

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

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD

v.

MERCHANT MARINER LICENSE
&
MERCHANT MARINER DOCUMENT

Issued to: KIRK C. PLENDER

DECISION OF THE
VICE COMMANDANT
ON APPEAL

NO. 2705

APPEARANCES

For the Government:
Mr. Gary F. Ball

Suspension and Revocation National Center of Expertise

For Respondent:
William Hewig III, Esq.
Kopelman and Paige, P.C.

Administrative Law Judge: Walter J. Brudzinski

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

By a Decision and Order (hereinafter "D&O") dated September 17, 2012, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard revoked the Merchant Mariner Credentials issued to Mr. Kirk C. Plender (hereinafter "Respondent") upon finding proved one charge of *incompetence*.

The specification found proved alleges the following. Respondent submitted a completed Merchant Mariner Physical Examination Report (Form CG-719K) to the Coast Guard on

February 18, 2010. His Implantable Cardioverter Defibrillator (hereinafter "ICD") and underlying cardiac conditions documented in the Form CG-719K rendered him physically incompetent and unfit for merchant mariner duties. The Coast Guard National Maritime Center (hereinafter "NMC"), on March 22, 2010, informed Respondent that he was not medically fit for merchant mariner duties due to the heart condition and ICD. Thereafter, on multiple occasions between March 22, 2010, and November 21, 2011, Respondent served onboard American President Lines (hereinafter "APL") vessels as Chief Mate, a safety-sensitive position required by the vessels' Certificates of Inspection. Finally, the specification alleges that by so serving while not medically fit to do so, Respondent committed an act of *incompetence*.

FACTS

At all relevant times, Respondent was the holder of the Coast Guard-issued credentials at issue in this proceeding. [D&O at 8-9]

In March 2009, while on a ski trip, Respondent suffered a severe myocardial infarction (heart attack), which caused substantial damage to his heart and required implantation of two stents. [D&O at 3] Among other things, this resulted in a reduced ejection fraction of 20 to 25 percent. [D&O at 3, 9] Ejection fraction is a measure of the ability of the heart to pump blood to the body. [D&O at 3, 10] A normal ejection fraction is greater than 55 percent. [D&O at 3, 10] A heart condition with a low ejection fraction like Respondent's presents an increased risk for dangerous dysrhythmias called ventricular tachycardia or fibrillation. [CG Ex. 2 at 1] They can cause sudden incapacitation and death. [*Id.*]

In June 2009, Respondent had an ICD implanted in his chest. [D&O at 4, 10] The purpose of an ICD is to administer an electric shock to the heart if arrhythmia occurs. [D&O at 3, 10] Arrhythmia is an irregular heart rhythm which causes the heart to malfunction. [D&O at 3, 10] An ICD is appropriate for primary prevention of sudden cardiac death in patients deemed to be at high risk of developing fatal arrhythmias. [CG Ex. 4 at 2] The electric shock administered by an ICD is expected to convert a lethal heart rhythm to a normal rhythm. [CG Ex. 2 at 1] In rare instances, ICDs have administered shocks when there was no arrhythmia. [D&O at 3-4, 10] When an ICD administers a shock, there is a risk of temporary incapacitation. [Tr. at 36-37; CG Ex. 2 at 1] The

ICD also may administer a shock but fail to restore a normal rhythm, in which case incapacitation or death may result. [CG Ex. 2 at 1]

Respondent's medical conditions, including ischemic cardiomyopathy,¹ reduced ejection fraction, and the implanting of an ICD, put him at a higher risk of sudden incapacitation or sudden death than the general population. [D&O at 12]

In October 2009, Respondent returned to work as a Chief Mate for APL after the implantation of the ICD. [D&O at 3-4, 11] In his Answer to the Complaint, Respondent admitted that on numerous occasions between March 22, 2010 and November 21, 2011, he served aboard APL vessels as Chief Mate.

