not permit an Investigating Officer or an ALJ to engage in future speculations, nor to rely on a potential debilitating condition.” [Respondent’s Appellate Brief at 5] Respondent notes, however, that several Commandant Decisions on Appeal carve out “a narrow exception to the rule precluding future speculation, in cases involving claims of disabling mental illness or impairment, or psychiatric disorders.” [Respondent’s Appellate Brief at 6]

46 C.F.R. § 5.31 defines incompetence as “the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof.”

In the *Picciolo* case, Mr. Picciolo suffered from diabetes and was found by a Coast Guard ALJ to be physically incompetent to hold a Merchant Mariner Credential due to episodes of high blood sugar, irrespective of the fact that the most recent fitness for duty assessment by a physician had found him fit for duty. Following Mr. Picciolo’s appeal, the Commandant remanded the case to the ALJ because the record lacked evidence of whether Mr. Picciolo’s blood sugar level could be controlled only through a periodic monitoring program, whether such a program was compatible with available medical services at sea or ashore, whether such a program would unduly interfere with Mr. Picciolo’s ability to perform his duties, and the level of risk that Mr. Picciolo would pose to fellow crewmembers and a ship at sea if he failed to follow a prescribed medical program.

The *Picciolo* decision stated that although the ALJ had correctly found the respondent’s diabetic condition had been poorly controlled in the past, the medical testimony from his more recent medical care indicated that his condition was then satisfactorily controlled and “it could not be reasonably inferred that he would return to a poorly controlled level should he return to sea.”

Contrary to Respondent's argument, the definition of incompetence set forth in 46 C.F.R. § 5.31 does not "speak[] entirely in the present tense," and the *Picciolo* case does not suggest that it does. [Respondent's Appellate Brief at 2] Rather, *Picciolo* supports the proposition that a mariner's medical competence must be determined not based solely on a past incident but by reference to competent medical testimony concerning the individual's condition and necessary treatment, and the risks they present.

In the instant case, there is extensive medical testimony on the individual's condition, how it is being treated, and the risks of the condition and treatment, discussed in section I of this opinion. This testimony makes the case similar to Appeal Decision 2664 (SHEA), cited by Respondent. *Shea* concluded that a mental disorder rendered a mariner unfit based on the risk of a future mental breakdown. Respondent claims that *Shea* and other cases "carved out a narrow exception to the rule precluding future speculation" in cases of disabling mental illness or impairment, or psychiatric disorders. [Respondent's Appellate Brief at 6] I reject that characterization; the principle controlling *Shea* is not so narrow.

In the *Shea* case, the respondent suffered from bipolar disorder. He abandoned his watch station and acted in an irrational manner during a ship's voyage. Mr. Shea's actions aboard the vessel eventually led to his being relieved of all duties, being placed in restraints, and being confined in his quarters until the end of the voyage. After subsequently receiving medical treatment, Mr. Shea was declared by his physician to be fit for duty because his mental illness was in remission and his symptoms were being treated with prescription medications. Irrespective of this fit for duty determination, the ALJ found that Mr. Shea was incompetent and ordered the revocation of his Merchant Mariner Credentials.

On appeal, Mr. Shea argued that the ALJ erred in finding him incompetent because the record contained substantial evidence to support a conclusion that his mental condition was medically manageable. The *Shea* decision noted that "[a]lthough the original record did not contain evidence as to the impact that a medical monitoring program would have on the mariner's ability to perform the duties associated with his mariner credential in the *Picciolo* case, such evidence was admitted into the record . . ." in Mr. Shea's case. In *Shea*, the ALJ found that

because Respondent remained at a greater risk than the general population for having breakthrough episodes, even if he was fully compliant in his medical regimen, he could not agree with Mr. Shea's physician as to his fitness for duty. This was because Mr. Shea's physician could not state to a reasonable degree of certainty that Mr. Shea would remain asymptomatic even if he continued taking his medication, because the prescription drug that Mr. Shea was taking had the potential to impair his judgment and motor skills and because Mr. Shea would have to remain asymptomatic for five years before contemplating the cessation of his medications. Because the record contained substantial evidence on the manageability of Mr. Shea's condition supporting the ALJ's conclusion, even though the ALJ reached a different conclusion than Mr. Shea's physician, the ALJ's finding that Mr. Shea was incompetent was upheld.

Mr. Shea further argued that the ALJ abused his discretion by incorrectly basing his finding that Mr. Shea was incompetent on "Respondent's risk of future incompetence, rather than the evidence presented which showed that Respondent was competent and able to safely perform his duties as a ship's engineer at the time of the hearing." *Shea* noted, citing Appeal Decision 2181 (BURKE): "Although Respondent argues the contrary, acknowledging and mitigating the risk of a future mental breakdown stemming from a contemporaneous affliction is not without precedent in these proceedings." In short, *Shea* supports the idea that medical incompetence is not restricted to a determination based on apparent fitness for duty at the present moment. It calls for assessment of the risk of impairment of a mariner's ability to safely carry out duties in the future.

In this case, the ALJ discussed Appeal Decision 2547 (PICCIOLO) and Appeal Decision 2664 (SHEA). The ALJ stated: "Unlike the ALJ's initial decision in PICCIOLO, the ALJ's initial decision issued in SHEA 'considered the testimony, evidence, and arguments presented by Respondent regarding the manageability of his mental condition.'" Thus, the ALJ reasoned, "Appeal Decision 2664 (SHEA) distinguished PICCIOLO, and upheld the ALJ's Order revoking Respondent's credentials despite Respondent's claims that his condition was manageable." [D&O at 12]

Respondent here argues that engaging in speculation as to Respondent's future ability to perform the duties associated with his Merchant Mariner Credentials should not be allowed because such a determination is reserved for cases involving severe psychiatric disorders, as was the case in *Shea*. Nothing in *Shea* limits its scope in that manner, and its reasoning ought to apply with equal force in other circumstances that make out a disability presenting a future risk.

I agree that findings as to fitness for duty should not be based on uninformed speculation. However, the record shows that the ALJ here found Respondent incompetent after carefully considering the evidence contained in the record. In finding the incompetence charge proved the ALJ stated:

The highest standard of care is placed on vessel officers for the personal safety of passengers and crew. Respondent's license allows him to be in control of the vessel. His medical condition including his implanted ICD places him at greater risk of heart attack or syncope. The Court finds that the Coast Guard has met its burden in regard to presenting sufficient evidence regarding Respondent's medical condition that the risk of incapacitation of Respondent as holder of an MML constitutes medical incompetence and presents a risk to maritime safety.

[D&O at 15-16] (internal citations omitted). I find that the ALJ did not abuse his discretion or act contrary to Commandant Appeal Decision precedent in so finding. There is substantial evidence in the record to show that Respondent's medical condition and his implanted ICD put him at significant risk of an incapacitating incident, to the detriment of maritime safety. The ALJ did not err in relying on the holding in the *Shea* case and considering the future risk presented by Respondent's condition.

While Respondent was not shown to have suffered incapacitation while performing his duties in the past, the risk that he could become so in the future is too great to ignore. Any other holding would be inconsistent with the safety and security of the maritime environment. The ALJ's conclusion that Respondent is medically incompetent is not in error and will not be reversed on this appeal.

## III.

*The ALJ's conclusion of law Nos. 5 and 8 are not in accordance with applicable law, precedent and public policy because the Commandant's Medical Waiver denial of February 15, 2010, upon which conclusion Nos. 5 and 8 is based, was concluded in violation of the Rehabilitation Act of 1974 and the Due Process provision of the Fifth Amendment of the United States Constitution.*

Respondent contends in his second basis of appeal that the Coast Guard's handling of his medical waiver request violated the Rehabilitation Act of 1974. Respondent argues that because Respondent is a "person with a disability" under the Rehabilitation Act, he is entitled to "an individualized review, or a case-by-case determination" as to his medical waiver request. [Respondent's Appellate Brief at 15] Respondent contends that such an individualized review did not occur in Respondent's case.

The Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors. The standards for determining employment discrimination under the Rehabilitation Act are the same as those used in Title I of the Americans with Disabilities Act (hereinafter "ADA"). 29 U.S.C. § 794(d). A court has noted: ". . . the focus of the Rehabilitation Act is upon providing remedies for individuals who are employees. The Rehabilitation Act and Title I of the ADA are interchangeable in many respects. The ADA requires an employee-employer relationship, and the Rehabilitation Act contemplates the same." *Wojewski v. Rapid City Regional Hosp., Inc.*, 450 F.3d 338, 345 (8th Cir. 2006) (internal citations omitted). Therefore, as the ALJ noted, because "the Coast Guard is not Respondent's employer [and] instead . . . has been designated by Congress to set the standards for licensing merchant mariners to promote safety at sea," Respondent's arguments regarding the application of the Rehabilitation Act are inapposite. [D&O at 20]

Moreover, the Coast Guard's denial of a waiver is not at issue in this case. Although the ALJ discussed the waiver in his D&O, there is ample independent basis in the evidence before him for his finding that Respondent is medically incompetent.

**THE COAST GUARD'S APPEAL**

*The ALJ abused his discretion by making the revocation Order applicable to one, but not all, of Respondent's credentials. In so doing the ALJ failed to follow the plain language of 46 C.F.R. § 5.567(b), and the Commandant's clear guidance on the interpretation and application of this regulatory language.*

The Coast Guard argues that the ALJ erred in failing to revoke Respondent's Merchant Mariner Document (MMD). In this case, the ALJ expressly found that insufficient evidence was presented in the record to justify the revocation of Respondent's MMD. The Coast Guard appeals the ALJ's determination on this point and argues that the ALJ did not have discretion to direct the revocation order at only Respondent's Merchant Mariner License. For the reasons discussed below, I disagree.

Concerning orders issued by ALJs, 46 C.F.R. § 5.567(b) provides: "The order is directed against all credentials or endorsements, except that in cases of negligence or professional incompetence, the order is made applicable to specific credentials or endorsements."

As previously stated, 46 C.F.R. § 5.31 defines incompetence as "the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof."

The ALJ held that the Coast Guard had not established that Respondent's condition was such as to present an unacceptable risk with regard to duties of positions under an MMD, highlighting evidence to the contrary. [D&O at 23] Most prominently, when asked whether the position held by a person with an ICD was a factor, Dr. Hall responded affirmatively and testified that "a pilot or a master would be of more concern than perhaps somebody who's working on the deck who's not in charge of vessel navigation." [Tr. at 66-67] He later testified that the risk presented by Respondent's condition is "a significant concern for a mariner with a pilot endorsement," apparently allowing for the possibility that it was not a concern for an unlicensed person. [Tr. at 98-99] The ALJ also pointed out that some entry-level unlicensed ratings do not require a medical exam, and the requirement for an annual physical did not apply to holders of an MMD. [D&O at 23]

The issue turns on the meaning of “professional incompetence” in 46 C.F.R. § 5.567(b). Since 46 C.F.R. § 5.31 defines incompetence, it is appropriate to consider it in interpreting 46 C.F.R. § 5.567(b). The Coast Guard’s position seems to assume that 46 C.F.R. § 5.31 sets up three separate categories of incompetence: professional, physical, and mental. But the regulation does not use the terms “professional incompetence,” “physical incompetence,” and “mental incompetence.” It refers only to “Incompetence”, describing it in terms of “professional deficiencies, physical disability, mental incapacity, or any combination thereof.” Accordingly, the term “professional incompetence” in 46 C.F.R. § 5.567(b) is novel and undefined, and I will exercise reasoned judgment in construing it, consistent with 46 C.F.R. § 5.31. I note that physical incompetence might well include both “professional deficiencies” and some kinds of “physical disability” affecting certain professional positions, such as the lack of normal color sense essential to performance as a deck officer. *See Appeal Decision 2125 (COPLEY)*. The evidence in this case, explicitly contrasting the level of concern appropriate to a pilot or master with that appropriate to a deck worker, surely calls for a nuanced interpretation of 46 C.F.R. § 5.567(b). Of course, the regulation must be read with an eye to the needs of safety.

