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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
MERCHANT MARINER LICENSE & MERCHANT MARINER DOCUMENT	:	NO. 2664
	:	
	:	
	:	
Issued to: PATRICK BEAU SHEA	:	

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 25, 2005, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at Honolulu, Hawaii, issued a decision revoking the merchant mariner credentials of Mr. Patrick B. Shea, (hereinafter "Respondent") upon finding proved charges of both misconduct and incompetence.

The first specification found proved alleged that Respondent committed misconduct by abandoning his watch station, without a relief, while underway on the SS EWA on December 18, 2003. The second specification found proved alleged that Respondent was incompetent due to his suffering from bipolar disorder which caused him to abandon his watch station on the SS EWA on December 18, 2003, and act in an irrational manner, which resulted in Respondent being relieved of all duties and being placed in restraints and confined to his quarters until the end of the vessel's voyage.

PROCEDURAL HISTORY

On June 3, 2004, the Coast Guard filed a Complaint against Respondent alleging both incompetence and misconduct. The Complaint was personally served on Respondent and was filed with the ALJ Docketing Center on the same day. Respondent filed his Answer to the Complaint on June 18, 2004, admitting all jurisdictional allegations but denying several of the factual allegations that supported the charges.

The hearing was held on October 6, 2004, in Honolulu, Hawaii. Respondent was represented by professional counsel. During the hearing, the Coast Guard Investigating Officers (hereinafter "IOs") called three witnesses and introduced six exhibits into the record. Respondent introduced one exhibit into evidence and testified on his own behalf.

On January 25, 2005, the ALJ issued the D&O, finding the charges of incompetence and misconduct proved. [D&O at 1] Thereafter, on February 15, 2005, Respondent filed his notice of appeal in the matter. Respondent perfected his appeal by filing his Appellate Brief on March 14, 2005. Therefore, this appeal is properly before me.

APPEARANCE: John O'Kane, Esq. and Mark Hamilton, Esq. for Respondent. The Coast Guard was represented by Lieutenant Michael Pierno and Chief Warrant Officer Giles Loftin of U.S. Coast Guard Sector Command Central Pacific, Honolulu, Hawaii.

FACTS

At all times relevant herein, Respondent was the holder of the Coast Guard issued merchant mariner credentials at issue in these proceedings. [Transcript (hereinafter "Tr.") at 12]

On December 18, 2003, Respondent was acting under the authority of his Coast Guard issued merchant mariner credentials when he served as Second Assistant Engineer aboard the SS EWA. [Tr. at 31, 52] At that time, the SS EWA was underway on a voyage from Long Beach, California, to Honolulu, Hawaii. [Tr. at 46, 51] At or about 0630 on December 18, 2003, while on watch in the engine room of the SS EWA, Respondent left his watch station without obtaining a relief watch stander. [Tr. at 32-33, 177-178] Shortly after leaving his watch station, the Chief Mate observed Respondent crawling on his hands and knees on the vessel's port bridge wing. [Tr. at 32-33, 62, 177-178; IO Exhibit 1]

As a result of Respondent's erratic behavior, he was relieved of his duties, placed in restraints and kept confined to his stateroom, under a suicide watch, for three days until the SS EWA arrived in Honolulu. [Tr. at 35-38, 68-71, 177-178; IO Exhibit 1] The Master of the SS EWA, Captain Thomas Stapleton, interviewed Respondent in his stateroom in order to determine the cause of his erratic behavior. [Tr. at 68-69; IO Exhibit 1] During this interview, Respondent handed a folder with his medical records to Captain Stapleton. [*Id.*] The folder contained summaries of medical treatment received by Respondent at Lions Gate Hospital in North Vancouver, British Columbia, Canada, from March 3, 2003, to March 19, 2003, and again from April 3, 2003, to April 22, 2003. [Tr. at 65-67; IO Exhibit 1; IO Exhibit 2] From these medical records, Captain Stapleton learned that Respondent was suffering from a mental illness. [Tr. at 77; IO Exhibit 1; IO Exhibit 2] During the interview, Captain Stapleton also learned that Respondent was concerned that the vessel would not complete its voyage to Honolulu and that, as a result, he had made preparations to abandon ship, which included removing

a life raft from its cradle and dragging it aft approximately fifty feet and stuffing trash bags with food and personal belongings. [Tr. at 71-74; IO Exhibit 1; IO Exhibit 3]

