

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
vs.	:	
	:	ON APPEAL
	:	
	:	NO. 2661
MERCHANT MARINER LICENSE &	:	
MERCHANT MARINER DOCUMENT	:	
	:	
<u>Issued to: ERIC NORMAN SHINE</u>	:	

This appeal is taken in accordance with 46 USC § 7701 *et seq.*, 46 CFR Part 5, and the procedures in 33 CFR Part 20.

By a Decision and Order (hereinafter “D&O”) dated February 20, 2004, an Administrative Law Judge (hereinafter “ALJ”) of the United States Coast Guard at Alameda, California, issued a summary decision revoking the merchant mariner credentials of Mr. Eric Norman Shine (hereinafter “Respondent”) upon finding proved a charge of *medical incompetence*.

The specification found proved alleged that Respondent suffers from a mental impairment of sufficient disabling character which renders him unable to safely perform his duties aboard a merchant vessel.

PROCEDURAL HISTORY

On March 6, 2003, the Coast Guard issued a Complaint against Respondent alleging that he is medically incompetent due to a major depressive disorder, or other psychiatric condition, “the exact nature of which...[would]...be determined through the hearing process.” [Complaint at 2]

From March 2003, when the Coast Guard filed its Complaint, until the ALJ issued his D&O, Respondent and the Coast Guard engaged in extensive motions practice. During that time, approximately 129 motions, replies and orders were filed and issued; the record is extensive and voluminous. Most notably, the ALJ issued three Orders (on July 30, 2003, August 4, 2003, and September 8, 2003) requiring Respondent to submit to a psychological examination by an independent doctor of the ALJ's choosing. [D&O at 2] Respondent did not comply with any of those orders to the satisfaction of the ALJ¹ [*Id.*] Instead, on August 1 and August 22, 2003, Respondent submitted to a psychological evaluation by his chosen Doctor, Dr. Richard G. Rappaport.

On September 10, 2003, citing the negative inference created by Respondent's failure to submit to the psychological examination ordered by the ALJ, as well as many other pieces of evidence, the Coast Guard filed a "Contingent Motion for Summary Decision." [D&O at 6, 33 C.F.R. § 20.901(a)] On October 1, 2003, Respondent filed a brief in reply to the Coast Guard's Contingent Motion for Summary Decision. [D&O at 7] In his Reply, Respondent argued that there was a genuine disputed issue of material fact presented in the case and, to support that assertion, he provided the ALJ with Dr. Rappaport's report which indicated that although Respondent suffered from "major depression," that depression did not render him incompetent to perform the duties associated with his merchant mariner credentials. [D&O at 7; Report of Richard G. Rappaport, M.D. at 15] Following the issuance of numerous other orders, motions and

¹ The record shows that although Respondent showed up for the last scheduled psychological examination, he insisted that both his attorney and a videographer be present during the evaluation. Because the attending psychiatrist would not allow the evaluation to be conducted in this manner, the evaluation did not occur. [D&O at 30-31]

replies which will not be discussed herein, on February 20, 2004, the ALJ granted a summary decision, in favor of the Coast Guard, in the case. [D&O at 45] As such, no hearing was held.

Respondent filed his Notice of Appeal of the ALJ's summary decision on March 9, 2004, and, thereafter, perfected his appeal by filing his Appellate Brief on April 26, 2004. Therefore, this appeal is properly before me.

APPEARANCE: Prior to filing his appeal, Respondent was represented by Forgie, Jacobs & Leonard (Peter S. Forgie, Esq.), 4165 E. Thousand Oaks Boulevard, Suite 355, Westlake Village, CA 91362. On appeal, Respondent appears *pro se*. The Coast Guard was represented by LT Chris Tribolet and LT Brian Hill, of U.S. Coast Guard Marine Safety Office Los Angeles-Long Beach, California.

FACTS

At all times relevant herein, Respondent was the holder of the Coast Guard issued merchant mariner credentials at issue in these proceedings. [Complaint at 1; D&O at 23]

Respondent acted under the authority of his merchant mariner credentials by serving as the Third Engineer and/or Second Engineer aboard the M/V MAUI between March 6, 2001, and June 11, 2001. [Complaint at 2] In addition, Respondent acted under the authority of the same merchant mariner credentials when he served as the Third Engineer aboard the M/V PRESIDENT JACKSON between December 2, 2001 and January 5, 2002. [*Id.*]

While serving as an engineer on the M/V MAUI and the M/V PRESIDENT JACKSON, the Respondent allegedly engaged in behavior that was viewed by his supervisors and members of the crew as harassing, aggressive, litigious and unsafe.