In light of the evidence in this case, where there is a lack of evidence that safety would be impaired by Respondent’s retention of his MMD, it is consistent with the intent of 46 C.F.R. § 5.567(b) to place Respondent’s condition in the category of professional incompetence. The ALJ did not abuse his discretion in declining to order the revocation of Respondent’s Merchant Mariner Document.

### CONCLUSION

The ALJ’s findings and decisions are lawful, based on correct interpretation of the law and supported by reliable, probative, and substantial evidence. The hearing was conducted in accordance with the law. The ALJ did not abuse his discretion; his actions were neither arbitrary nor capricious. Accordingly, Respondent’s appeal is without merit.

*Ally Bruce-O'Hara*

**ORDER**

The ALJ's Order, dated January 4, 2011, is AFFIRMED.

*VADM, Vice Commandant*

Signed at Washington, D.C. this <sup>25<sup>th</sup></sup> day of *April*, 2012.

**UNITED STATES OF AMERICA**  
**U.S. DEPARTMENT OF HOMELAND SECURITY**  
**UNITED STATES COAST GUARD**

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**UNITED STATES COAST GUARD**

**COMPLAINANT**

**vs.**

**JAMES BRUCE HOCKING**

**RESPONDENT**

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**DOCKET NO: 2010-0133**  
**CG ENFORCEMENT ACTIVITY NO: 3569505**

**DECISION & ORDER**

**DATE ISSUED: JANUARY 4, 2011**

**ISSUED BY: HON. MICHAEL J. DEVINE**  
**ADMINISTRATIVE LAW JUDGE**

**APPEARANCES:**

**FOR COMPLAINANT**

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## **I. PRELIMINARY STATEMENT**

The United States Coast Guard (Coast Guard) initiated the above-captioned administrative action seeking revocation of Respondent James Bruce Hocking's (Respondent) Coast Guard-issued Merchant Mariner's Document (MMD) and Coast Guard-issued Merchant Marine License (MML) (collectively referred to as Coast Guard-issued credentials). This action is brought pursuant to the legal authority codified at 46 U.S.C. §7703(4) and the underlying regulations as set forth in 46 C.F.R. Part 5.

On March 23, 2010, the Coast Guard filed a Complaint against Respondent's Coast Guard-issued credentials averring Respondent to be physically incompetent and unfit to perform the merchant mariner duties associated with his Coast Guard-issued credentials due to an underlying cardiac condition, including the fact that he has an Implantable Cardioverter-Defibrillator (ICD). As alleged in the Complaint, an April 2, 2009, letter from the National Maritime Center (NMC) advised Respondent that he was not medically fit to perform merchant mariner duties. The Coast Guard further alleged that Respondent committed incompetence by continuing to serve as Master of the M/V NANTUCKET on multiple occasions between May 18, 2009, and May 31, 2009, while medically unfit.

On April 9, 2010, Respondent filed an Answer wherein he admitted the jurisdictional allegations and admitted, in part, and denied, in part, the factual allegations of the Complaint. More specifically, Respondent averred that the occasions at issue occurred during the pendency of his April 25, 2010, request for reconsideration of the NMC's finding that he was not medically fit for duty. However no law or regulation provides any valid legal defense based on seeking reconsideration. Respondent denied

the Coast Guard's allegations that he is not medically fit and further denied that he is medically incompetent. In addition, Respondent asserted matters labeled as affirmative defenses, which are addressed infra.

On April 12, 2010, the Chief Administrative Law Judge (CALJ) assigned the instant matter to the undersigned Administrative Law Judge (ALJ) for adjudication. On April 21, 2010, the parties participated in a pre-hearing telephone conference during which time preliminary matters were discussed and the hearing of this matter was set to commence on June 30, 2010, in Boston, Massachusetts.

On June 2, 2010, the Coast Guard moved for summary decision contending that there was no material issue of fact at issue, to wit: Respondent's continued operation of the M/V NANTUCKET, despite receiving notification that he was found medically unfit to perform merchant mariner duties, constituted incompetence. On June 11, 2010, Respondent filed a response in opposition to the Coast Guard's motion for summary decision and a counter motion for summary decision. On June 22, 2010, the court issued an Order denying the parties' respective motions for summary decision. The court observed that while the Respondent's medical condition was not in dispute, that fact alone was not considered sufficient to dispose of the matter by means of summary decision. Accordingly, the court held that both motions were denied without prejudice pending a hearing and full development of the facts. The parties were encouraged to develop the record through medical testimony or other evidence that would further explain the written documentation regarding Respondent's condition, how such a condition may affect Respondent's fitness for duty and whether Respondent's condition constitutes incompetence. Also on June 22, 2010, the parties submitted a joint motion

seeking to continue the instant matter because Respondent had filed a civil action regarding the Coast Guard's action to revoke his license in the United States District Court in Boston, Massachusetts. The continuance was granted.

On July 21, 2010, the United States District Court for the District of Massachusetts issued an Order denying Respondent's request for review of the Coast Guard's action declaring him medically unfit for merchant mariner duties and denying Respondent's Motion for an Injunction essentially because there was no final agency action on this matter.<sup>1</sup> The hearing date was subsequently rescheduled.

On September 23, 2010, the hearing of this matter commenced in Boston, Massachusetts. The proceeding was conducted in accordance with the Administrative Procedure Act (APA), as amended and codified at 5 U.S.C. §§551-59 and Coast Guard procedural regulations as set forth at 33 C.F.R. Part 20. Gary F. Ball, Esq. and Investigating Officer (IO) Eric A. Bauer, of the Coast Guard Suspension and Revocation National Center of Expertise, appeared on behalf of the Coast Guard. William Hewig, III, Esq. of Kopelman and Paige, P.C., appeared on behalf of Respondent.<sup>2</sup> One witness testified as part of the Coast Guard's case-in-chief; the Coast Guard offered fifteen exhibits into evidence, all of which were admitted.<sup>3</sup> Respondent offered the testimony of five witnesses, as well as his own, and offered forty-one exhibits into evidence, all of which were admitted. Also admitted into the record were two ALJ Exhibits. ALJ

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<sup>1</sup> A copy of the District Court's Order issued on July 21, 2010, is Attachment B of this Order.

<sup>2</sup> Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at \_\_\_\_). Citations referring to Coast Guard Exhibits are as follows: (CG Ex. 1, etc.). Citations to Respondent's Exhibits are as follows: (Resp. Ex. A, etc.) Citations to ALJ Exhibits are as follows: (ALJ Ex. I, etc.).

<sup>3</sup> Prior to the commencement of the hearing, the parties stipulated as to the admissibility of exhibits. (Tr. at 13). However, as noted by the court at the outset of the hearing, "it [is] up to counsel . . . to demonstrate relevance and applicability" of the proffered evidence. The court placed particular emphasis upon the need for testimony to explain relevance of technical medical materials. (Tr. at 30, 32).

Exhibit I is Respondent's Motion for Directed Decision that was filed upon the completion of the Coast Guard's case-in-chief. The court denied Respondent's Motion. (Tr. at 171-175). At the conclusion of the parties' respective oral closing statements, the Coast Guard made an oral motion requesting Respondent's MML and MMD be retained pending the court's decision. ALJ Exhibit II is Respondent's written response to the Coast Guard's motion. The court denied the Coast Guard's Motion and permitted Respondent to retain his MML and MMD during the pendency of the issuance of a Decision and Order in the instant matter. (Tr. at 165-166, 290-293, 305-307).

On October 8, 2010, the parties were served with a copy of the transcript; and, in keeping with the parties' agreement at the close of the hearing, allowed fifteen days to submit a closing brief and proposed findings of facts together with conclusions of law, or both. Upon receipt of the parties' respective arguments, the court closed the administrative record herein as required by 33 C.F.R. §§20.709, 20.903.

## **II. FINDINGS OF FACT**

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire record taken as a whole.

1. The United States Congress has passed comprehensive legislation to promote safety of life and property at sea. See 46 U.S.C. Subtitle II.
2. The Coast Guard is the agency responsible for setting and enforcing standards for Merchant Marine Licenses and Documents including medical standards and guidelines for holders of Merchant Mariner Credentials. 46 U.S.C. Chapters 71 and 73.
3. The Coast Guard has published medical guidelines for Merchant Mariner credentials in Navigation and Inspection Circular 04-08. (CG Ex. 13)
4. The purpose of suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. § 7701 (a); 46 C.F.R. § 5.5.

5. At all times relevant herein, Respondent James Bruce Hocking is the holder of and acting under the authority of his Coast Guard-issued Merchant Mariner's License (MML) and Merchant Mariner's Document (MMD). (Answer; Tr. at 248, 288; Resp. Ex. E and F).
6. On December 4, 2008, Respondent submitted Form CG 719K, "Merchant Mariner Physical Examination Report" to the United States Coast Guard.
7. On March 23, 2010, the Coast Guard charged Respondent James Bruce Hocking with being medically unfit and thereby medically incompetent to perform duties as a licensed mariner.
8. Respondent James Bruce Hocking has a heart condition diagnosed as ischemic cardiomyopathy, which is a weakening of the heart muscles caused by lack of blood flow to the heart muscles. (Tr. at 59).
9. Ischemic cardiomyopathy can result in heart arrhythmia, sudden death and/or incapacitation. (Tr. at 60, 97-99).
10. In March 1995, Respondent James Bruce Hocking suffered an episode of ventricular tachycardia (VT). (Tr. at 251-252).
11. The term "ejection fraction" refers to "the percentage of the blood volume that's ejected on each stroke or each squeeze of the heart relative to the amount that comes into the heart." (Tr. at 77). An ejection fraction below the normal range is indicative of a heart that is not pumping as well as it should (Id.).
12. Normal ejection fraction is typically in the 55 to 60 percent range. (Tr. at 77).
13. Respondent James Bruce Hocking's ejection fractions have been measured at 45 percent, 38 percent, 35 percent and 32 percent. (Tr. at 78, 86-87, 88, 89; CG Ex. 6, 9).
14. People with ischemic cardiomyopathy and/or low ejection fractions "are at risk for sudden cardiac death due to the ventricular arrhythmias." (Tr. at 59-60, 88-90).
15. "In ventricular tachycardia, the ventricle beats on its own" whereas, "[n]ormally, electrical impulses travel from the upper chamber to the lower chamber." (Tr. at 73).
16. The danger of ventricular tachycardia is that it "presents a risk for sudden cardiac death and incapacitation." (Id.).