Upon the SS EWA's arrival at Honolulu on December 22, 2003, Respondent was taken to Queen's Medical Center and was treated by Dr. Barry Carlton, the hospital's Assistant Chief of Psychiatry. [Tr. at 90-91; IO Exhibit 5] Dr. Carlton's diagnosis of Respondent was that he was suffering from bipolar disorder, current episode manic. [Tr. at 94, 96; I.O. Exhibit 6] Dr. Carlton treated Respondent from his admission to the hospital until his discharge on January 6, 2004, and remained his treating psychiatrist on an out-patient basis through the date of the hearing. [Tr. at 89-91; I.O. Exhibit 5] On February 13, 2004, Dr. Carlton declared Respondent "fit for duty" because his mental illness was in remission and his symptoms were being treated with prescription medications. [Tr. at 99-101; I.O. Exhibit 5]

The details of Respondent's erratic behavior on December 18, 2003, during the SS EWA's voyage to Honolulu were reported by Captain Stapleton to the Coast Guard. [I.O. Exhibit 1] Apparently, Respondent then voluntarily deposited his mariner credentials with the Coast Guard.[1] On June 3, 2004, the Coast Guard allegedly returned Respondent's merchant mariner credentials to him. On that same day, the Coast Guard issued Respondent a Complaint, alleging incompetence and misconduct. [D&O at 4] The hearing and D&O that followed resulted in Respondent's appeal which is now before me.

[1] Reference to a voluntary deposit is made in Respondent's Appellate Brief. However, the record does not contain a copy of any kind of voluntary deposit or voluntary surrender agreement between Respondent and the Coast Guard. There is no other mention of a voluntary deposit or voluntary surrender in the record.

BASES OF APPEAL

This appeal is taken from the ALJ's D&O which found the charges of incompetence and misconduct proved. After a thorough review of Respondent's Appellate Brief, his multiple assignments of error are summarized as follows:

I. *The ALJ erred in finding Respondent incompetent since the Coast Guard returned his voluntarily deposited merchant mariner credentials.*

II. *The ALJ erred in finding Respondent incompetent since his condition is manageable.*

III. *The ALJ erred in finding Respondent incompetent by applying an erroneous standard by misinterpreting Appeal Decision 2417 (YOUNG).*

IV. *The ALJ erred in admitting Respondent's medical discharge summaries from Lions Gate Hospital into evidence because they were not properly authenticated and constituted only a portion of Respondent's relevant medical history.*

V. *The ALJ erred in finding Respondent committed an act of misconduct because willfulness is a necessary element to a charge of misconduct and that element was not proven by the Coast Guard.*

OPINION

I.

The ALJ erred in finding Respondent incompetent since the Coast Guard returned his voluntarily deposited merchant mariner credentials.

On appeal, Respondent asserts that he voluntarily deposited[2] his merchant mariner credentials with the Coast Guard and that those credentials were later returned to him.

[2] Respondent's appeal brief uses the terms "voluntary deposit" and "voluntary surrender" interchangeably. However, under the applicable regulations, these terms do not have the same meaning. A voluntary deposit is an agreement where a mariner leaves his mariner credential(s) in the possession of a Coast Guard Investigating Officer during a period of physical or mental incompetence, until such incompetence is cured. 46 C.F.R. § 5.201. A voluntary surrender, on the other hand, is the relinquishment of a mariner's credential(s) in order to avoid a suspension and revocation hearing. 46 C.F.R. § 5.203. Although the record is unclear as to whether—or even if—Respondent entered into a voluntary deposit or surrender agreement with the Coast Guard, viewing the record in the light most favorable to Respondent, this decision will assume that Respondent's argument is referring to a voluntary deposit agreement.

[Respondent's Appeal Brief at 4] Based upon these alleged occurrences, Respondent argues that the Coast Guard would not have returned his credentials to him unless he had "demonstrated satisfactory rehabilitation of his condition and complied with the physical and professional requirements for the issuance of a license or document." [Respondent's Appeal Brief at 4] For the reasons discussed below, Respondent's assertion, in this regard, is not persuasive.