Merchant Mariner deck officers such as Respondent are required to submit the results of an annual medical examination to the NMC "to ensure that there are no conditions that pose an inordinate risk of sudden incapacitation or debilitating complication," among other things. [D&O at 4, 11; 46 C.F.R. § 10.215(d)] The annual medical examinations are documented in a Merchant Mariner Credential Medical Evaluation Report, Form CG-719K. [D&O at 11] Respondent submitted a Form CG-719K, on January 1, 2010, to the NMC. [D&O at 4, 11] On March 22, 2010, Chief, Medical Evaluations Division, NMC, denied Respondent's request for a medical waiver, finding he was not medically qualified for his Merchant Mariner duties due to severe cardiomyopathy requiring the placement of an ICD. [D&O at 4, 11; CG Ex. 2] A subsequent request for reconsideration of the waiver and an appeal of the NMC decision were denied by the Coast Guard. [D&O at 4, 11-12]

PROCEDURAL HISTORY

On November 22, 2011, the Coast Guard filed a Complaint against Respondent's Merchant Mariner Credentials. On December 12, 2011, Respondent filed an Answer to the Complaint wherein he admitted the jurisdictional allegations and admitted in part and denied in part the Complaint's factual allegations. Respondent expressly denied acts of incompetence between

¹ Weakening of the heart muscles caused by a lack of blood flow to them is a condition referred to as "ischemic cardiomyopathy." *Commandant v. Hocking*, NTSB Order No. EM-212 (2013) at 5 (n. 15).

March 22, 2010 and November 21, 2011, the dates specified in the Complaint.

The hearing was held on April 24, 2012, at Boston, Massachusetts. At the hearing, the Coast Guard presented the testimony of one witness and introduced six exhibits. Respondent testified on his own behalf and introduced six exhibits.

The ALJ issued his D&O on September 17, 2012. Respondent filed his Notice of Appeal on October 16, 2012, and perfected his appeal by filing an Appeal Brief on November 19, 2012. The Coast Guard filed a Reply on December 26, 2012. This appeal is properly before me.

BASES OF APPEAL

Respondent appeals the ALJ's D&O revoking his Merchant Mariner Credentials, and raises the following bases of appeal:

- I. *The ALJ's "Ultimate Findings of Fact and Conclusions of Law" No. 3, 4, 7 and 8 are not in accord with applicable law, precedent and public policy because they wrongfully ignore the plain language of 46 U.S.C. § 7703(4);*
- II. *The ALJ's "Ultimate Findings of Fact and Conclusions of Law" No. 4 and 7 are fact findings not supported by substantial evidence;*
- III. *Because "Ultimate Findings of Fact and Conclusions of Law" No. 3, 4 7 and 8 are contrary to applicable law, precedent and public policy, and because findings 4 and 7 are not supported by substantial evidence, the ALJ's Ultimate Findings No. 3, 4, 7 and 8 are arbitrary, capricious and an abuse of discretion; and,*
- IV. *The ALJ's "Ultimate Findings of Fact and Conclusions of Law" No. 3, 4, 6, 7 and 8 are not in accordance with applicable law, precedent and public policy because the underlying procedure was conducted in violation of the Rehabilitation Act of 1974 and the Due Process Clause of the Fifth Amendment of the United States Constitution.*

OPINION

This case is very similar to the case decided by the National Transportation Safety Board (hereinafter "NTSB") in *Commandant v. Hocking*, NTSB Order No. EM-212 (2013). The facts in this case are largely undisputed. In his appeal brief, Respondent concedes, "It is undisputed that [Respondent] suffered a myocardial infarction in 2009 (T. 158), had a recorded ejection fraction of below 40 (CG Ex. 2, 3), and underwent the surgical implantation of an ICD (T. 160-1)."

