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
v.	:	ON APPEAL
	:	NO. 2709
MERCHANT MARINER LICENSE	:	
Issued to: WILLIAM TEE COFFY	:	

APPEARANCES

For the Government:
LT Gregory J. Knoll, USCG
LT Jessica L. Bohn, USCG
LT Eric L. Sumpter, USCG
Coast Guard Sector Hampton Roads

Respondent:
Mr. William Tee Coffy, *pro se*

Administrative Law Judge: Michael J. Devine

This appeal is taken in accordance with 46 U.S.C. Chapter 77, 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") dated January 7, 2013, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard revoked the Merchant Mariner Credential of Mr. William Tee Coffy (hereinafter "Respondent") upon finding proved one specification of use of or addiction to the use of dangerous drugs.

The specification found proved alleges that Respondent submitted to a random drug test on May 3, 2012, and that the specimen that he provided subsequently tested positive for the presence of cocaine metabolites.

FACTS

At all relevant times, Respondent was the holder of a Merchant Mariner Credential issued to him by the United States Coast Guard. [D&O at 8]

On May 3, 2012, Respondent was employed by MAERSK Line, Ltd., aboard the M/V MAERSK VIRGINIA. [D&O at 8; Coast Guard Exhibits (hereinafter "CG Ex.") 2, 4] On that date, pursuant to employer direction, Respondent participated in a random drug test at Substance Abuse Testing of Savannah. [D&O at 8; Transcript of the proceedings (hereinafter Tr.) at 30, 59-68; CG Ex. 2] The collector who obtained Respondent's urine sample followed Department of Transportation (hereinafter "DOT") procedures. [D&O at 8]

Following collection, Respondent's urine sample was sent to Quest Diagnostics, a laboratory certified by the Department of Health and Human Services to perform drug testing under federal regulations. [D&O at 9; Tr. at 92; CG Ex. 8] Upon arrival at Quest Diagnostics, the chain of custody for Respondent's urine specimen was intact and without flaws. [D&O at 9; Tr. at 108; CG Ex. 7] Respondent's urine subsequently tested positive for cocaine metabolites. [D&O at 9; Tr. at 107]

A Medical Review Officer (hereinafter "MRO") interviewed Respondent on May 8, 2012. [D&O at 9] Although Respondent denied using cocaine during the interview, the MRO determined that there was no valid excuse or medical explanation for the positive test result and verified Respondent's result as positive. [D&O at 9; Tr. at 129-45, 168-70; CG Ex. 11]

During his interview with the MRO, Respondent requested that his split sample be tested by a second laboratory. [D&O at 9, Tr. at 140] As a result, testing of Respondent's split specimen was conducted by Clinical Reference Laboratory, a DOT-approved laboratory in Lenexa, Kansas. [D&O at 9; Tr. at 140, 151-52] Testing at Clinical Reference Laboratory confirmed the presence of cocaine metabolite in Respondent's urine sample. [D&O at 9; CG Ex. 11]

On May 18, 2012, after the results of the testing of Respondent's split specimen were returned, the MRO again verified Respondent's results as positive. [D&O at 9; Tr. at 131; CG Ex. 11]

PROCEDURAL HISTORY

On May 21, 2012, the Coast Guard filed a Complaint against Respondent's Merchant Mariner Credential. On July 10, 2012, the Coast Guard filed a Motion for Default in the matter because Respondent failed to file his Answer within the procedurally mandated timeframe. However, before the ALJ ruled on the Coast Guard's Motion for Default, on July 16, 2012, Respondent filed an Answer. Although the ALJ could have considered the Coast Guard's Motion for Default, he deemed it moot and protected the due process rights of the *pro se* Respondent by proceeding to address Respondent's case on the merits. [D&O at 3-4]

In his Answer, Respondent admitted all of the Complaint's jurisdictional and factual allegations, but requested to be heard on the proposed order and to commence settlement discussions.

On August 13, 2012, the Coast Guard submitted a Motion for Summary Decision contending that there were no genuine issues of material fact based on Respondent's Answer. However, in view of perceived ambiguity in Respondent's Answer, including the fact that he had indicated a desire to have a hearing, and mindful of Respondent's status as a *pro se* party, the ALJ denied the Coast Guard's Motion for Summary Decision and reconfirmed the hearing that had previously been scheduled. [Order dated September 5, 2012]

The hearing took place on October 23, 2012, at Norfolk, Virginia. The Coast Guard offered the testimony of six witnesses and entered fourteen exhibits into the record. Respondent testified on his own behalf and entered two exhibits into the record.

Following the hearing, the record was left open for one week to allow Respondent to submit additional documents, subject to objection by the Coast Guard. Respondent subsequently

offered eleven exhibits into the record and filed a "Motion to Exclude," apparently attempting to change his Answer to the Complaint. The Coast Guard objected to both Respondent's "Motion to Exclude" and the admission of his post-hearing documents. While the ALJ admitted Respondent's post-hearing documents into the record, he denied his "Motion to Exclude" as untimely and meritless, and noted that Respondent was provided the opportunity to fully contest the matter at the hearing. [D&O at 5]

The ALJ issued his D&O on January 7, 2013. Respondent filed his Notice of Appeal on January 10, 2013 and his Appeal Brief on February 13, 2013, thus perfecting his appeal. The Coast Guard filed a Reply on March 20, 2013. This appeal is properly before me.