- ✓ 17. Ventricular tachycardia “can occur at any time independent of exertion . . . [i]t can occur while you’re out shopping; it can occur while you’re exerting yourself.” (Tr. at 80).
- ✓ 18. After experiencing a cardiac event in 1995, Respondent James Bruce Hocking had an implantable cardioverter-defibrillator (ICD) surgically placed. (Tr. at 55-63, 254; CG Ex. 1).
- ✓ 19. The ICD is “an electrical generator... designed to detect abnormal rhythms and then provide an electrical shock to correct those rhythms.” (Tr. at 60-61).
- ✓ 20. The ICD is designed to treat abnormal rhythms and then provide an electrical shock to correct those rhythms, and it’s also designed to treat ventricular fibrillation. (Tr. at 61-62).
- ✓ 21. The ICD does not eliminate the underlying condition of ischemic cardiomyopathy and the risk for a potential lethal arrhythmia. (Tr. at 61-63).
- ✓ 22. The ICD also has the potential to cause incapacitation. The ICD is an electrical device . . . that provides a shock to the heart. (Tr. at 61-62). The ICD’s “shock, if it’s in defibrillator mode, can cause an incapacitating event in and of itself. If [the ICD] fails to fire, that heart rate could result in incapacitation or even death.
- ✓ 23. The electric devices of the ICD may be subject to electrical and magnetic interference by shipboard electrical devices. (Tr. at 62).
- ✓ 24. Pursuant to 46 C.F.R. §11.709, “[e]very person holding a license or endorsement as first class pilot shall have a thorough physical examination each year while holding the license or endorsement.” Id.; §10.709 (2008).
- ✓ 25. Physical examination findings and results are recorded on Merchant Mariner Physical Examination Reports (CG-719K).
26. Based on the underlying heart condition documented in Respondent James Bruce Hocking’s medical record, including the 2008 719K there is sufficient information to support the Coast Guard’s Finding that Respondent was not fit for duty. (Tr. at 62-63, 83-84, 97-99).
27. Since 2009, Respondent James Bruce Hocking has continued to serve on his Merchant Mariner’s License as the Master of the M/V NANTUCKET after receiving notice from the Coast Guard that he was determined to be medically unfit. (CG Exhibit 3, 11, Tr. at 17-20, 288)

### III. DISCUSSION

#### A. **General**

The United States Congress has passed comprehensive legislation expressly charging the Coast Guard with the responsibility to promote the safety of life and property at sea. See generally 46 U.S.C. Subtitle II. “[O]versight of the conduct of mariners is an essential step in fulfilling that congressional mandate.” Appeal Decision 2279 (LEWIS) (1981). Coast Guard Suspension and Revocation proceedings are one of the administrative processes designed to promote safety at sea and maintain standards of competence and conduct. See 46 U.S.C. §7701; 46 C.F.R. §5.5. Pursuant to 46 C.F.R. §5.19, Administrative Law Judges (ALJ) are vested with the authority to conduct hearings and to suspend or revoke a credential for violations arising under 46 U.S.C. §§7703 and 7704.

The APA, as amended and codified at 5 U.S.C. §§551-559, applies to Coast Guard Suspension and Revocation hearings. The APA authorizes imposition of sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative and substantial evidence. 5 U.S.C. § 556(d). The Coast Guard bears the burden of proof to establish that the charges are supported by a preponderance of the evidence. 33 C.F.R. §§ 20.701; 20.702(a).

There is no dispute that the Coast Guard has jurisdiction in this matter. Respondent admitted jurisdiction by Answer and on the record at the hearing. (Tr. at 12-13). With regard to the Complaint’s factual allegations, Respondent admitted receipt of the April 9, 2009, letter from the National Maritime Center (NMC) informing him that

the Coast Guard had determined that he was not medically fit for merchant mariner duties. He also admitted that he continued to serve as Master of the M/V NANTUCKET.

**B. Incompetence**

“Incompetence,” as Coast Guard regulations define that term, is “the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof.” 46 C.F.R. § 5.31.

“The duties required are those which are inherent in the license or document at issue.”

Appeal Decision 2547 (PICCIOLO) (1992); see also Appeal Decision 328

(SKJAVELAND) (1949) (holding that incompetence should be based on a license or certificate holder’s inability to perform duties required by license or certificate.).

All merchant mariners take an oath to faithfully perform their duties. 46 U.S.C. §§ 7105, 7305. “The ability to perform duties without endangering yourself or others is certainly the most minimal requirement of professional competence. Given this statutory and regulatory background, there can be no doubt that an allegation that an individual is unable to safely perform his required duties states a cause for revoking a merchant mariner [credential].” Appeal Decision 2655 (KILGROE) (2006).

In Appeal Decision 2547 (PICCIOLO) (1992), the Commandant remanded an order of revocation where a charge of incompetence was found proved. The Commandant further directed the presiding ALJ to take additional evidence concerning the mariner’s “most recent medical condition, prognosis, and impact any medical monitoring program will have on his ability to perform the functions of his document decision.” Id. Unlike the ALJ’s initial decision in PICCIOLO, the ALJ’s initial decision issued in SHEA “considered the testimony, evidence, and arguments presented by

Respondent regarding the manageability of his mental condition.” Appeal Decision 2664 (SHEA) (2007) distinguished PICCIOLO, and upheld the ALJ’s Order revoking Respondent’s credentials despite Respondent’s claims that his condition was manageable.

Respondent’s past service as a competent and professional mariner is not in issue. Respondent testified that he has served for approximately 38 years as a Coast Guard-credentialed mariner for the Wood’s Hole Steamship Authority without incident. (Tr. At 247-248, 281). Testimony presented at the hearing demonstrates that Respondent’s peers hold him in high esteem. (Tr. at 198-199, 224). However, Respondent’s professional record alone is not a legal defense to the allegation he is medically unfit. All medical evidence of record and the applicable medical standards for mariners must be considered in the interests of safety at sea to determine whether he is physically competent to continue to hold his license and document.

In order to prove incompetence the Coast Guard must prove that Respondent:

- 1) Is the holder of a license, certificate or registry, or document; who:
- 2) is required to perform duties when acting under the authority of that license, certificate of registry, or document; and
- 3) is unable to or disqualified from performing required duties due to professional deficiencies, physical disability, mental incapacity or any combination thereof.

See 46 U.S.C. 7703(1)(B).

There is no dispute regarding the first two elements. Respondent holds a Coast Guard issued license and document and there is no dispute that Respondent was acting under the authority of his Coast Guard issued license and document during the alleged time period. However, the issue remains whether the Coast

Guard has established the third element, that Respondent is physically incompetent.

**C. Medical Standards Established by the Coast Guard**

As discussed supra, Congress has passed comprehensive legislation to promote safety of life and property at sea. See 46 U.S.C. Subtitle II. The Coast Guard, as provided by that authority, is the agency responsible for creating and enforcing standards applicable to those who hold, or apply for, Merchant Mariner Credentials, Licenses and Documents. Such responsibility includes, but is not limited to, establishing physical and medical standards by which all licensed mariners must comply. In keeping with its statutory and regulatory authority, the Coast Guard has developed NVIC 04-08 for use in developing and implementing standards for determining whether a mariner is physically and/or medically qualified and competent to hold a Merchant Mariner's Credential. 46 U.S.C. § 7101; 46 C.F.R. § 10.205.

In keeping with Coast Guard regulations<sup>4</sup>, all mariners who hold a license or endorsement as a First-Class Pilot of vessels 1600 gross tons or more are required to submit to annual physical examinations and provide a completed medical evaluation form (CG-719K) to the Coast Guard. 46 C.F.R. § 11.709. The NMC then reviews the submitted medical evaluations using guidance as set forth in U. S. Coast Guard NVIC No. 04-08 "Medical and Physical Evaluation Guidelines for Merchant Mariner Credentials." 73 FR 56600-01.

NVIC No. 04-08 was promulgated, in part, for public safety reasons in response to the findings of a National Transportation and Safety Board (NTSB) investigation into a

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<sup>4</sup> See CG Exhibits 13, 14 and 15.

Staten Island ferry allision.<sup>5</sup> NVIC No. 04-08 replaced NVIC No. 02-98 and instituted substantial changes to the Coast Guard's evaluation process. (Tr. at 50-54; CG Ex. 14).

**D. Respondent Does Not Meet the Medical Standards Established by the Coast Guard**

NVIC No. 04-08 provides a medical standard that a mariner with an implantable cardioverter defibrillator is generally not eligible for a medical waiver. (CG Ex. 2 and 13). Upon receipt of a mariner's physical evaluation form, the NMC conducts various levels of review. NMC staff initially review medical evaluations and documents; however, "if there's any concern for significant medical conditions or the potential for disqualification, those cases are then referred to" the division chief for mariner medical evaluations. (Tr. at 47).

As established by the Coast Guard, review by a board certified occupational medicine physician of Respondent's 2008 Merchant Mariner Physical Evaluation Report (form CG-719K) resulted in a determination that he did not meet the established medical standards needed to hold a MML. In support of its position, the Coast Guard introduced Respondent's 2008 physical evaluation report (CG Ex. 1); the applicable portions of NVIC 04-08 (CG Ex. 2 and 13) and presented the testimony, via telephone, of Captain Matthew Hall, M.D.<sup>6</sup>

Dr. Hall is a medical doctor, who is board certified in occupational medicine. (Tr. at 40-45). From 2008 to 2010, Dr. Hall served as the division chief for merchant mariner evaluations at the NMC. During that time, Dr. Hall personally reviewed Respondent's case. (Tr. at 47-48). Dr. Hall testified regarding the evidence of record on the effects and

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<sup>5</sup> See Tr. at 50-54; CG Exhibit 14.

<sup>6</sup> Telephonic testimony is expressly authorized by 33 C.F.R. §20.707.

risks associated with Respondent's medical condition of ischemic cardiomyopathy with an ICD. (Tr. at 65-99). Dr. Hall also specifically testified that Respondent's condition presents a risk of sudden death or syncope and that his medical condition places him at substantially greater risk than the general population. (Tr. at 97-99, 123-24).

Additionally, the ICD itself presents risks of going off incorrectly and incapacitating a person even when it does work. (Tr. at 61-62). He also provided testimony that the recent evidence of Respondent's condition showed that his condition had declined in view of a lower ejection fraction and also that the lower ejection fraction (below 40%) is an independent basis to find him medically unfit and disqualified for a merchant mariner officer license. (Tr. at 94-99; CG Ex. 9).

The evidence of record, including Dr. Hall's testimony, distinguishes the instant matter from Appeal Decision 2547 (PICCIOLO) and instead is comparable to the analysis and holding in Appeal Decision 2664 (SHEA); (aff'd by NTSB Order No. EM-204 (2008)). Accordingly, the court finds that the Coast Guard has presented sufficient evidence demonstrating that Respondent's medical condition of ischemic cardiomyopathy with an ICD, along with the recent evidence of a decreased ejection fraction, places him at greater risk than the general public of sudden death or incapacitation. (Tr. at 124, 141, 154-55).

The highest standard of care is placed on vessel officers for the personal safety of passengers and crew. Appeal Decision 2257 (MALANAPHY) (1981) (internal citations omitted). Accord Appeal Decisions 2467 (TOMBARI) (1988); 2464 (FUTCHER) (1987); 2440 (LYONS) (1986); 2439 (FREDERICKS) (1986). Respondent's license allows him to be in control of the vessel. His medical condition including his implanted

ICD places him at greater risk of heart attack or syncope. The Court finds that the Coast Guard has met its burden in regard to presenting sufficient evidence regarding Respondent's medical condition that the risk of incapacitation of Respondent as holder of an MML constitutes medical incompetence and presents a risk to maritime safety.

Although Respondent offered numerous medical records into evidence, he did not present any direct medical testimony by his cardiologist or any other medical doctor. Respondent did extensively cross-examine Dr. Hall regarding the basis for the Coast Guard's determination that he was not medically fit for duty. As part of his case-in-chief, Respondent presented evidence through the testimony of other mariners, as well as his own testimony, regarding his physical capabilities. Additionally, Respondent presented documentary evidence of studies. (Resp. Ex. MM, NN, OO). Respondent's presentation of his excellent work record and his actions in setting up shipboard procedures on M/V NANTUCKET to ensure additional personnel are available to react in the event of his physical incapacitation is commendable. However, Respondent's work record and prophylactic measures do not provide a valid defense to the evidence that he does not meet the physical requirements necessary to hold a merchant marine officer license.