[Respondent's Appeal Brief at 5] He also concedes "that, with that diagnosed condition, [Respondent] had nonetheless successfully sailed as a Chief Mate between 2009 and 2012." [*Id.*] The essential dispute concerns how the Coast Guard interprets and applies 46 U.S.C. § 7703(4) and 46 C.F.R. § 5.31, provisions relating to the basis for suspension and revocation of Merchant Mariner Credentials for incompetence.

Respondent's first three bases of appeal all relate to this dispute about the proper interpretation of 46 U.S.C. § 7703(4) and 46 C.F.R. § 5.31, and whether the ALJ's fact-finding reflected a proper interpretation of those provisions. Accordingly, I will address those three bases of appeal together.

I.

Whether the ALJ's Ultimate Findings of Fact and Conclusions of Law ignore the plain language of 46 U.S.C. § 7703(4) and 46 C.F.R. § 5.31.

Respondent challenges certain of the ALJ's Ultimate Findings of Fact and Conclusions of Law. Respondent asserts, based on a narrow interpretation of 46 U.S.C. § 7703(4) and 46 C.F.R. § 5.31, that the specified Findings and Conclusions ignore the plain language of 46 U.S.C. § 7703(4).

46 U.S.C. § 7703(4) provides in pertinent part that a Merchant Mariner Credential may be suspended or revoked if the holder "has committed an act of incompetence relating to the operation of a vessel." 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."

After jurisdictional findings, the ALJ's Ultimate Findings of Fact and Conclusions of Law are as follows:

3. Respondent committed an act of incompetence when he suffered a severe heart attack in March, 2009.

4. Respondent's incapacitation as a result of his heart attack demonstrated an inability to perform his required duties due to physical disability.
5. Respondent's medical conditions place him at greater risk for sudden incapacitation or sudden death than that of the general population.
6. Because Respondent's medical conditions place him at greater risk for sudden incapacitation or sudden death than that of the general population, his heart attack is relating to the operation of a vessel.
7. Respondent has committed an act of incompetence demonstrating his inability to perform required duties due to physical disability that is relating to the operation of a vessel.
8. Respondent is incompetent due to physical disability to hold any Coast Guard issued credential.

[D&O at 22-23]

Of the foregoing Findings and Conclusions, Respondent challenges 3, 4, 7, and 8.

Respondent argues that, based on their plain language, 46 U.S.C. § 7703(4) and 46 C.F.R. § 5.31 should be read to authorize revocation of a merchant mariner's Coast Guard-issued credentials for incompetence due to physical disability only when there is evidence of inability, at the time of the hearing, to perform required physical tasks or functions of his position; or evidence of a medical incident, during his service relating to operation of a vessel, that affected his physical ability to perform duties at that time. Implicit in Respondent's argument is the notion that forward-looking concerns, such as the risk of future sudden death or sudden incapacitation, are not encompassed within the language of those provisions, and are not relevant or appropriate considerations in a suspension and revocation proceeding involving incompetence based on physical disability.

Subsequent to Respondent's appeal, the NTSB issued *Commandant v. Hocking*, NTSB Order No. EM-212 (2013). The appellant in that case, holder of a Merchant Mariner License as Master, had suffered a ventricular tachycardia event and had elected to have an ICD implanted. A diagnosis of ventricular tachycardia typically precludes issuance of a Merchant Mariner License absent a waiver. In 2009, the Coast Guard refused to grant the appellant a waiver, and initiated

suspension and revocation proceedings against his credentials alleging that he had committed an act of incompetence by operating a vessel while incompetent. His license was revoked, and the order of revocation was affirmed on appeal to the Commandant. Appeal Decision 2698 (HOCKING) (2012). On appeal to the NTSB, the Coast Guard's appeal decision was affirmed. *Commandant v. Hocking*, NTSB Order No. EM-212 (2013).