Respondent's argument implies that the return of a voluntarily deposited mariner credential precludes the Coast Guard from taking suspension and revocation action. This is simply not the case. On its face, the regulation that authorizes the Coast Guard to accept a voluntary deposit in cases of physical or mental incompetence does not expressly prohibit the agency from further action, even when a voluntarily deposited mariner credential is returned to the mariner. 46 C.F.R. § 5.201. According to 46 C.F.R. § 5.105, the courses of action available to a Coast Guard Investigating Officer include issuing a Complaint, accepting a voluntary surrender, accepting a voluntary deposit, referring the case to others for further action, giving a written warning, and closing the case. The regulation does not make any one course of action mutually exclusive of the others, nor does it expressly limit the Investigating Officer to only one course of action. Accordingly, Respondent's assertions with respect to the return of his voluntarily deposited mariner credentials are wholly unpersuasive.

II.

The ALJ erred in finding Respondent incompetent since his condition is manageable.

On appeal, Respondent argues that the ALJ erred in finding him incompetent because the record contains substantial evidence to support a conclusion that

Respondent's mental condition is medically manageable. To that end, Respondent argues that because he was declared fit for duty by his physician on February 13, 2004, and has taken his medication as ordered and not suffered any relapses, the ALJ erred in finding him incompetent. After a thorough review of the record, I do not find Respondent's assertions in this regard persuasive.

Pursuant to Coast Guard regulation, "incompetence" 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. Apart from providing a definition of the term "incompetence," Coast Guard regulations do not address whether medical management of a physical or mental ailment is an appropriate factor to be considered in ultimately determining whether a mariner is competent to hold Coast Guard issued merchant mariner credentials. However, as Respondent notes in his appeal, at least one prior Commandant Decision on Appeal has stated that the feasibility of management of a mental or physical condition is an appropriate factor to be considered in determining whether a mariner is incompetent. *See* Appeal Decision 2547 (PICCIOLO). Citing Appeal Decision 2547 (PICCIOLO), Respondent asserts that the ALJ erred in failing to accord the evidence that he presented as to the manageability of his mental condition proper weight. I disagree.

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. Following Mr. Picciolo's appeal, the Commandant remanded the case to the ALJ because the record lacked evidence of whether Mr. Piccciolo's blood sugar level could be controlled 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.

Although 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 to the record in this case. Indeed, a careful review of the ALJ's D&O shows that he spent considerable time discussing the effect that medical monitoring would have on Respondent's ability to perform the duties associated with his mariner credentials:

> [Respondent] has been taking Zyprexa, a psychotropic drug, and according to Dr. Carlton his illness is currently in remission. As such, Dr. Carlton opines that Respondent is now competent and fit for duty. However, Dr. Carlton also states that bipolar disorder is a chronic illness that requires long-term management and could not say with certainty that...[Respondent]...would not have breakthrough episodes because it is difficult to judge the illness' course. Dr. Carlton expects a sustained remission but, even so, one who is in remission still has a greater risk of breakthrough episodes than someone who does not have bipolar disorder. Moreover, it is not certain that Respondent will remain symptom free even if he is compliant and takes the medication because the course of the illness is highly variable.
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> Dr. Carlton's opinion that Respondent is fit for duty...is not unqualified. It carries many caveats or warnings: Dr. Carlton anticipates at least five years of asymptomatic condition before he would even consider recommending discontinuing the medication. The course of Respondent's remission and the chances that he will have breakthrough episodes cannot be predicted and it cannot be said with certainty that he will not have a breakthrough episode. The medicines are helpful in preventing breakthroughs but it (absence of breakthrough episodes) cannot be guaranteed. There is always an ongoing risk. Respondent will not be cured but will remain in remission because Bipolar disorder is [a] chronic [condition] that requires long-term management...Even if Respondent remains in remission; that is symptom free, for five years and continues to take Zyprexa for that period of time, he still remains at greater risk than