Upon review of all testimony and evidence contained within the record, the court finds Dr. Hall's testimony concerning Respondent's medical condition to be persuasive. Inasmuch as Respondent's medical condition presents a significant risk of sudden death or incapacitation, the evidence is sufficient to support the Coast Guard determination that Respondent is medically incompetent to perform the duties required of his current license a merchant marine officer, Master of Steam or Motor Vessels of any Gross Tons and First Class Pilot of Vessels of Any gross tons. The Coast Guard presented evidence at the

hearing that Respondent continued to operate the M/V NANTUCKET after receiving notice that he was considered to be medically unfit to operate under his MML and Respondent did not dispute that he has continued to serve under his license. (CG Ex. 3, 11, Tr. at 17-20, 288). Respondent stated that he has continued to serve under his license since receiving the April 2, 2009 letter from the Coast Guard. (Tr. at 288). The court finds that the evidence presented constitutes sufficient proof of medical incompetence in violation of 46 U.S.C. § 7703(4) and 46 C.F.R. § 5.31.

**E. The Medical standards Established by the Coast Guard and the determination not to grant a waiver are entitled to deference.**

As discussed supra, NVIC No. 04-08 provides that a mariner with an ICD is generally not eligible for a medical waiver. In addition to finding Respondent medically unfit to serve under his current license, the NMC determined that he was not eligible for a medical waiver. (CG Ex. 3, Resp. Ex. II). On April 2, 2009, Respondent was notified by the NMC of its determination. (*Id.*). On April 25, 2009, and in accordance with 46 C.F.R. § 1.03-40, Respondent requested reconsideration of the NMC's April 2, 2009, findings. (CG Ex. 4). On June 12, 2009, the NMC advised Respondent that the April 2, 2009, decision to deny his request for a medical waiver was upheld. (CG Ex. 8; Resp. Ex. JJ). On October 6, 2009, in accordance with the provisions of 46 C.F.R. § 1.03-40, Respondent appealed the NMC determination to the Commandant's Director of Prevention Policy. (CG Ex. 9). Acting of the behalf of the Commandant, the Director of Prevention Policy denied Respondent's appeal and upheld the NMC's determination. (CG Ex. 10). The Coast Guard contended that such denial constituted final agency action.

Respondent now seeks relief in this administrative forum to find him fit for duty contrary to what is indicated in the medical guidance promulgated and implemented by the Coast Guard so that he may continue to serve under the authority of his Merchant Mariner's License.

However, the Suspension and Revocation administrative hearing process is not an alternative forum to challenge the medical standards adopted by the Coast Guard or to appeal the determination not to grant a waiver. It is within the authority of the Coast Guard to develop and implement medical standards and other qualifications to determine whether a mariner possesses the requisite qualifications and are medically fit for service. See generally 46 U.S.C. § 7101; 46 C.F.R. Part 10. For denial of waivers when applying for or renewing a license the regulations provide a process for appeal of determinations made by the NMC. The Coast Guard has followed that process in regard to the waiver requested, and has denied Respondent's request for a medical waiver. With regard to Respondent's current MML, there is no evidence that an affirmative action to grant a waiver was taken when it was renewed. Likewise, there is no evidence that Respondent did anything different than his previous license renewals. However, since 1998, subsequent issuances of Respondent's MML were not expressly endorsed with a medical waiver.

According to the testimony of Dr. Hall, who reviewed Respondent's medical evaluation and records, the grant of a waiver was not appropriate in view of the risk of sudden death or incapacitation, including the potential for the ICD to malfunction and generate a shock unnecessarily resulting in incapacitation.

Respondent has also asserted that he would accept a restrictive endorsement on his license and has instituted procedures on his vessel (M/V NANTUCKET) to ensure that another pilot qualified mariner is on the bridge in restricted waters along with an able-bodied seaman. The Coast Guard counters that argument with the fact that the shipboard procedures adopted by Respondent are voluntary procedures that could be changed at any time and Respondent's license provides authority to operate as the only licensed officer on a vessel. Similar to the question of waivers, the determination of whether to allow restrictive endorsement on mariner licenses is a matter generally within the discretion of the agency and not a matter for adjudication in Suspension and Revocation proceedings. In keeping with Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) and its progeny, the Coast Guard's determinations in such matters, including interpretation of its own regulations, are entitled to deference. Federal Express Corp. v. Holowecki, 552 U.S. 389; 128 S.Ct. 1147 (2008). The court finds that the Coast Guard has demonstrated that Respondent does not meet the medical standards for retaining his MML and the determination not to grant a waiver is within Coast Guard authority and in the interests of safety at sea. Coast Guard Ex. 14 documents the bases for the change in the medical and physical evaluation process (NVIC 04-08) including the public safety concerns raised because of the incapacitation of the assistant Captain of the Staten Island ferry ANDREW J. BARBERI that led to a marine casualty resulting the death of 10 passengers and injuries to 70 others. The Coast Guard actions in denying a waiver or a restrictive endorsement are not arbitrary or capricious. Cf. Soderback v. Siler, 610 F.2d 643 (9th Cir. 1979).

**F. Respondent's Allegations that the Coast Guard's actions in denying his waiver request violate the rehabilitation act and the U.S. Constitution do not present a defense to incompetence or any basis to circumvent the Medical standards Established by the Coast Guard.**

Although Respondent did not present any specific evidence in support of this argument at the hearing, he has raised this issue in his Answer to the Complaint and in subsequent briefs.

Respondent's Answer and post-hearing submissions attempt to assert that the Coast Guard's actions in seeking to revoke Respondent's license and document are unconstitutional and violate both the Rehabilitation Act and the Americans with Disabilities Act (ADA). Neither challenges to the Constitutionality of Coast Guard determinations on medical issues for merchant mariners, nor other statutes that do not address safety at sea concerns, present a relevant basis for challenge of or defense to the charge of incompetence within the context of a Coast Guard suspension and revocation proceeding. Other than mere reference to the Rehabilitation Act or the ADA, Respondent has not presented any basis for considering such matters in regard to the physical requirements for persons to hold merchant marine credentials. Some positions such as police officer, require physical standards that exceed what is required of the general population. Eg., Joyce v. Suffolk County, 911 F.Supp. 92 (E.D. N.Y. 1996). Such matters would appear to preclude the application of the Rehabilitation Act or the ADA, as Respondent would suggest. Additionally, the Coast Guard is not Respondent's employer, instead the Coast Guard has been designated by Congress the set the standards for licensing merchant mariners to promote safety at sea. 46 U.S.C. § 7101(c); see generally 46 U.S.C. Chapter 71; 46 U.S.C. Chapter 73.

The instant matter is a purely administrative proceeding. The purpose of Suspension and Revocation actions is to “promote safety at sea” and “is limited to compliance with statutes and regulations” designed to that end. It is well established that “Constitutional issues are beyond the province of this administrative body.” Appeal Decision 2632 (WHITE) (2002). Judicial review of non-administrative issues, such as Constitutional concerns, is available in the federal court. Appeal Decisions 2632 (WHITE) (2002); 2599 (GUEST) (1998); 2594 (GOLDEN) (1997); 2560 (CLIFTON) (1995), 2546 (SWEENEY) (1992) aff’d Administrator v. Sweeney, NTSB Order No. EM-176 (1994).

However, with respect to determinations of Constitutionality, the Courts have long held that although an administrative “agency may always determine questions about its own jurisdiction . . . [t]he law has long been clear that agencies may not nullify statutes.” Appeal Decision 2632 (WHITE) (2002) citing Weinberger v. Salfi, 422 U.S. 749, 765 (1975); Johnson v. Robinson, 415 U.S. 361, 368 (1974); Oestereich v. Selective Service Board, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); Public Utilities Commission v. U.S., 355 U.S. 534, 539 (1958).

The court would note that the record herein clearly demonstrates that Respondent’s due process rights have been properly safeguarded within the Coast Guard’s administrative process, a process that has been held to be constitutionally sufficient. Respondent has been afforded the right to appear before a neutral Trier of fact, to face all evidence presented against him, to present evidence on his own behalf, to cross-examine the Coast Guard’s witnesses and to call witnesses on his own behalf.

Respondent is also afforded the right to appeal the instant decision to a higher authority. See Attachments B and E of this Order.

Also, Respondent's underlying argument would imply that there is some conflict of statutes or an ambiguity involving the Coast Guard's authority as the agency responsible for setting and enforcing standards for Merchant Mariner Licenses and Documents, including medical standards and guidelines for holders of Merchant Mariner Credentials. As noted supra, the Coast Guard is not Respondent's employer, instead the Coast Guard is the agency responsible for setting and enforcing standards for Merchant Mariner Licenses and Documents, including medical standards and guidelines for holders of Merchant Mariner Credentials. Where the plain language of a statute is clear there is no need to engage in statutory interpretation or analysis. See 2A Sutherland Statutory Construction 46.1 (7th ed.); Jimenez v. Quarterman, 129 S.Ct. 681, 689 (2009); Dodd v. United States, 545 U.S. 353, 359 (2005); Lamie v. United States Trustee, 540 U.S. 526, 534 (2004). The Coast Guard's actions in applying the authority given to it by Congress is entitled to deference under Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984). Gonzales v. Oregon, 546 U.S. 243, 255-56 (2006) citing United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). Respondent has received the process due under 46 U.S.C. Chapter 77 and the Coast Guard regulations in 33 C.F.R. Part 20 and 46 C.F.R. Part 5.

**G. The Coast Guard did not present evidence sufficient to demonstrate that Respondent is unfit to perform duties for all positions that require service under an MMD.**

As discussed supra, the Coast Guard bears the burden of proof in these proceedings. While the evidence of Respondent's condition that presents a risk of sudden

death or incapacitation is a valid basis to disqualify him from duties as a licensed officer that would be in control of a vessel, the same level of risk to maritime safety has not been demonstrated with regard to duties of an able bodied seaman or other positions under an MMD. There might exist a basis to make such an argument, however, the Coast Guard did not present sufficient evidence to support that argument in this case. Instead, the Coast Guard's witness acknowledged there was more of a concern in the risk to maritime safety for a person with a license as a pilot or a master as compared to someone working on deck that is not in charge of vessel navigation. (Tr. 66-67). The Coast Guard presented only the testimony of Dr. Hall and the various exhibits including the complete NVIC 04-08 which was admitted to the record as CG Exhibit 13. Enclosure (1) to NVIC 04-08 indicates that some entry level ratings do not require a general medical exam or vision and hearing standards. That Enclosure also indicates some positions may require a demonstration of physical ability. However, the Coast Guard did not present any evidence that Respondent could not successfully demonstrate the physical ability required for an MMD. Additionally, the annual physical requirement for pilots does not appear to apply positions requiring only an MMD. Pursuant to 46 C.F.R. § 12.02-27 (2009), a physical exam is only required upon the renewal of an MMD. While the Coast Guard might have had the potential to present evidence in support of physical incompetence for the MMD level, the undersigned cannot find sufficient evidence in the record to support that contention. Respondent testified as to his physical activity level including his activity during relatively recent training. (Tr. at 272). The Coast Guard did not present any specific evidence regarding the standards for positions requiring only an MMD. As noted previously, the Coast Guard bears the burden of proof in these proceedings. In the

limited circumstances of this proceeding, the court finds that the Coast Guard failed to meet the burden of proof in regard to demonstrating evidence that Respondent is medically unfit to retain an MMD.