[D&O at 24, 26-28] A logbook entry from the M/V PRESIDENT JACKSON indicated that Respondent's continued presence onboard created an un-seaworthy condition due to his insubordination and inability to follow orders which threatened the safety of the ship.

[D&O at 26] The Chief Engineer onboard the MAUI reported that Respondent did not have the necessary skills to perform his duties and possessed an overall inability to work with other crewmembers. [D&O at 27]

Respondent contends that he has been the long-standing recipient of unfair treatment by his labor union and supervisors. [Appellate Brief at 3, 8-10, 15] Respondent has filed numerous complaints with his union against crewmembers and supervisors on the ships he has served on. [Appellate Brief at 8-10, 15] Respondent claims the union has not taken any appropriate action in response to his numerous requests. [*Id.*] Respondent has filed several lawsuits against his union during the course of these proceedings. [*Id.* at 15-18]

In January of 2001, Respondent learned that his father had cancer and he went home for some time. [Investigating Officer (hereinafter "IO") Proposed Exhibit 32 at 5] Fearing that he may be fired, and alleging the M/V MAUI was not giving him the leave due to him under the circumstances, Respondent returned to work. [*Id.*] The day after getting another assignment on the M/V MAUI, Respondent's father passed away. After Respondent returned home, he learned that he had been replaced aboard the MAUI. [*Id.*] Respondent claims that the passing of his father in conjunction with the other labor disputes he was involved in were damaging to him psychologically. [*Id.*] Respondent contends that he never committed any act of incompetence while acting under the

authority of his mariner credentials and that he is currently mentally capable of returning to a ship. [*Id.*]

BASIS OF APPEAL

Respondent raises numerous issues on appeal, many of which may or may not have substantial merit. According to 33 C.F.R. § 20.1001(c), however, “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.”

In this case, the ALJ granted the Coast Guard’s motion for summary decision, after finding that “the Coast Guard has shown that there exists no genuine issue of material fact that Respondent suffers from a mental impairment of sufficient disabling character, which renders him unable to safely perform his duties aboard a merchant vessel.” [D&O at 44] As such, the sole issue presented in this case is whether there is a genuine issue of material fact regarding Respondent’s mental health and ability to serve under the authority of his merchant mariner credentials.

OPINION

Pursuant to Coast Guard regulation, an ALJ may grant Summary Decision in a Suspension and Revocation proceeding only if “the filed affidavits, the filed documents, the material obtained by discovery or otherwise, or matters officially noted show that there is no genuine issue of material fact and that a party is entitled to summary decision as a matter of law.” 33 C.F.R. § 20.901(b). The regulation further states that once the moving party has supported his motion for summary decision, the party opposing the motion may not “rest upon the mere allegations or denials of facts contained in his or her

own pleading,” instead, the opponent’s “response to the motion...[for summary decision]...must provide a specific basis to show that there is a genuine issue of material fact for the hearing.” 33 C.F.R. § 20.901(c).

An exhaustive search of prior Commandant Decisions on Appeal shows that the issue presented in this case is one of first impression. As such, I have turned to federal case law precedent for guidance on the issue presented. The federal courts have held that, in summary decision cases, an actual controversy of fact exists only where both parties have submitted evidence of contradictory facts. Olabisiomotosho v. City of Houston, 185 F.3d 521, 525 (5th Cir. 1999). Furthermore, in such cases, “the evidence of the non-movant [here, Respondent] is to be believed, and all justifiable inferences are to be drawn in his favor.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The non-moving party is, nonetheless, required to “present affirmative evidence in order to defeat a properly supported motion for summary [decision].” Schoonejongen v. Curtiss-Wright Corp., 143 F.3d 120, 130 (3rd Cir 1998). The courts have made clear that the affirmative evidence presented “must amount to more than a scintilla, but may amount to less...than a preponderance.” Williams v. Borough of West Chester, Pa., 891 F.2d 458, 460-61 (3rd Cir. 1989).

Perhaps more important here, the courts have stated that the function of a motion for summary decision is not to permit the court (or here ALJ) to decide issues of fact, but solely to determine whether there is an issue of fact to be tried. See Aetna Ins. Co. v. Cooper Wells & Co., 234 F.2d 342 (6th Cir. 1956); Nyhus v. Travel Management Corp., 466 F.2d 440 (D.C. Cir. 1972); U.S. v. Bissett-Berman Corp., 481 F.2d 764 (9th Cir. 1973). In that vein, the Courts have noted that “preponderance of the evidence is not the

test in a summary judgment proceeding; rather the test is whether a genuine issue of material fact remains after examination of pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits.” Ransburg Electro-Coating Corp. v. Lansdale Finishers, Inc., 484 F.2d 1037, 1039 (3d Cir. 1973).