> the (general) population for an exacerbation of illness. The inference from Dr. Carlton's caveats is that no matter how compliant Respondent is with his regimen of medication and lifestyle practices, at best, his illness still puts him at greater risk than the general population for breakthrough episodes.
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> In reviewing Respondent's course of treatment starting with the discharge summaries from Lions Gate Hospital...through his inpatient treatment at Queen's Medical Center...and the present outpatient treatment, there is no question that Dr. Carlton's treatment is responsible for...[Respondent's]...favorable prognosis and it appears that Respondent may well continue to remain symptom free as long as he is compliant with his medication and properly manages his lifestyle issues, including weight control and normal sleep patterns. Or, he may not. The only thing that is known for sure is that despite his insight and efforts in lifestyle management and sleep patters, he still remains at greater risk for breakthrough symptoms than the general population. Adding to this uncertainty is the reasonably foreseeable likelihood of emergency situations arising aboard a ship creating stress and unpredictable sleep patterns. Moreover, the greater likelihood...[that]...other circumstances such as having to stand additional watches for another engineer...inadvertently may place Respondent at greater risk for breakdown episodes despite his insight and perceived ability to adjust his medication.

[D&O at 16-20, citations to transcript omitted]

The key issue presented here, therefore, is whether the ALJ considered the testimony, evidence, and arguments presented by Respondent regarding the manageability of his mental condition and whether the ALJ gave that evidence the appropriate weight in reaching his determination. Numerous prior Commandant Decisions on Appeal make clear that, in evaluating the evidence presented at a hearing, the ALJ is in the best position to both weigh the testimony of witnesses and assess the credibility of evidence. *See, e.g.*, Appeal Decisions 2584 (SHAKESPEARE), 2421 (RADER), 2319 (PAVELIC), 2589 (MEYER), 2592 (MASON), and 2598 (CATTON). In addition, prior Commandant Decisions on Appeal show that the ALJ has broad discretion in making determinations regarding the credibility of witnesses and in

resolving inconsistencies in evidence. *See, e.g.*, Appeal Decisions 2560 (CLIFTON), 2519 (JEPSON), 2516 (ESTRADA), 2503 (MOULDS), 2492 (RATH), 2598 (CATTON), 2382 (NILSEN), 2365 (EASTMAN), 2302 (FRAPPIER), and 2290 (DUGGINS). Moreover, the ALJ's decision is not subject to reversal on appeal unless his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See, e.g.*, Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), aff'd NTSB Order No. EM-182, 2390 (PURSER), 2363 (MANN), 2344 (KOHAJTA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2589 (MEYER), 2592 (MASON), and 2560 (CLIFTON).

In this case, the ALJ found that "[b]ecause Respondent remains at greater risk than the general population for having breakthrough episodes even if fully complaint" with the medical regimen prescribed by his physician, he could not accept Dr. Carlton's opinion that Respondent was fit for duty. [D&O at 17] The record shows that, irrespective of the finding of "fit for duty," Respondent's physician testified: 1) that he could not state to a reasonable degree of medical certainty that Respondent would remain asymptomatic even if he continued taking his medication, 2) that the prescription drug that Respondent is taking had the potential to impair Respondent's judgment and motor skills, and 3) that Respondent would have to remain asymptomatic for five years before contemplating cessation of his medication. [Tr. at 105, 107, 109, 120, 135-135]

As is discussed above, a review of the ALJ's D&O shows that he carefully considered the evidence presented as to the manageability of Respondent's condition. Although the ALJ reached a different conclusion than Respondent's physician after reviewing that evidence, given the ALJ's broad authority to weigh the evidence and to

make credibility determinations, and the fact that at least one prior Commandant Decision on Appeal supports the notion that the ALJ is not bound by the recommendations of a psychiatrist in these proceedings, I find that the ALJ did not err in finding Respondent incompetent. *See* Appeal Decision 2192 (BOYKIN). Accordingly, I am not persuaded by Respondent's second basis of appeal.

III.

The ALJ erred in finding Respondent incompetent by applying an erroneous standard by misinterpreting Appeal Decision 2417 (YOUNG).

Respondent next argues that the ALJ abused his discretion by incorrectly basing his finding that Respondent 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. [Respondent's Appeal Brief at 7] To that end, Respondent argues that the ALJ's D&O "erroneously concluded…[that Respondent]…was incompetent because he was more of a risk of incompetence than the general population, not that he was unable to perform required duties." After a thorough review of the record, I am not persuaded by Respondent's assertions in this regard.