#### **IV. ULTIMATE FINDINGS OF FACT & CONCLUSIONS OF LAW**

1. At all relevant times herein, including the period between May 18, 2009 and May 31, 2009, and continuing after May 2009, Respondent James Bruce Hocking was the holder of a Coast Guard-issued Merchant Mariner's License and Merchant Mariner's Document.
2. Respondent James Bruce Hocking and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. § 7703(4); 46 C.F.R. Part 5; 33 C.F.R. Part 20; and the APA as codified at 5 U.S.C. §§ 551-59.
3. On December 4, 2008, Respondent James Bruce Hocking submitted a completed Merchant Mariner Physical Examination Report (Form CG-719K), dated October 31, 2008, to the National Maritime Center.
4. On April 2, 2009, the National Maritime Center transmitted a letter to Respondent James Bruce Hocking advising that he was not medically fit for merchant mariner duties due to a heart condition and an Implantable Cardioverter Defibrillator (ICD).
5. Respondent James Bruce Hocking's Implantable Cardioverter Defibrillator (ICD) and underlying cardiac condition, as documented in the Physical Examination Report submitted on December 4, 2008, render him physically incompetent and unfit for merchant mariner duties associated with his Coast Guard-issued Merchant Mariner's License.
6. On multiple occasions between May 18, 2009, and May 31, 2009, Respondent James Bruce Hocking served as Master (Captain) of the M/V NANTUCKET (ON 556196), a Coast Guard inspected passenger ferry, operating upon the waters of Nantucket Sound.
7. Respondent continued to serve as Master of the M/V NANTUCKET after May 2009 and intends to continue service as long as he holds his license.
8. Respondent James Bruce Hocking operated a vessel under the authority of his license while medically incompetent to serve in such capacity in violation of 46 U.S.C. §7703(4) by serving on various dates between May 18, 2009 and May 31, 2009, and has continued to operate the M/V NANTUCKET in 2009 and 2010 as

Master (Captain) of the M/V NANTUCKET (ON 556196) while not medically fit for merchant mariner duties.

## V. CONCLUSION

For the reasons as set forth and discussed supra, the Coast Guard **PROVED** by a preponderance of reliable, probative, and credible evidence that, Respondent violated 46 U.S.C. § 7703(4) and 46 C.F.R. § 5.31. The Coast Guard presented sufficient evidence to prove Respondent is medically incompetent to serve under the authority of his Coast Guard-issued Merchant Mariner's License. Respondent's service as Master of M/V NANTUCKET while medically unfit in May 2009 and after constitutes physical incompetence.

The Coast Guard **DID NOT PROVE** by a preponderance of reliable, probative, and credible evidence that Respondent is incompetent to serve under the authority of his Coast Guard-issued Merchant Mariner's Document.

## VI. SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. 46 C.F.R. § 5.567; Appeal Decision 2362 (ARNOLD) (1984). The selection of an appropriate sanction is the responsibility of the ALJ. 46 C.F.R. § 5.569(a). The nature of this administrative proceeding is to "promote, foster, and maintain the safety of life and property at sea." Appeal Decision 1106 (LABELLE) (1959); 46 U.S.C. § 7701. These proceedings are remedial, not penal in nature, and "are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea." 46 C.F.R. § 5.5. In this matter where the charge of physical incompetence is proved with

regard to Respondent's MML and in consideration of the interests of maritime safety the appropriate sanction is revocation. 46 C.F.R. § 5.569 and Table 46 C.F.R. § 5.569.

## **VII. ORDER**

**IT IS HEREBY ORDERED**, that all elements of the Complaint filed against Respondent James Bruce Hocking on March 23, 2010, with respect to his Coast Guard-issued Merchant Mariner's License are found **PROVED**.

**IT IS FURTHER ORDERED**, that Respondent James Bruce Hocking's Coast Guard-issued Merchant Mariner's License is **REVOKED**.

**IT IS FURTHER ORDERED**, that Respondent James Bruce Hocking is to immediately tender his Coast Guard-issued Merchant Mariner's License to the National Maritime Center, 100 Forbes Drive, Martinsburg, West Virginia 25404. If you knowingly continue to use your Merchant Mariner License, you may be subject to criminal prosecution.

**IT IS FURTHER ORDERED**, that the charge of incompetence with regard to Respondent James Bruce Hocking's Coast Guard-issued Merchant Mariner's Document is **NOT PROVED**. Respondent may retain his MMD.

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**PLEASE TAKE NOTE**, that issuance of this Decision & Order serves as notice of the parties' right to appeal under 33 C.F.R. Part 20, Subpart J. A copy of Subpart J is provided as Attachment E.

**IT IS SO ORDERED.**

  
**Honorable Michael J Devine**  
**Administrative Law Judge**  
**United States Coast Guard**

Date:

## **VIII. ATTACHMENT A: WITNESS & EXHIBIT LISTS**

### **COAST GUARD EXHIBITS**

1. Respondent's Merchant Mariner Physical Examination Report (Form CG-719K) dated 10/31/2008
2. Excerpt of NVIC 04-08 (7 Pgs)
3. National Maritime Center's letter 16720/499027, dated 04/02/ 2009, to Respondent informing him that he is not medically fit for merchant mariner duties.
4. Respondent's request for reconsideration dated 04/25/2009
5. Respondent's medical evaluation by Falmouth Cardiology Associates dated November 2, 1995
6. Letter from Falmouth Cardiology Associates dated 10/13/1998
7. Respondent's 2007 Merchant Mariner Physical Examination Report (Form CG-719K)
8. National Maritime Center's determination on reconsideration dated 06/12/ 2009
9. Respondent's appeal of National Maritime Center's determination dated 10/06/2009
10. CG-54 letter 16721/499027 dated 02/15/2010
11. Official log of M/V NANTUCKET (ON 556196), for the month of May 2009.
12. Article "Expert Panel Recommendations, Cardiovascular Disease and Commercial Motor Vehicle Driver Safety"
13. Complete NVIC NO. 04-08
14. Federal Register Vol. 71, No. 188 / 56998-57000 (Sept.28, 2006) (Notice of proposed Changes to Medical and Physical Evaluation Guidelines for mariners).
15. Federal Register Vol. 73, No. 189 / 56600-56604 (Sept. 29, 2008) (Notice of Final Version of Changes to Medical and Physical Evaluation Guidelines for mariners).

### **COAST GUARD WITNESSES**

1. Captain Matthew Hall, M.D., United States Coast Guard

### **RESPONDENT EXHIBITS**

- A. Chronology Of Events
- B. MML License History Report dated 5/5/2010
- C. Medical Waiver granted 10/28/98
- D. USCG License issued 5/18/2002
- E. USCG License issued 10/15/2007
- F. Copies of Respondent's credentials expiring 2007 & 2012
- G. Merchant Mariner's Physical Exam Report dated 3/19/1998
- H. Merchant Mariner's Physical Exam Report dated 9/25/2002
- I. Merchant Mariner's Physical Exam Report dated 10/17/2003
- J. Merchant Mariner's Physical Exam Report dated 10/20/2004
- K. Merchant Mariner's Physical Exam Report dated 10/14/2005
- L. Merchant Mariner's Physical Exam Report dated 10/5/2006
- M. Merchant Mariner's Physical Exam Report dated 9/19/2007
- N. Merchant Mariner's Physical Exam Report dated 10/31/2008
- O. Steamship Authority Letter dated 4/16/1980

- P. Steamship Authority Letter dated 4/17/1984
- Q. Steamship Authority Letter dated 5/18/1985
- R. Steamship Authority Letter dated 10/28/1988
- S. Steamship Authority Letter dated 9/21/1993
- T. Steamship Authority Letter dated 12/22/1997
- U. Steamship Authority Letter dated 12/5/2002
- V. Steamship Authority Letter dated 7/23/2007
- W. Certificate Of Inspection date 5/15/2009
- X. Letter by Capt. Everett B. Jackson dated 10/3/2009
- Y. Letter by Margaret Dowd dated 10/02/2009
- Z. Letter by Capt. Louis P. Joska dated 10/5/2009
- AA. Letter by Jeremy McKnight dated 10/7/2009
- BB. Letter by Capt. David E. Reid dated 10/3/2009
- CC. NVIC 04-08 Cover Document & Condition No. 81 only
- DD. Letter from Congressman William Delahunt to RADM Dale G. Gabel dated 6/16/2009
- EE. Memorandum from Capt. James Hocking to Congressman William Delahunt
- FF. Letter from Andy Hammond to NMC dated 10/06/2009
- GG. Email from Capt. Matthew Hall to Andy Hammond dated 10/7/2009
- HH. Medical Waiver Denial Letter dated 4/02/2009
- II. Medical Waiver Denial Letter dated 6/12/2009
- JJ. Medical Waiver Denial Letter dated 9/10/2009
- KK. Medical Waiver Denial Letter dated 2/05/2010
- LL. New England Journal of Medicine article dated 8/8/2001
- MM. Journal Of The American College Of Cardiology, V. 50 No. 23 (2007) Pages 2233-2240
- NN. Steamship Authority Letter dated 8/28/1998
- OO. Article entitled "Risk Stratification For Primary Implantation Of A Cardioverter-Defibrillator In Patients With Ischemic Ventricular Dysfunction"

**RESPONDENT WITNESSES**

1. Andrew R. Hammond
2. Philip Parent
3. Charles Gifford
4. Edward Jackson
5. Louis Josca
6. James B. Hocking

**ALJ EXHIBITS**

- I. Respondent Capt. James Bruce Hocking's Motion for Directed Findings at Conclusion of Coast Guard's Case
- II. Respondent's Opposition to CG Motion's for ALJ to Retain License and Credentials



**IX. ATTACHMENT B—DISTRICT COURT ORDER**

Only the Westlaw citation is currently available.  
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(Cite as: 2010 WL 2925903 (D.Mass.))

**This decision was reviewed by West editorial staff and not assigned editorial enhancements.**

United States District Court,  
D. Massachusetts.  
Captain James Bruce HOCKING, Plaintiff,  
v.  
UNITED STATES of America and United States Coast Guard, Defendants.  
**Civil Action No. 10-11007-JLT.**

July 21, 2010.

Jackie A. Cowin, William Hewig, III, Kopelman & Paige, PC, Boston, MA, for Plaintiff.

Christine J. Wichers, United States Attorney's Office, Boston, MA, for Defendants.

*ORDER*

TAURO, District Judge.

\*1 In this action, Plaintiff seeks judicial review of a decision by the United States Coast Guard declaring him medically unfit to perform his duties as a merchant mariner, due to the defibrillator surgically implanted in his chest, and refusing to grant a medical waiver of his condition to enable him to renew his currently active license when it expires in 2012. Specifically, Plaintiff contends that the Coast Guard's decision violated his rights pursuant to Section 504 of the Rehabilitation Act <sup>FN1</sup> because the Coast Guard failed to conduct an individualized inquiry as to whether Plaintiff is otherwise qualified to perform the duties of a merchant marine officer, despite the presence of his defibrillator. Rather, the Coast Guard based its decision entirely upon a recent regulation issued by the Coast Guard Commandant, Navigation and Inspection Circular No. 04-08, which states that the presence of an implantable defibrillator, such as Plaintiff's, is "generally not waivable." <sup>FN2</sup>

FN1. 29. U.S.C. § 794.

FN2. Compl., Ex. B., Navigation and Vessel Inspection **NVIC No. 04-08.**

Presently at issue is *Plaintiff's Motion for Preliminary Injunction* [# 3], by which Plaintiff asks this court to enjoin the Coast Guard from commencing an administrative hearing to determine whether to revoke Plaintiff's merchant marine license based on the prior finding that he is

medically unfit for duty and not entitled to a medical waiver. Because there has been no final agency action with regard to the specific issue Plaintiff asks this court to review, namely whether the Coast Guard's decision as to Plaintiff's medical fitness violated his rights under the Rehabilitation Act, *Plaintiff's Motion for Preliminary Injunction* [# 3] is DENIED.<sup>FN3</sup>

FN3. See *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (holding that an agency action is final only when (a) the action marks the consummation of the agency's decisionmaking process; and (b) the action determines a party's rights or obligations, or legal consequences will flow from it). Because the Coast Guard has not yet had an opportunity to address the Rehabilitation Act challenge presented here, this court cannot conclude that any prior agency action that has occurred marks the consummation of the agency's decisionmaking process on that issue.

