U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	COMMANDANT
vs.	:	
	:	ON APPEAL
MERCHANT MARINER'S DOCUMENT NO.(REDACTED)	:	NO. 2547
Issued to: John R. Picciolo	:	

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 C.F.R. 5.701.

By an order dated 15 January 1992, an Administrative Law Judge of the United States Coast Guard at Long Beach, California, revoked Appellant's document upon finding proved a charge of incompetence. The single specification supporting the charge alleged that Appellant, while serving as Able Seaman aboard SS SEA-LAND HAWAII, O.N. 547288, under authority of his document, was found not fit for duty due to uncontrolled diabetes, and continued to suffer from the effects of diabetes.

The hearing was held at Long Beach, California, on 13 November and 12 December 1991. Appellant appeared personally and was advised of his rights. He elected to represent himself, which he did for the remainder of the hearing.

Appellant responded to the charge and specification by denial

as provided in 46 C.F.R. 5.527. The Investigating Officer introduced five exhibits into evidence and two witnesses testified at his request. Appellant introduced a total of four exhibits and the testimony of three witnesses.

At the conclusion of the 12 December 1991 hearing, the Administrative Law Judge verbally advised Appellant that he was finding the charge and specification proved and ordering revocation of his document. The record is unclear, but the Administrative Law Judge stated an intention to issue a written order that same day. Appellant obtained counsel who filed a notice of appeal on 7 January 1992. The Administrative Law Judge's written final order revoking all documents was, in fact, issued on 15 January 1992, and was served on Appellant shortly thereafter. Appellant's counsel received the transcript on about 24 March 1992, filed his completed brief on 14 May 1992. Under these circumstances, this matter is properly before the Commandant for review.

Appearance: Martin L. Lindahl, Underwood, Gillis & Karcher, 44 West Flagler St., Miami, Florida, 33130.

FINDINGS OF FACT

At all times relevant herein, Appellant was the holder of the above-captioned document issued to him by the United States Coast Guard. Appellant has suffered since at least 1989 from diabetes without insulin dependency. His medical treatment extended to diet, exercise, and medication intended to control his blood sugar level at about 150 milligrams per centimeter. Subsequently, Appellant's blood sugar level appears to have been under erratic control until November 1990, when Appellant was issued a union medical fitness card.

On 12 June 1991, while serving as Able Seaman aboard SS SEA-LAND HAWAII, Appellant presented himself at St. Mary's Health Center in San Francisco, California. He had exhausted his supply of his diabetes medication about a week previously and was seeking a refill. St. Mary's obtained a blood sample and measured his blood sugar level to be 335 milligrams per centimeter. Using a threshold standard of about 200 milligrams per centimeter, he was found not fit for duty due to uncontrolled diabetes.

On 19 June 1991, Appellant, who lives in the Los Angeles area, was examined at the Anderson Medical Group in San Pedro, California. That clinic found him fit for duty with a blood sugar measurement of 169 milligrams per centimeter. According to

Appellant, he then served aboard the SS OVERSEAS NEW ORLEANS.

He was not seen again by any medical care providers until commencing treatment at the Immediate Medical Care Clinic in San Pedro, California. On 4 November 1991, his first visit there, Appellant's blood sugar was not under control. It measured 224 milligrams per centimeter. His medication dosage was quadrupled and he was placed on a weekly monitoring program. On 10 November, his blood sugar measured 160 milligrams per centimeter and showed improved control.

The hearing commenced on 13 November 1991. Over the Investigating Officer's objection, the Administrative Law Judge deferred making a decision and continued the hearing to obtain information on Appellant's condition derived from the monitoring program. On 12 December 1991, the medical testimony was that under the treatment program **subsequent** to 4 November, Appellant's blood sugar had been checked four times and was being satisfactorily controlled. The recommendation was that Appellant's blood sugar level should be checked on a monthly basis until the level was considered to be under good control. There is no evidence in the record when the monthly monitoring could be suspended.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge revoking Appellant's document. Appellant states several bases of appeal including that the Administrative Law Judge's decision was premature in light of the evidence. In view of my disposition of this case, Appellant's arguments will not be addressed seriatim.

OPINION

I.

Incompetence, including by reason of physical disability, is the inability to perform required duties. 46 C.F.R. 5.31. The duties required are those which inhere in the license or document at issue. Diabetes, in common with any number of physical conditions, has the potential to render a mariner incompetent. However, simply identifying a condition and its potential debilitating effects does not prove physical incompetence. Furthermore, the physical evaluation guidelines of Navigation and Inspection Circular 6-89, relied upon by the Administrative Law Judge, do not establish absolute standards of physical incompetence. There must be evidence on the record that tends to prove that the Appellant is unable to perform the required duties

expected of a holder of a document. Appeal Decision 2280 (ARNOLD).