As Respondent notes in his appeal, Appeal Decision 2417 (YOUNG) states that a finding of mental incompetence "must rest upon substantial evidence of a reliable and probative character showing that the person charged suffers from a mental impairment of sufficient disabling character to support a finding that he is not competent to perform safely his duties aboard a merchant vessel." Respondent argues that the ALJ did not find, in accordance with *Young*, that Respondent currently suffers from a mental impairment that precludes him from holding merchant mariner credentials, but rather that the ALJ

found that Respondent could, at some point in the future, suffer such an affliction. I disagree.

In this case, the ALJ found that Respondent "*currently* suffers from a psychiatric condition that would affect adversely his ability to serve at sea." [D&O at 16, Emphasis added] In so finding, the ALJ disregarded a finding of "fit for duty" from Respondent's physician because he determined that the finding was "based on the premise that Respondent will control his symptoms by being compliant with his medication and properly manages lifestyle issues," actions which the ALJ determined would be uncertain given the "reasonably foreseeable likelihood of emergency situations arising aboard" merchant vessels. [D&O at 19] 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 Appeal Decision 2181 (BURKE), an ALJ's decision to revoke a mariner's license due to mental incompetence was affirmed. In *Burke*, the ALJ expressly found that "the 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." The *Burke* decision was subsequently upheld by the National Transportation Safety Board which expressly found that although the mariner's current mental status was, as in this case, satisfactory, his history of 'emotional difficulties' caused him to present a risk of a future 'emotional difficulty' that disqualified him for work in a supervisory capacity." Commandant v. Burke, NTSB Order No. EM-83, 3 N.T.S.B. 4441 (1980).

Although Respondent's physician determined that he was "fit for duty," the ALJ disregarded that finding because the physician's decision, in that regard, was:

> ...based on the premise that Respondent will control symptoms by being compliant with his medications and properly manage lifestyle issues and sleep patterns because he has sufficient insight to identify symptoms and take appropriate action. Although Dr. Carltons's fit for duty opinion is based on a review of Matson's Second Assistant Engineer job description, it is reasonable to infer that prolonged exposure to heat, rotating shifts that disrupt sleep patterns, and emergency situations, are unpredictable and would tend to impact adversely on Respondent's ability to manage lifestyle issues. This greater risk for breakthrough episodes is sufficient evidence subsequent to his treating psychiatrist finding him fit for duty to find the Incompetence charge proved.

[D&O at 20]

As I stated above, the decision of the ALJ may only be overturned if his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See, e.g.*, Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), aff'd NTSB Order No. EM-182, 2390 (PURSER), 2363 (MANN), 2344 (KOHAJTA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2589 (MEYER), 2592 (MASON), and 2560 (CLIFTON). The exhaustive testimony of Dr. Carlton, shows that Respondent suffers from a chronic mental illness that will require the administration of psychotropic drugs for the foreseeable future. [D&O at 18; Tr. at 105-110] While Dr. Carlton declared Respondent "fit for duty," the record shows that the physician could not quantify the risk of remission posed by Respondent's condition, even with regular doses of prescription medication being taken to control Respondent's symptoms. [D&O at 18; Tr. at 107, 109] Furthermore, Dr. Carlton stated that one of the prescription drugs being used to treat Respondent's condition carries with it a risk of impaired judgment and impaired motor skills, as well as a warning against operating hazardous machinery. [Tr. at 120] Based

upon this evidence, the record contains substantial evidence to support the ALJ's conclusion that the risk that Respondent could suffer another manic episode while standing watch on a merchant vessel while at sea is significant enough to preclude a finding that he is competent to perform his duties. As such, the ALJ's finding, in this regard, was not arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence and will not now be disturbed.

IV.

The ALJ erred in admitting Respondent's medical discharge summaries from Lions Gate Hospital into evidence because they were not properly authenticated and constituted only a portion of Respondent's relevant medical history.

Respondent asserts that it was error to allow the medical discharge summaries from Lions Gate Hospital to be admitted into evidence because they were not authenticated in accordance with Federal Rule of Evidence 901 and they did not represent Respondent's complete medical record. [App. Br. at 13] I disagree.

In Coast Guard suspension and revocation proceedings, the ALJ has broad authority to admit any evidence that he or she deems relevant. *See* 33 C.F.R. § 20.802 *and* Appeal Decision 2657 (BARNETT). Relevant evidence is defined as "evidence tending to make the existence of any material fact more probable or less probable than it would be without the evidence." 33 C.F.R. § 20.802. In addition, the Coast Guard's procedural rules require that the ALJ "regulate and conduct the hearing so as to bring out all relevant and material facts and to ensure a fair and impartial hearing." *See* 46 C.F.R. § 5.501 *and* Appeal Decision 2657 (BARNETT). Clearly, the medical discharge summaries from Lions Gate Hospital were relevant to the issue of Respondent's alleged incompetence and were thus admissible.