In *Hocking*, as a preliminary matter, the NTSB approved the idea that incompetence could be based on a medical diagnosis. NTSB Order No. EM-212 at 13. En route to affirming the Coast Guard's decision, the NTSB identified as significant to the finding of incompetence the fact that the mariner may become incapacitated at any time, without warning (*id.* at 14); the mariner's ability or inability to control his condition, specifically the circumstance of incapacitation due to his condition (*id.* at 15); and the risk presented as a result of the mariner's medical condition (*id.*). The NTSB cited with approval Appeal Decisions 2547 (PICCIOLO) (1992) and 2664 (SHEA) (2005), affirming that a diagnosis of a certain condition may render a seaman incompetent, and affirming the relevance of a mariner's control of his condition and a risk assessment in the consideration of incompetence due to physical disability.

In view of the NTSB's holding in *Hocking*, the arguments for a narrow interpretation of 46 U.S.C. § 7703(4) and 46 C.F.R. § 5.31 asserted by Respondent in his first three bases of appeal are unpersuasive. Given Respondent's concessions that he suffered a myocardial infarction, that he has an abnormally low ejection fraction, and that he has an implanted ICD, unquestionably he has a diagnosis of a medical condition that may render him incompetent due to physical disability. Respondent has not challenged the ALJ's Ultimate Findings of Fact and Conclusions of Law number 5, which states: "Respondent's medical conditions place him at greater risk for sudden incapacitation or sudden death than that of the general population." [D&O at 22] This finding is well supported by the evidence. Nothing more is required to establish incompetence due to physical disability. See Appeal Decisions 2698 (HOCKING) (2012) at 15-16 and 2664 (SHEA) (2005) at 10.

I turn to the ALJ's Ultimate Findings of Fact and Conclusions of Law attacked by Respondent. Ultimate Finding/Conclusion number 3, that Respondent committed an act of

incompetence when he suffered a severe heart attack in March, 2009, is problematic at best. It has never been held that merely incurring a physical disability or suffering a medical incident or condition at an unspecified location, although it may render a mariner incompetent, is an act of incompetence relating to the operation of a vessel. Ultimate Finding/Conclusion number 6, that Respondent's heart attack relates to the operation of a vessel (which Respondent has not attacked), is more than problematic. The ALJ reasoned that because Respondent's condition created an unacceptable risk to safety at sea, it related to the operation of a vessel for the purposes of 46 U.S.C. § 7703(4). I do not accept this logic, which stretches the meaning of "relating to the operation of a vessel" in the statutory language "an act of incompetence relating to the operation of a vessel" too far. The ALJ may have been reading the phrase "relating to the operation of a vessel" as modifying "incompetence", but I see it as modifying "act"; otherwise the word "act" has no meaning.

I need not decide whether a heart attack aboard a vessel could be an act of incompetence within the meaning of 46 U.S.C. § 7703(4).² Respondent's heart attack, which took place ashore during a ski trip, did not relate to the operation of a vessel.

Ultimate Finding/Conclusion number 4, that Respondent's incapacitation as a result of his heart attack demonstrated an inability to perform his required duties due to physical disability, is not wrong, but it is insufficient to establish incompetence in more than a temporary sense, and therefore would not by itself support an order of revocation. *See Appeal Decision 2547 (PICCIOLO) (1992).*

Having determined that Ultimate Finding/Conclusion numbers 3 and 6 are in error at least in part, and that Ultimate Finding/Conclusion number 4 is of little if any effect, I must consider the effect of these determinations. The specification alleges that Respondent served as Chief Mate, and that by so serving while not medically fit to do so, Respondent committed an act of incompetence. The latter assertion, that by so serving while not medically fit, Respondent committed an act of incompetence, is a proper example of an act of incompetence relating to

² *Appeal Decision 2547 (PICCIOLO) (1992)* suggests that it could be, but also shows that later events are relevant to a proper determination.

operation of a vessel. The ALJ found as a fact that after his heart attack and implantation of an ICD, Respondent resumed working under the authority of his Merchant Mariner Credentials as a Chief Mate. [D&O at 11] This finding clearly supports a conclusion that the foregoing allegation (that Respondent served as Chief Mate, and that by so serving while not medically fit to do so, Respondent committed an act of incompetence) has been proved, and hence supports the ALJ's finding the specification proved. Thus, Ultimate Findings/Conclusions numbers 3, 4 and 6 are unnecessary to the case. To the extent they are in error, they are harmless.