Plaintiff's Rehabilitation Act challenge was raised in administrative proceedings for the first time through his answer to the Coast Guard's complaint seeking revocation of Plaintiff's license. The Administrative Law Judge (ALJ) stated by an *Order Denying Motions for Summary Decision* in the revocation action that, in accordance with Plaintiff's due process rights, he will hold an evidentiary hearing to allow the parties to fully develop the facts with regard to Plaintiff's medical condition and how it may affect his fitness for duty.<sup>FN4</sup> In addition to medical evidence, the ALJ directed the parties to provide any and all evidence or authority pertaining "to the changes to medical requirements for Mariners contained in Navigation and Inspection Circular (NVIC) No. 04-08 ... or to Coast Guard regulations in 46 CFR Parts 10 and 11," if such are relevant to Plaintiff's situation.<sup>FN5</sup>

FN4. See Pl.'s Reply Supp. Mot. Prelim. Inj., Ex. 8, *Order Denying Motions for Summary Decision*, 4.

FN5. *Id.*

It is therefore clear from the ALJ's Order that Plaintiff may present and preserve any issues bearing on his medical fitness, as well as the potential license revocation that flows therefrom, in the administrative hearing.<sup>FN6</sup> And if, on completion of the hearing, the ALJ should either reject or fail to address Plaintiff's Rehabilitation Act challenge, Plaintiff is not without an adequate judicial remedy. To the contrary, he may appeal an adverse decision to the Commandant,<sup>FN7</sup> then to the National Transportation Safety Board,<sup>FN8</sup> and finally to the United States Court of Appeals.<sup>FN9</sup>

FN6. As the ALJ pointed out in his Order, the determination not to grant a medical waiver of Plaintiff's implantable defibrillator is not subject to review in a revocation proceeding. But the ALJ explicitly stated that the evidentiary hearing would address the issue of whether Plaintiff is medically fit to perform his duties, despite the absence of a medical waiver.

FN7. See 33 C.F.R. §§ 20.1003(a), 20.1004.

FN8. See 49 U.S.C. § 1133(3); 49 C.F.R. § 825.5.

FN9. See 49 U.S.C. § 1153(a). Notably, upon judicial review, the Administrative Procedures Act requires the Court of Appeals to set aside agency action if it is “not in accordance with law” or is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” See Cousins v. Sec’y of U.S.D.O.T., 880 F.2d 603, 605 (1st Cir.1989) (quoting 5 U.S.C. § 706(2)).

**\*2 IT IS SO ORDERED.**

D.Mass.,2010.  
Hocking v. U.S.  
Slip Copy, 2010 WL 2925903 (D.Mass.)

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**X. ATTACHMENT C—PARTIES’ PROPOSED FINDINGS OF FACT**

**Coast Guard’s Proposed Findings of Fact**

1. On December 4, 2008, Respondent submitted a “Merchant Mariner Physical Examination Report,” form CG-719K, to the United States Coast Guard (USCG). CG Ex. 1. **ACCEPTED & INCORPORATED**
2. Respondent’s 2008 719K noted that Respondent had heart disease and an implantable cardioverter defibrillator (ICD). CG Ex 1. **ACCEPTED & INCORPORATED**
3. A Coast Guard credentialed mariner with Respondent’s medical condition and ICD, is required to have medical waiver. CG Ex. 2 p. 7 of 7; Tr. at 67 lns 3-8. **ACCEPTED IN PART. NVIC 04-08 set medical standards that would require a waiver for an MML.**
4. On April 2, 2009, Respondent was informed by the USCG National Maritime Center (NMC) that he was “not medically fit,” and was not approved for a medical waiver.<sup>7</sup> CG Ex. 3. **ACCEPTED & INCORPORATED**
5. Respondent operated under the authority of his USCG credential after April 2, 2009, and continued to operate as a licensed pilot up to the time of the oral hearing in this matter. CG Ex. 11; Tr. at 233 lns 8-14; 287 lns 1-4. **ACCEPTED & INCORPORATED**
6. On June 12, 2009, the NMC upheld its previous determination and concluded that Respondent was “medically unfit” and a waiver for his medical condition was not approved. CG Ex. 8. **ACCEPTED IN PART. Evidence of the NMC action was accepted into evidence and considered in issuing the decision in this matter.**
7. On February 15, 2010, the USCG Director of Prevention Policy upheld NMC’s previous determinations and issued “final agency action” denying Respondent’s medical waiver.<sup>8</sup> CG Ex. 10. **ACCEPTED IN PART. Evidence of the NMC action and subsequent action on the appeal was accepted into evidence and considered in issuing the decision in this matter.**
8. Respondent’s medical condition puts him at greater risk for sudden incapacitation than the general population. TR at 99 lns 15-22. **ACCEPTED & INCORPORATED**
9. Respondent’s medical condition puts him at greater risk for sudden incapacitation than the general population. Tr. at 99 lns 15-22. **ACCEPTED & INCORPORATED**

<sup>7</sup> Under 46 CFR §1.03-15(f), the original decision of NMC remains in effect while the matter is appealed, unless a stay is granted. A stay was not granted in this case. Despite being appealed, Respondent’s medical waiver denial was in effect upon issuance of NMC’s initial determination.

<sup>8</sup> Per 46 CFR § 1.03-40, “[t]he decision of the Director of Prevention Policy, Commandant (CG-54), on such an appeal will constitute final agency action.”

10. Respondent's medical condition renders him physically unfit for duty as a credentialed merchant mariner. CG Ex. 3, 8, 10; Tr. at 96-99. **ACCEPTED IN PART AND REJECTED IN PART. Evidence of Respondent's medical condition was accepted into evidence and considered in issuing the decision in this matter. As noted in the Decision the Coast Guard failed to prove Respondent medically unfit to hold an MMD.**

**Respondent's Proposed Findings of Fact**

1. Capt. Hocking is the current holder of U.S.C.G. License to Merchant Marine Officer 120813, Issue No. 7, dated at Boston, Massachusetts October 15, 2007 (Tr.246; Ex. E). **ACCEPTED, IN PART, as provided in the Decision and Order**
2. Capt. Hocking is the current holder of United States Merchant Mariner's Document [REDACTED], expiring on October 15, 2012 (Tr. 246; Ex. F). **ACCEPTED, as provided in the Decision and Order**
3. Capt. Hocking has been serving under the authority of his Coast Guard License as Master aboard the vessels of the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority since 1985, and for the last 10 years, exclusively as Master and Senior Captain of the Motor Vessel Nantucket (Tr. 148). **ACCEPTED, IN PART, as provided in the Decision and Order.** The period of service from May 2009 and later is the primary focus of this proceeding.
4. Capt. Hocking began his sailing career in 1967 when he joined the United States Navy out of high school. Beginning in January, 1968, he served four (4) years aboard Navy destroyers, including combat duty in Viet Nam, following which he received an honorable discharge (Tr. 247). **NEITHER ACCEPTED NOR REJECTED.** The period of service from May 2009 and later is the primary focus of this proceeding.
5. Following his discharge from the United States Navy, Capt. Hocking went to college, then began working for the Steamship Authority in 1973, and from that time to the present, a total of 37 years, has worked exclusively for them (Tr. 247, 250; Ex. O-W). **NEITHER ACCEPTED NOR REJECTED.** The period of service from May 2009 and later is the primary focus of this proceeding.
6. While working for the Steamship Authority, Captain Hocking worked his way up from able bodied seaman, to Bosun, to licensed inland mate in 1980, pilot in 1983, and Master in 1985 (Tr. 248). **NEITHER ACCEPTED NOR REJECTED.** The period of service from May 2009 and later is the primary focus of this proceeding.
7. In March, 1985, while performing in a church talent show, Capt. Hocking suffered a ventricular tachycardia. He neither became unconscious nor incapacitated, but merely felt lightheaded, and retained full control of his faculties. He concluded his performance, and worked lights, music and a tape machine until the talent show was concluded (Tr. 252); **ACCEPTED, IN PART, as provided in the Decision and Order**

8. After being diagnosed with ventricular tachycardia at a hospital after the show, Capt. Hocking consulted with a cardiologist and an electrophysiologist (Tr. 252); **NEITHER ACCEPTED NOR REJECTED**. Respondent's condition during the period of service from May 2009 and later is the primary focus of this proceeding.
9. After considering a number of options, including blind studies, and toxic medicines, Capt. Hocking elected to have an implantable cardioverter defibrillator ("ICD") surgically implanted. This course of treatment was purely elective, and included less, or not-so-toxic medications as well. The ICD was surgically implanted in April, 1995 (Tr. 253-4). **ACCEPTED, IN PART, as provided in the Decision and Order**
10. An ICD is a medical device that is implanted into a patient, measures each heartbeat, and if it detects arrhythmia or tachycardia, it can emit a pacing signal to control the rhythm of the heartbeat, by speeding it up, or a shock signal to break the heart rhythm (Tr. 255). **ACCEPTED, as provided in the Decision and Order**
11. The shock signal is stronger than the pacing signal, but even the higher impact signal is not incapacitating in Capt. Hocking's case (Tr. 255). **NEITHER ACCEPTED NOR REJECTED**. Respondent's condition during the period of service from May 2009 and later is the primary focus of this proceeding.
12. Since Capt. Hocking's 1995 ICD surgical implant, he has never been incapacitated by his condition, on the job or off, and has never had any incident while serving under authority of his License (Tr. 256, 271). **NEITHER ACCEPTED NOR REJECTED**. Respondent's condition during the period of service from May 2009 and later is the primary focus of this proceeding.
13. Since Capt. Hocking's 1995 ICD surgical implant, he has been serving successfully and safely under the authority of his License and medical waiver since 1995 (Tr. 271). **NEITHER ACCEPTED NOR REJECTED**. Respondent's condition during the period of service from May 2009 and later is the primary focus of this proceeding.
14. As of the day of the hearing (September 23, 2010), Capt. Hocking was able to perform all of the functions and tasks of a licensed ship's captain, including standing on a bridge for seven (7) hours; walk up and down steep ladders in the event of an emergency; operate radar; plot on a chart; supervise a watch; pilot the vessel in and out of port using the throttle or wheel; and navigate the ship in the waters for which he has pilotage. There is, in short, no function of a ship's master that Capt. Hocking's ICD or his current medical condition prevented him from doing as of the date of the hearing (Tr. 256-7). **ACCEPTED IN PART AND REJECTED IN PART**. The Record did not present evidence of any specific incident or failure to perform duties by Respondent. However, there is evidence that Respondent's medical condition places him at greater risk of sudden death or incapacitation. This additional risk does impact his ability to safely perform duties as Master of the NANTUCKET and serve under the authority of his MML. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.