Respondent's reliance on Federal Rule of Evidence 901 is unavailing. Federal agencies are not bound by the strict rules of evidence that govern jury trials. Gallagher v. National Transportation Safety Board, 953 F.2d 1214, 1218 (10th Cir. 1992) *citing* Sorenson v. National Transportation Safety Board, 684 F.2d 683, 688 (10th Cir. 1982). Instead, the admissibility of evidence before executive agencies is governed by the Administrative Procedure Act, which allows any documentary or oral evidence to be received. *See* 5 U.S.C. § 556(d), Gallagher *and* Sorenson. Only irrelevant, immaterial or unduly repetitious evidence need be excluded. *Id.* "Under this standard, in order to be admissible for consideration in an administrative proceeding, the evidence need not be authenticated with the precision demanded by the Federal Rules of Evidence." Gallagher at 1218. Authentication of Respondent's medical records under Federal Rule of Evidence 901 was not a necessary predicate to their admission into evidence.

Respondent's further argument that the medical discharge summaries from Lions Gate Hospital were not his complete medical record and were therefore prejudicial to him fails for the same reasons. [Respondent's Appeal Breif at 15] Since these proceedings are not strictly bound by the Federal Rules of Evidence, Respondent's reliance on Federal Rule of Evidence 106 is also misplaced and without merit. Gallagher v. National Transportation Safety Board, 953 F.2d 1214, 1218 (10th Cir. 1992) *citing* Sorenson v. National Transportation Safety Board, 684 F.2d 683, 688 (10th Cir. 1982). Therefore, because Respondent's medical discharge summaries were relevant to the charge of incompetence, the ALJ did not err in admitting them into the record.

V.

The ALJ erred in finding Respondent committed an act of misconduct because willfulness is a necessary element to a charge of misconduct and that element was not proven by the Coast Guard.

Respondent argues that the ALJ erred in finding that an act of misconduct was committed because the Coast Guard failed to prove Respondent's willfulness, a necessary element of the charge of misconduct. [Respondent's Appeal Brief at 12] Respondent's assertion, in this regard, is without merit.

46 CFR 5.27 states that "misconduct" is,

> human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required.

The misconduct for which Respondent was charged was his departure from his watch station in the engine room aboard the SS EWA while it was underway. [D&O at 21] Respondent left his watch station without a proper relief and later had to be relieved of all duties and confined to his quarters. [*Id.*] Respondent does not deny this conduct; rather, he asserts that because he was suffering from a debilitating illness when the conduct occurred and because the conduct was not due to negligence or callous disregard for the consequences, the ALJ erred in finding the misconduct charge proved. I disagree.

It is well established that "willfulness" is not a necessary element of a charge of misconduct in these proceedings. *See, e.g.*, Appeal Decisions 2490 (PALMER), 2286 (SPRAGUE), 2447 (HODNET), 2445 (MATHISON), 2248 (FREEMAN), 2136 (DILLON), and 922 (WILSON). Indeed, when a misconduct charge is based upon a

violation of a duty imposed by formal rule or regulation, as in this case, there is no requirement that misconduct be willful. Appeal Decision 2445 (MATHISON).

Irrespective of Respondent's mental state at the time of the incident, there is reliable, probative and substantial evidence in the record to support the ALJ's conclusion that Respondent committed misconduct by departing his watch station without a proper relief and, thereafter, having to be relieved of all duties and confined to his quarters. Accordingly, the ALJ's finding that Respondent committed misconduct was not arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence and is affirmed.

CONCLUSION

The actions of the ALJ had a legally sufficient basis and his decision was not arbitrary, capricious, or clearly erroneous. Competent, reliable, probative, and substantial evidence existed to support the findings and order of the ALJ. Therefore, Respondent's bases of appeal are without merit.

ORDER

The order of the ALJ, dated January 25, 2005, at New York, New York, is AFFIRMED.

Signed at Washington, D.C. this 7th of August, 2007.