Ultimate Finding/Conclusion number 7 finds that Respondent committed an act of incompetence related to the operation of a vessel.³ Again, Respondent has conceded that he sailed as a Chief Mate between 2009 and 2012, after his disqualifying medical conditions were diagnosed. Together with the finding that Respondent is at greater risk for sudden incapacitation or sudden death than that of the general population due to his physical disabilities (medical conditions), his sailing as a Chief Mate supports the finding that Respondent committed an act of incompetence relating to the operation of a vessel. *See Appeal Decision 2698 (HOCKING) (2012) at 15-16.*

Ultimate Finding/Conclusion number 8 is essentially redundant with Ultimate Finding/Conclusion number 7 and warrants no further discussion.

In this case, I hold that a mariner's permanent physical disability that involves a risk of sudden death or incapacitation that is greater than the risk in the general population constitutes incompetence within the terms of 46 C.F.R. § 5.31.⁴ Accordingly, the Coast Guard may seek revocation of a Merchant Mariner Credential if the mariner is diagnosed with a medical condition that places him or her at greater risk for sudden incapacitation or sudden death than that of the general population, and the mariner, after the diagnosis, serves as a merchant mariner on a vessel or otherwise performs an action relating to operation of a vessel. This understanding of what it means to commit an act of incompetence relating to the operation of a vessel is consistent with the

³ The language reflecting Ultimate Finding/Conclusion number 4 ("demonstrating" his inability to perform) is surplusage.

⁴ This holding is entirely consistent with *Commandant v. Hocking*, NTSB Order No. EM-212 (2013) and *Appeal Decisions 2698 (HOCKING) (2012), 2664 (SHEA) (2005), and 2547 (PICCIOLO) (1992).*

purpose of suspension and revocation proceedings, which is "to promote safety at sea." 46 U.S.C. § 7701(a). Allowing a risk of sudden death or incapacitation to exist, endangering public and maritime safety, simply does not promote safety at sea, and neither NTSB nor Coast Guard precedent interpreting 46 U.S.C. § 7703(4) and 46 C.F.R. § 5.31 requires the acceptance of such a risk.

I note that in this case, as in *Hocking*, Respondent was notified by the Coast Guard that he was considered medically disqualified and denied a waiver before the acts of incompetence alleged. In both *Picciolo* and *Shea* there were no administrative determinations by the Coast Guard that the mariners were medically disqualified, before the ALJs determined that each had committed an act of incompetence. However, the mariners manifested their disabilities while acting under the authority of their Merchant Mariner Credentials. In *Picciolo*, the mariner visited a medical clinic during a port visit and was found not fit for duty due to uncontrolled diabetes; in *Shea*, the mariner exhibited erratic behavior while on shipboard watch, leading to a diagnosis of mental illness. In the absence of such an incident relating to operation of a vessel, it is sound practice to initiate a charge of incompetence due to physical or mental disability after the mariner has been notified of the determination of medical disqualification and has thereafter committed an act of incompetence relating to the operation of a vessel, as was done in *Hocking* and in the present case.

This case does not present the question of whether there is a degree of risk of sudden death or sudden incapacitation that, while greater than the risk in the general population, is not sufficient to warrant a finding of incompetence. 46 C.F.R. § 10.215(d)(1) uses the term inordinate risk, indicating that inordinate risk warrants medical disqualification. Incompetence should be aligned with medical disqualification; surely inordinate risk also warrants a finding of incompetence. In this case, as the ALJ noted, a reviewing physician of the Coast Guard stated that Respondent "has an inordinate risk of sudden death and incapacitation due to a ventricular arrhythmia." [D&O at 11-12; CG Ex. 04] The evidence in this case amply supports a conclusion that Respondent presents an inordinate risk of sudden death or sudden incapacitation due to his physical disability. Such risk is an unacceptable risk to public and maritime safety. It might be said that any risk greater than that in the general population is an inordinate risk, but this case does not require that I

go that far.