The record reflects that Appellant was found not fit for duty because of uncontrolled diabetes and removed from SS SEA-LAND HAWAII on 12 June 1991. [I.O. Exhibit

3-D]. This action was based solely on the elevated level of his blood sugar when examined at the St. Mary's Health Center. One week later, on 19 June 1991, he was found fit for duty. [Resp. Exhibit A-4]. Between then and the date of the initial hearing, 13 November 1991, Appellant was alternately found to have his diabetes controlled and uncontrolled. During this period, the record is absent of any not fit for duty medical declaration. Immediately prior to the continued hearing date, 12 December 1991, he was found to have his blood sugar level under satisfactory control. [TR of 12 December 1991 at 14]. Ordinarily, proof of incompetence must be based on sufficient evidence of an incompetent act subsequent to any fit for duty declaration. Appeal Decisions 2417 (YOUNG); 2280 (ARNOLD).

Just as Appellant did not dispute that his blood sugar level had several times been "uncontrolled", so the Investigating Officer did not dispute that the Appellant had been found fit for duty. The Investigating Officer merely speculated that Appellant would not have been found fit for duty on 19 June 1991 had the Anderson Medical Clinic known the blood sugar level recorded the prior week by St. Mary's Health Clinic.

Even if there was sufficient evidence to find that the 19 June 1991 fit for duty declaration was a medical mistake, the ultimate issue is whether Appellant can perform the functions expected of him. Contrary to the Investigating Officer's arguments that Appellant was incapable of controlling his diabetes at sea, the record offers only the single incident of 12 June 1991 to support that thesis. While clearly Appellant may not have been as vigilant to the regimen for controlling his blood sugar level as he needed to be, the primary reason for his elevated blood sugar was the exhaustion of his medication supply during the final days of the voyage. [IO Exhibit 4-J; TR of 13 November 1991 at 35]. I note that Appellant's conduct and ability were rated "Very Good" by the Master for the 35 days he sailed. [I.O. Exhibit 3-C]. I further note that even under the uncontrolled blood sugar level episodes of 12 June and 4 November 1991, he apparently suffered neither diarrhea, loss of strength, blurred vision, nor a diabetic coma which the medical testimony in this case identified as the primary risks for an uncontrolled

diabetic at sea. [TR of 7 December 1991 at 31, 32, and 38]. Furthermore, Appellant's current physician was satisfied with his progress and control of the condition. [TR of 7 December 1991 at 14].

The Administrative Law Judge is not bound by medical findings and opinions. The ultimate finding as to fitness is his alone. Appeal Decisions 2191 (BOYKIN); 1720 (HOWELL) (aff'd 1 NTSB 2165); 1466 (SMITH). On the other hand, the Administrative Law Judge's discretion cannot extend beyond the substantial evidence on the record. In this case, the Administrative Law Judge was clearly correct in finding that Appellant's diabetic condition had been poorly controlled in the past. However, the only reliable evidence of Appellant's prognosis for the future came from the testimony of the Immediate Medical Care Clinic doctors. [TR of 13 November 1991 at 67-73 and TR of 12 December 1991 at 12-17]. It is clear that the dosage level adjustment had succeeded in satisfactorily controlling Appellant's blood sugar level. Given this change, it could not be reasonably inferred that he would return to a poorly controlled level should he return to sea.

Nonetheless, it remains a significant concern that Appellant's doctors testified that Appellant's blood sugar level should be monitored on a monthly basis. It is certainly possible that the requirements of such a monitoring program would not be complied with by Appellant should he return to sea. The record is deficient in whether Appellant's blood sugar level can be controlled only through a periodic monitoring program and, if so, whether such a program is compatible with available medical services at sea or ashore, whether such a program will unduly interfere with Appellant's ability to perform, and to what extent Appellant may pose a risk to fellow crewmembers and a ship at sea should he not follow such a program. These issues, as well as others bearing on Appellant's ability to perform the duties expected of a holder of a document, should be addressed on the record. Since they were not, this matter will be remanded for further proceedings.

CONCLUSION

The evidence of Appellant's diabetic condition and past uncontrolled blood sugar levels is insufficient in light of his satisfactory shipboard performance and modified medical regime to support a finding that Appellant is physically incompetent to perform the expected duties of the holder of a document. Whether the medical program prescribed to monitor Appellant's ability to satisfactorily control his blood sugar level is compatible with

the aforesaid expected duties requires further findings.

ORDER

The decision and order of the Administrative Law Judge dated 15 January 1992, is hereby REMANDED. The Administrative Law Judge is directed to REOPEN THE HEARING and permit the Appellant and the Investigating Officer to present evidence of Appellant's most recent medical condition, prognosis, and impact any medical monitoring program will have on his ability to perform the functions of his document.

//S// ROBERT T. NELSON

ROBERT T.NELSON Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 19th day of August, 1992.

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