15. Following his 1995 ICD surgical implant, Capt. Hocking underwent the Coast Guard-required annual medical examination each year from 1995 through to 2009, with his physician Dr. Baxley, each year, he submitted to the Coast Guard his required CG 719K medical exam report, and each year, up to the present, he has been found by his examining physician to have been “fit for duty” (Tr. 257-260, 271, 282). **ACCEPTED, IN PART, as provided in the Decision and Order**
16. Dr. Baxley has been Capt. Hocking’s examining physician for many years. He knows what Capt. Hocking does, knows all about him, and is the doctor who knows the most about Capt. Hocking (Tr. 282). **NEITHER ACCEPTED NOR REJECTED.** Dr. Baxley did not appear as a witness and did not provide any testimony at the hearing. The undisputed existence of Respondent’s heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.
17. In 1998, Capt. Hocking began the process of renewing his Coast Guard Master’s License. Along with his application for renewal, he submitted the required most recent CG 719K medical report, disclosing fully the medical information about his ICD, to the Coast Guard’s Regional Examination Center (“REC”) in Boston (Tr. 259). **ACCEPTED, IN PART, as provided in the Decision and Order.** Respondent’s condition during the period of service from May 2009 and later is the primary focus of this proceeding.
18. Upon submission of his application for renewal of his Coast Guard Master’s License in 1998, REC Boston asked Capt. Hocking for additional medical information about his heart condition. Upon submission of the requested additional medical information, the Coast Guard granted Capt. Hocking a medical waiver, and renewed his license in 1998 for another five (5) year term (T. 259-60; Ex. C). **ACCEPTED, IN PART, as provided in the Decision and Order.** Respondent’s condition during the period of service from May 2009 and later is the primary focus of this proceeding.
19. Similarly, the Coast Guard renewed Capt. Hocking’s Master’s License when it came up for renewal in the years 2002 and 2007 (Tr. 261; Exhs. B, D, E). **REJECTED.** Since 1998, subsequent issuances of Respondent’s MML were not expressly endorsed with a medical waiver. Prior service of Respondent is not in issue in this matter. Respondent’s condition during the period of service from May 2009 and later is the primary focus of this proceeding.
20. In April, 2009, Capt. Hocking received in the mail a letter dated April 2, 2009 from a Capt. D.C. Stalfort, of the Coast Guard’s National Maritime Center (“NMC”), stating the he reviewed Capt. Hocking’s most recent 719K and concluded that Capt. Hocking was not medically fit due to a heart condition and an ICD, and that a waiver was therefore not approved (Tr. 262; Ex. II). **ACCEPTED, as provided in the Decision and Order.**
21. Following his receipt of the Coast Guard’s April 2, 2009 letter, Capt. Hocking placed a call to NMC in Martinsburg, West Virginia for the purpose of asking for an extension to

get more medical information, to pass along to NMC. He spoke to one Eric A. Bauer (mis-spelled in the transcript as "Bower"). Mr. Bauer told Capt. Hocking that "he wasn't concerned about the medical side, the medical people would take care of that, but it was his job to get me off the water." (Tr. 262-3). **NEITHER ACCEPTED NOR REJECTED.** Respondent's condition during the period of service from May 2009 and later is the primary focus of this proceeding.

22. Capt. Hocking realized that the April 2, 2008 letter implied that the medical waiver denial implied that it had been based on one single medical document Capt. Hocking's 2008 719K. He confirmed that by checking with REC Boston, and determining that they still had his complete file in their possession (Tr. 264). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.
23. Following that, Capt. Hocking then sent an e-mail to the same Capt. Hall who testified at the hearing, asking if the additional medical records, which he had by that time sent, had arrived. Capt. Hall never even gave Capt. Hocking the courtesy of a reply (Tr. 264-5). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.
24. Capt. Hocking then enlisted the assistance of Andy Hammond, a former REC employee, for the specific reason that the Coast Guard was not giving him information about how to get the waiver (Tr. 265). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.
25. Even with Mr. Hammond's assistance, a request for further time to permit Capt. Hocking to make an appointment with his cardiologist for a further stress test, which would have given the Coast Guard additional, current cardiological information, was denied by Capt. Hall (Tr. 265-6, 268). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.
26. Capt. Hocking took the stress test anyway. The test rated him at a 95% for persons of his age, and determined that his ejection fraction had risen from 32 to 38% (Tr. 267). **ACCEPTED, IN PART, as provided in the Decision and Order.** The Coast Guard was

required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.

27. The Coast Guard applies an ejection fraction for securing a medical waiver of 40% (Tr. 87). **ACCEPTED, IN PART, as provided in the Decision and Order.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.
28. The Coast Guard's Expert Panel Recommendations, CG Ex. 12, are found in a report which, on its face, states that it is "comprised of research conducted to analyze the impact of cardiovascular Disease on commercial motor vehicle driver safety. (Ex. 12). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. CG Ex. 12 was accepted into evidence and considered in issuing the decision in this matter. Respondent's cross examination of the Coast Guard's witness and presentation of evidence was fully considered in reaching a decision in this matter.
29. The Coast Guard introduced no evidence at the hearing that Capt. Hocking has cardiovascular disease. **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
30. Accordingly, the medical standards in the Expert Panel Recommendations, Ex. 12, do not even apply to Capt. Hocking. **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
31. The Steamship Authority operates the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, operates 9 vessels in the summer, and 7 vessels in the winter. These vessels run on the Hyannis-Nantucket and Woods Hole-Martha's Vineyard runs. The vessels complete approximately 22,000 trips a year, and carry approximately 2.6 million passengers and approximately 600,000 cars and trucks to the islands of Martha's Vineyard and Nantucket safely each year (Tr. 212-3). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD

during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.

32. With its high volume of passenger and automobile traffic, the Steamship Authority's confidence in Capt. Hocking is in large part based on the fact that its strict requirements for multiple manning of bridge watch standers, as well as Capt. Hocking's higher manning and performance standards for his watch standers make it assured that if anyone on the bridge has an incapacitating event, qualified back-up personnel are present and able to stand in immediately. **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
33. Capt. Hocking has made those on his watch aware of his medical condition, including his ICD (Tr. 239-41). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
34. The testimony of the Steamship Authority's officials, Philip Parent, Capt. Charles Gifford, the Port Captain, and Capt. Edward Jackson, Capt. Hocking's long time mentor, show how far the Steamship Authority has gone to minimize the risk of danger to the public from any incapacitating event to any Steamship Authority bridge watch stander. **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
35. If either licensed pilot aboard the bridge of a Steamship Authority vessel has an incapacitating event, the other licensed pilot is there to take over immediately. **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
36. Capt. Hocking proceeded with the help of Andrew Hammond to request reconsideration of the Coast Guard's April 2, 2008 decision, and then to appeal directly to the

Commandant. Both requests were denied (Tr. 265, 268-7; Ex. JJ (denial letter dated June 12, 2009); LL (denial letter dated Feb. 15, 2010). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.

37. As further evidence of his currently sound physical condition, Capt. Hocking successfully completed a 16-hour Coast Guard-approved basic firefighting course on March 11-12, 2009. This course includes 8 hours of donning heavy gear and carrying heavy equipment such as helmets, boots and air packs up and down several floors to fight actual fires (Tr. 272). **ACCEPTED IN PART AND REJECTED IN PART.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. As provided in the Decision in this matter Respondent's activity level does not present evidence that he is not subject to a higher risk of sudden death or incapacitation which impacts duties associated with an MML. Respondent's evidence of his physical activity was considered in determining that the Coast Guard failed to prove he was not fit to retain an MMD. The decision in this matter is based on the record as a whole and the applicable law and regulations.
38. Capt. Hocking does not smoke, and has consciously gone into a program of not drinking coffee; and he has cut down on meals and has lost 15 pounds (Tr. 273). **NEITHER ACCEPTED NOR REJECTED.** The decision in this matter is based on the record as a whole and the applicable law and regulations.
39. Capt. Hocking has never experienced syncope, loss of consciousness or fainting (Tr. 273). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
40. Capt. Hocking has never had renal failure (failure of the kidneys) (Tr. 273). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
41. Capt. Hocking has never been told he has cardiovascular disease (Tr. 273). At no time since the implantation of his ICD has Capt. Hocking ever experienced shortness of breath

- (Tr. 284). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
42. There is no history of sudden death in Capt. Hocking's family (Tr. 273-4). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
43. In his present condition, neither his ICD nor his present medical condition have caused Capt. Hocking to be in any way unable to perform any of the functions required of a ship's captain (Tr. 274). **REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
44. Required on the bridge of all Steamship Authority ships are a Master and Pilot Mate. Capt. Hocking has, however, always been more strict with his crews, requiring in addition an AB to come to the bridge as well as a lookout (Tr. 275). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
45. On Capt. Hocking's vessel, the pilot is at the wheel when leaving port. The pilot steers the vessel out between the buoys, making the necessary turns to conform to the channel. At the sea buoy, the pilot then turns the vessel over to the AB, and he then directs the vessel's navigation to the next sea buoy, piloting, plotting, being a lookout, where he again takes over the wheel (Tr. 275-7). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.

46. Even when the ship's wheel is turned over to the AB and the ship is out in the sound, out of pilotage waters, Capt. Hocking still retains three people on the bridge – Captain, Mate and AB (Tr. 276). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
47. On Capt. Hocking's vessel, if conditions require it, such as fog or heavy traffic, a fourth person is brought to the bridge (Tr. 276). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
48. At all times during a transit, Capt. Hocking stays on the bridge. At all times, he has a supervising role, but he may be also attending to other duties such as log keeping or record keeping (Tr. 277). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
49. The transit time from Hyannis to Nantucket is two hours and 15 minutes (T. 277). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
50. The transit time from Woods Hole to Martha's Vineyard is 45 minutes (Tr. 277). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
51. The term "Pilot" as used aboard Steamship Authority vessels is different than deepwater usage. A Steamship Authority Pilot is required to be at the wheel and navigating inside pilotage waters, and must remain on the bridge and continue to navigate outside pilotage waters (Tr. 278); the pilot navigates and steers the vessel by memorizing the route,

including buoys and courses (Tr. 235). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. Requirements for holding a license or document are set by the Coast Guard in keeping with its statutory authority. The decision in this matter is based on the record as a whole and the applicable law and regulations.

52. Capt. Hocking has disclosed his medical condition to other bridge watch-standers aboard his vessel. If Capt. Hocking were on the bridge of his ship and were to have an incapacitating event, his watch standers would be able to safely handle the vessel. The Pilot/Mate is trained to navigate the vessel in and out of the channel, and to dock and undock it, and that person would take over immediately (Tr. 278-281). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. Requirements for holding a license or document are set by the Coast Guard in keeping with its statutory authority. The decision in this matter is based on the record as a whole and the applicable law and regulations.
53. Capt. Hocking has never had any actions taken against his Coast Guard License, and apart from the three Coast Guard letters dated April 2, 2009, June 15, 2009 and February 15, 2010, no one has ever before told Capt. Hocking that he was "incompetent", including his examining physician Dr. Baxley, and his cardiologist (Tr. 257-60, 271, 281-2). **ACCEPTED, IN PART, as provided in the Decision and Order.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. Requirements for holding a license or document are set by the Coast Guard in keeping with its statutory authority. The decision in this matter is based on the record as a whole and the applicable law and regulations.
54. When Capt. Hocking first got his defibrillator implanted in 1995, he immediately informed his employer, the Steamship Authority management (Tr. 283). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.
55. Also, immediately after he got his defibrillator, Capt. Hocking noted that the instructions stated that the device could be disabled by electromagnets. Accordingly, he consulted with the radar technicians who service his vessel, Bardwell Electronics, and with his

doctors. They determined that although the radar had a powerful magnet in it, the makeup and the output of the radar would be of no consequence to the operation of his ICD (Tr. 283-4). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.

56. The Certificate of Inspection for M/V NANTUCKET is a Certificate Issued by the Coast Guard setting forth manning requirements for the ship. Capt. Hocking's own rules for watch-standers aboard his vessel exceed those manning requirements (Tr. 285; Ex. X). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. Requirements for holding a license or document are set by the Coast Guard in keeping with its statutory authority. The decision in this matter is based on the record as a whole and the applicable law and regulations.
57. Capt. Hocking has no plans to work for anyone other than the Steamship Authority until the time of his retirement (Tr. 284). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.
58. Capt. Hocking would accept an endorsement on his license restricting its use to Steamship Authority service (Tr. 287). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. Requirements for holding a license or document are set by the Coast Guard in keeping with its statutory authority. The decision in this matter is based on the record as a whole and the applicable law and regulations.