Respondent's first three bases of appeal are rejected.

IV.

Did the proceeding violate the Rehabilitation Act of 1974?

In his final basis for appeal, Respondent argues that the Rehabilitation Act, 29 U.S.C. § 794, prohibits across-the-board exclusion of persons with a disability from holding Merchant Mariner Credentials. He asserts that mariners with a disability are entitled under the Rehabilitation Act to receive an individualized review, or a case-by-case determination, and complains that he did not receive an individualized review because the Coast Guard has a policy of not granting medical waivers for heart conditions requiring the implantation of an ICD.

As with Respondent's other bases for appeal, this basis for appeal was addressed by the NTSB in its decision in *Commandant v. Hocking*, NTSB Order No. EM-212 (2013). Like Respondent, the appellant in that case was the subject of a suspension and revocation proceeding because of a heart condition and the implantation of an ICD. The appellant also argued that the Rehabilitation Act was applicable and was violated by the Coast Guard's actions against him. *Id.* at 20. The NTSB rejected the appellant's position, relying on *Buck v. U.S. Dept. of Transportation*, 56 F.3d 1406 (D.C. Cir. 1995). *Id.* The NTSB stated, "The term 'otherwise qualified individual,' as stated in the [Rehabilitation] Act, is defined as a person who is able to meet all a program's requirements in spite of his or her disability." *Id.* at 20, citing *Buck*, 56 F.3d at 1408. The NTSB concluded that Hocking was not an "otherwise qualified individual" given his undisputed condition and the properly established Coast Guard standard listing his condition as one that precludes a waiver. *Id.* at 21. Again citing *Buck*, the NTSB stated that "the Rehabilitation Act does not apply to preclude agencies from applying a 'general rule' of exclusion when an individual simply does not fulfill a certain safety standard." *Id.* at 20-21.

Accordingly, Respondent's argument that the Rehabilitation Act required the Coast Guard to undertake an individual review or a case-by-case determination in his case fails.

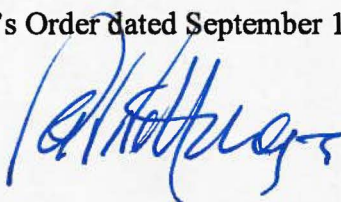
Moreover, although the Coast Guard did deny a medical waiver for Respondent's heart condition and the implanted ICD before the Coast Guard commenced suspension and revocation proceedings [D&O at 11-12], the ALJ did not simply find that the denial of a medical waiver was a basis for revoking Respondent's Merchant Mariner Credentials. Instead, the ALJ based his findings on independent evidence presented at the hearing, which showed that Respondent suffered from medical conditions that placed him at risk for sudden death or sudden incapacitation, and that proved that Respondent had committed an act of incompetence related to the operation of a vessel. To the extent that the evidence relied on the same general rule of exclusion that was applied in denying Respondent a waiver, that evidence and the ALJ's determination based thereon fall within *Buck* and do not violate the Rehabilitation Act.

CONCLUSION

With the exception of harmless errors in Ultimate Findings of Fact and Conclusions of Law numbers 3, 4 and 6, the ALJ's findings and conclusions are lawful, based on correct interpretation of the law, and supported by reliable, probative, and substantial evidence. The essential findings and conclusions are based on correct interpretation of the law. The hearing was conducted in accordance with the law.

ORDER

The ALJ's Order dated September 17, 2012, is AFFIRMED.



Signed at Washington, D.C., this 1st day of OCTOBER, 2014.