In this case, the record shows that the Coast Guard provided the ALJ with numerous documents to support its assertion that there was no genuine issue of material fact as to whether Respondent suffers from a major depressive disorder or other psychiatric condition that renders him incompetent. [D&O at 6] Included among these documents were “non-medical documentary evidence” and “medical reports from various physicians diagnosing Respondent with a depressive disorder.” [*Id.*] In addition, the Coast Guard relied on 33 C.F.R. § 20.1313 which states that a Respondent’s failure or refusal to undergo an ordered examination “may be sufficient for the ALJ to infer that the results would have been adverse to the respondent.”

In response to the Coast Guard’s motion for summary decision, Respondent asserted as follows:

If, indeed, the sole issue to be resolved in this case is the Respondent’s current mental state, and his “competency”...there nevertheless remain factual issues requiring a full hearing. As can be seen from the attached report of Richard Rappaport, M.D., Respondent does not now suffer from incapacitating mental disorders, and, furthermore, does not demonstrate any “incompetency” such as has been charged by the Coast Guard.

[Respondent’s Opposition to Contingent Motion for Summary Judgment at 13] In support of this assertion, Respondent provided the ALJ with Dr. Rappaport’s Declaration, his report discussing the findings and conclusions that resulted from his examination of Respondent, and a copy of Dr. Rappaport’s Curriculum Vitae.

A careful reading of the ALJ's D&O shows that the ALJ was highly concerned with the reliability of the evaluation conducted by Dr. Rappaport. In this vein, the ALJ stated as follows:

Neither the undersigned judge nor the Coast Guard had prior knowledge that Dr. Rappaport saw the Respondent. More importantly, Dr. Rappaport rendered his evaluation without sufficient information from the parties or specific instructions from the judge. Instead, by surreptitiously seeking Dr. Rappaport's services, the Respondent was able to manipulate the interview by selectively disclosing favorable information regarding his psychological well being. For example, the section in Dr. Rappaport's evaluation pertaining to Mr. Shine's psychiatric history is devoid of any reference to either Mr. Shine's nervous breakdown in January 2003, or his hospitalizations in December 2002 and January 2003. Similarly, the report fails to mention the Respondent's numerous counseling sessions with various psychologists over the past few years including, but not limited to, Dr. Francine Kulick, Dr. Emad Tadros, and Dr. Douglas Riddle. Suffice it to say, either Dr. Rappaport was not privy to Mr. Shine's complete psychological history or Dr. Rappaport deliberately chose to discount crucial information without providing a reasonable explanation. Consequently, Dr. Rappaport's conclusion that Respondent does not suffer from a mentally incapacitating disorder is viewed as conjecture at best and is appropriately rejected. [footnote omitted]

[D&O 31-32] Upon so concluding, the ALJ granted the Coast Guard's motion for summary decision.

As is discussed above, in evaluating whether summary decision was proper in this case, I will not weigh the evidence, but rather, I will view the evidence in the light most favorable to Respondent to divine the existence of a genuine dispute of material fact. With regard to whether Respondent suffers from an incapacitating mental disorder which renders him incompetent to perform the duties associated with his merchant mariner credentials, Respondent clearly presented evidence—Dr. Rappaport's report—to contradict the evidence presented by the Coast Guard. Although the ALJ's findings regarding the credibility of Respondent's evidence would likely have been upheld after a

hearing on the merits, it was improper for the ALJ to make such determinations at this stage of the proceedings. Respondent offers medical evidence and argument to show that he does not now suffer from an incapacitating mental disorder while the Coast Guard offers evidence to the contrary: this is a factual dispute at its very essence. This factual dispute makes the granting of summary decision improper. Accordingly, Respondent's appeal is granted.

CONCLUSION

There is conflicting evidence in the record as to whether Respondent is "fit" to serve under his Coast Guard issued merchant mariner credentials. Respondent has presented affirmative evidence, which the ALJ did not view in the light most favorable to Respondent. There remains a genuine issue of material fact that needs to be examined at a hearing, to wit: whether Respondent is currently mentally fit to serve under the authority of a merchant mariner license and document. As such, the findings of the ALJ did not have a legally sufficient basis and the ALJ erred in denying Respondent a hearing.

ORDER

The order of the ALJ, dated at Alameda, California, on February 20, 2004, is **VACATED** and **REMANDED** for a hearing in this matter to be convened.



V.S. Crea
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 27th of December, 2006.