## **XI. ATTACHMENT D—PARTIES’ PROPOSED CONCLUSIONS OF LAW**

### **Coast Guard’s Proposed Conclusions of Law**

1. By operating under the authority of his USCG-issued credential without a medical waiver, despite having a condition requiring a medical waiver, Respondent committed incompetence as defined in 46 CFR § 5.31, in violation of 46 United States Code (U.S.C.) § 7703(4). **ACCEPTED IN PART, as provided in the Decision and Order.** The court determined there was insufficient evidence to support the charge in regard to Respondent’s MMD.
2. By operating under the authority of his USCG-issued credential while not medically fit to perform merchant-mariner duties, Respondent committed incompetence as defined in 46 CFR § 5.31, in violation of 46 U.S.C. § 7703(4). **ACCEPTED IN PART, as provided in the Decision and Order.** The court determined there was insufficient evidence to support the charge in regard to Respondent’s MMD.

### **Respondent’s Proposed Conclusions of Law**

1. Coast Guard regulations define incompetence as: “the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof.” (33 CFR § 5.31). **NEITHER ACCEPTED NOR REJECTED.** The regulations speak for themselves.
2. Except for affirmative defenses, or as otherwise provided by statute or rule, the Coast Guard bears the burden of proof in this action. (33 CFR § 20.702). **ACCEPTED, as provided in the Decision and Order**
3. The party that bears the burden of proof shall prove his or her case or affirmative defense by a preponderance of the evidence (33 CFR § 20.701). **ACCEPTED, as provided in the Decision and Order**
4. In order to meet the “preponderance of evidence” standard, the ALJ must be convinced that the existence of a fact is more probable than not (Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California, 508 US 602, 622 (1993) (citing In Re: Winship 397 US 358, 371-2 (1970) (Harlan, J., concurring); App. Dec. 2670 (WAIN) (2007) at 10). **ACCEPTED IN PART, as provided in the Decision and Order.** There are many authorities that repeat the standard to be applied in administrative proceedings under the APA.
5. It is the function of the Administrative Law Judge (“ALJ”) to resolve conflicts in testimony and issues of credibility. The question of what weight to accord the evidence is committed to the discretion of the ALJ. (App. Dec. 2675 (MILLS) (2008));

**NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ.**

6. The findings of the ALJ need not be completely consistent with all evidence in the record as long as sufficient evidence exists to reasonably justify the findings (App. Dec. 2652 (MOORE) (2005)). **NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ.**
7. The ALJ is not necessarily bound by medical findings or opinions (App. Dec. 2547 (PICCIOLO) (1992) at 4). **NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ.**
8. The ALJ has broad discretion in making determinations regarding the credibility of evidence and resolving inconsistencies of evidence, but that discretion cannot extend beyond the substantive evidence on the record (App. Dec. 2664 (SHEA) (2007) at 9-10; App. Dec. 2547 (PICCIOLO) (1992) at 4); **NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ.**
9. All conclusions of law reached by the ALJ must accord with law, precedent and public policy (33 CFR §20.101(b)(2)); **NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ.**
10. Simply identifying a medical condition and its potential debilitating medical effects upon a mariner does not prove physical incompetence (App. Dec. 2547 (PICCIOLO) (1992) at 3); **NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ.**
11. There must be evidence on the record that tends to prove that the appellant is unable to perform the required duties expected of a merchant mariner's License (App. Dec. 2547 (PICCIOLO) (1992) at 3); **NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ. The burden of proof and various matters are addressed in the Decision and Order.**
12. It is not sufficient to sustain a finding of incompetence for an Investigating Officer to speculate that a mariner would not under certain circumstances be fit for duty. The ultimate issue is whether the appellant can perform the functions expected of him as a holder of his License (App. Dec. 2547 (PICCIOLO) (1992) at 3-4); **NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ. The burden of proof and various matters are addressed in the Decision and Order.**

13. If the Coast Guard seeks to revoke a mariner's seaman's papers for incompetence, the Coast Guard must meet its burden of proving that the mariner was not presently capable of performing the duties of an able bodied seaman (App. Dec. 2664 (SHEA) (2007)); **NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ. The burden of proof and various matters are addressed in the Decision and Order.**
14. No otherwise qualified individual with a disability in the United States as defined by Section 705(20) of 29 USC shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by an executive agency (29 USC §794(a); 42 USC §11211 et seq.); **NEITHER ACCEPTED NOR REJECTED. As addressed in Section III F of the Decision and Order the Coast Guard is not an employer of Respondent and the statutes cited do not appear relevant to these proceedings conducted pursuant to 46 U.S.C. Chapter 77 and intended by Congress to promote safety at sea.**
15. A mariner is a "person with a disability" within the meaning of 29 USC §794(a), and 49 USC §12102, by sole virtue of the fact that his medical waiver has been denied, he is currently "regarded as having an impairment" by the Coast Guard (29 USC §794; 49 USC §12102). **NEITHER ACCEPTED NOR REJECTED. As addressed in Section III F of the Decision and Order the Coast Guard is not an employer of Respondent and the statutes cited do not appear relevant to these proceedings conducted under 46 U.S.C. Chapter 77 and intended by Congress to promote safety at sea.**
16. Capt. Hocking is an otherwise qualified individual with a disability within the meaning of the Rehabilitation Act of 1974. **NEITHER ACCEPTED NOR REJECTED. As addressed in Section III F of the Decision and Order the Coast Guard is not an employer of Respondent and the Rehabilitation Act does not appear relevant to these proceedings conducted under 46 U.S.C. Chapter 77 and intended by Congress to promote safety at sea.**
17. Coast Guard license granting is a program or activity within the meaning of 29 USC §794 (Cousins v. Secretary of the US DOT, 880 F. 2d 603 (1<sup>st</sup> Cir., 1989). The term "program or activity" is to be construed broadly by courts interpreting this section of the ADA (49 USC §12102). Consolidated Rail Corp. v. Darrone, 465 US 264, 632 (1984). The Department of Homeland Security, of which the United States Coast Guard is a part, is an executive branch of the United States government. (6 USC §111; 468(b)); **NEITHER ACCEPTED NOR REJECTED. As addressed in Section III F of the Decision and Order the Coast Guard is not an employer of Respondent and the statutes cited do not appear relevant to these proceedings conducted pursuant to 46 U.S.C. Chapter 77 and intended by Congress to promote safety at sea.**
18. A qualifying person with a disability within the meaning of 29 USC §794 is entitled to an individualized review. School Board of Nassau County Florida v.

Arline, 480 US 273, 287 (1987) (case by case analysis must gather and analyze all relevant information regarding an individual's work history and medical history and thoroughly assess ability to perform duties of the job involved); Stillwell v. Kansas City Board of Police Commissioners, 872 F. Supp. 682 (W.D. MO. 1995); Cleveland Board of Education v. LaFleur, 414 US 632 (1974); Bombrys v. City of Toledo, 849 F. Supp. 1210, 1219 (N.D. Ohio, 1993) (blanket exclusions violate Rehabilitation Act).

**NEITHER ACCEPTED NOR REJECTED. As addressed in Section III F of the Decision and Order the Coast Guard is not an employer of Respondent and the statutes cited do not appear relevant to these proceedings conducted pursuant to 46 U.S.C. Chapter 77 and intended by Congress to promote safety at sea.**

19. NVIC 04-08, Condition 81 authorizes blanket exclusions or across the board exclusions for medical waivers requested by persons with an ICD. NVIC 04-08, Condition 81 (anti-tachycardia devices or implantable defibrillators "generally not waiverable").  
**NEITHER ACCEPTED NOR REJECTED. As addressed in Section III F of the Decision and Order the Coast Guard is not an employer of Respondent and the statutes cited do not appear relevant to these proceedings conducted pursuant to 46 U.S.C. Chapter 77 and intended by Congress to promote safety at sea.**
20. By applying blanket or across-the board exclusions against Capt. Hocking, the Coast Guard violated the Rehabilitation Act of 1974, and Capt. Hocking's due process rights under the Fifth Amendment of the United States Constitution. **NEITHER ACCEPTED NOR REJECTED, as provided in the Decision and Order.**
21. Failure on the part of the Coast Guard to follow the legally mandated procedural requirements of a federal statute, such as the Rehabilitation Act of 1974, also comprises a violation of the due process provision of the Fifth Amendment of the United States Constitution. International Union, United Government Security Officers of America v. Clark, 704 F. Supp. 2d 54 (D.D.C., 2010) (Rehabilitation Act does not preempt Fifth Amendment claim). **NEITHER ACCEPTED NOR REJECTED, as provided in the Decision and Order). As addressed in Section III F of the Decision and Order the Coast Guard is not an employer of Respondent and the statutes cited do not appear relevant to these proceedings conducted pursuant to 46 U.S.C. Chapter 77 and intended by Congress to promote safety at sea.**
22. The Coast Guard failed to meet its burden of proving that Capt. Hocking is not medically competent because it failed to produce any evidence that he is presently incapable of performing the functions of a licensed ship's master. **REJECTED, as provided in the Decision and Order**
23. The Coast Guard failed to meet its burden of proving that Capt. Hocking is medically incompetent to perform the functions of a licensed master because it failed to offer probative, substantial or reliable evidence that Capt. Hocking presently or ever has had cardiovascular disease, and accordingly the standards contained in its Expert Panel Recommendations (CG Ex. 12) do not apply to Capt. Hocking. **REJECTED, as provided in the Decision and Order**

24. The Coast Guard has failed to meet its burden of proving that Capt. Hocking is medically incompetent because the medical science upon which the Coast Guard relied as set forth in the "Expert Panel Recommendations" (CG Ex. 12), are not yet sufficient reliable to be applied in an inflexible fashion against mariners, and the medical recommendations of the report do not, therefore, constitute probative, substantial and reliable evidence sufficient to meet the Coast Guard's burden of proof. **REJECTED, as provided in the Decision and Order**

## **XII. ATTACHMENT E—NOTICE OF ADMINISTRATIVE APPEAL RIGHTS**

### **33 CFR 20.1001 General.**

(a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.

(b) No party may appeal except on the following issues:

- (1) Whether each finding of fact is supported by substantial evidence.
- (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
- (3) Whether the ALJ abused his or her discretion.
- (4) The ALJ's denial of a motion for disqualification.

(c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.

(d) The appeal must follow the procedural requirements of this subpart.

### **33 CFR 20.1002 Records on appeal.**

(a) The record of the proceeding constitutes the record for decision on appeal.

(b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --

- (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
- (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

### **33 CFR 20.1003 Procedures for appeal.**

(a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.

(1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --

- (i) Basis for the appeal;
- (ii) Reasons supporting the appeal; and
- (iii) Relief requested in the appeal.

(2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.

- (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
  - (1) The party has petitioned the Commandant in writing; and
  - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

**33 CFR 20.1004 Decisions on appeal.**

- (a) *The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.*
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.

**CERTIFICATE OF SERVICE**

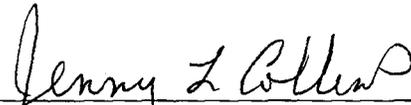
I hereby certify that a copy of the foregoing **DECISION & ORDER** was sent by the methods indicated to the following parties and entities:

Mr. Gary F. Ball, Esq.  
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ALJ Docketing Center  
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**Via MISLE**

Done and dated this 4th day of January, 2011,  
Baltimore, Maryland.

  
**JENNY L. COLLINS**  
**PARALEGAL SPECIALIST**