BASES OF APPEAL

Respondent appeals from the ALJ's D&O, which found proved a charge of use of or addiction to the use of dangerous drugs, and ordered the revocation of Respondent's Merchant Mariner Credential. From Respondent's filings, I discern the following four issues:

I. *Whether the drug test at issue in the proceedings was among those authorized by 46 C.F.R. Part 16;*

II. *Whether the ALJ was correct to find that the Coast Guard established a prima facie case even though it failed to submit a full litigation package;*

III. *Whether the ALJ was correct to find that the Coast Guard established a prima facie case absent the testimony of two witnesses who, although placed on the Coast Guard's initial witness and exhibit list, were not called at the hearing;*

IV. *Whether the record contains evidence of "judicial misconduct" to warrant the overturning of the ALJ's D&O.*

OPINION

I.

Whether the drug test at issue in the proceedings was among those authorized by 46 C.F.R. Part 16

Respondent, for the first time on appeal, complains that he was subjected to drug testing:

> . . . without any workplace post-accident or any reasonable suspicions called into play in the execution of my shipboard duties aboard the M/V MAERSK VIRGINIA that called for such test to be conducted, excluding [a] majority of the other seamen that I made the trip with who were allowed to pay-off and leave at the first port of call on our arrival to the shores of the United States.

Respondent's Appeal Brief at 1.

Respondent implies that because the drug test was not a "post-accident" test or a test resulting from a "reasonable suspicion" of drug use, the test was not conducted in accordance with 46 C.F.R. Part 16 and the ALJ erred in finding that the Coast Guard had established a *prima facie* case of drug use. This issue is without merit.

It is well settled that under 46 C.F.R. Part 16, employers are required to conduct five specific types of drug testing: 1) Pre-employment testing; 2) Periodic testing; 3) Random testing; 4) Serious marine incident testing; and 5) Reasonable cause testing. 46 C.F.R. §§ 16.210-16.250; Appeal Decision 2704 (FRANKS) (2014) at 5; Appeal Decision 2697 (GREEN) (2011) at 3.

In this case, the "Factual Allegations" portion of the Coast Guard's Complaint alleged that Respondent took a random drug test. Respondent admitted the Complaint's factual allegations, including that he had submitted to a random drug test, in his Answer to the Complaint.

More importantly, even though the "randomness" of Respondent's drug test was not contested by his Answer, testimony and evidence were presented at the hearing to show that Respondent was selected for testing via a scientifically valid method (in accordance with 46 C.F.R. § 16.230). [Tr. at 20-37; Coast Guard Ex. 2] Thus, there was substantial evidence to support the ALJ's third finding of fact: "Respondent submitted to a random drug test conducted in accordance

with 46 C.F.R. Part 16." [D&O at 8] Respondent's aspersions notwithstanding, there was no impropriety in subjecting him to drug testing or in using the results against him in this proceeding.

II.

Whether the ALJ was correct to find that the Coast Guard established a prima facie case even though it failed to submit a full litigation package

Respondent's second basis of appeal centers on what he calls a lack of "laboratory proof" to support a *prima facie* case of drug use. Respondent asserts that in allowing for the establishment of a *prima facie* case of drug use without the inclusion of a full laboratory "litigation package" in the record, the ALJ has allowed "someone's career to be destroyed . . . without any proof." [Respondent's Appeal Brief at 2] Respondent's assertion stems from a question raised by the ALJ at the close of the hearing and answered in the Coast Guard's post-hearing brief.

At the close of the hearing, the ALJ asked the Coast Guard to explain why it had not presented "documentation from the lab," in addition to the testimony of the Lab Director, in its attempt to establish a *prima facie* case. [Tr. at 191] The Coast Guard addressed this issue in its post-hearing submission, stating: "First, the Respondent admitted to all factual allegations in his Answer, at a prehearing conference and again at the hearing. Absent issues in dispute, the laboratory litigation package was not necessary to prove the *prima facie* case that the Respondent is a user of dangerous drugs." [Appeal Brief at 2] The Coast Guard further asserted that because it had presented substantial evidence, including the testimony of the urine collector, Lab Director and MRO, as well as the Federal Drug Testing Custody and Control Forms and the MRO's Final Report, to support the establishment of a *prima facie* case of drug use, the submission of a laboratory litigation package was unnecessary. The ALJ accepted the Coast Guard's assertions and found a *prima facie* case of drug use, without a litigation package. Respondent now contends that such finding was in error. I do not agree.

To establish a *prima facie* case of drug use based solely on a urinalysis test result, the Coast Guard must prove three elements: (1) that Respondent was tested for a dangerous drug, (2) that

Respondent tested positive for a dangerous drug, and (3) that the test was conducted in accordance with 46 C.F.R. Part 16. Appeal Decision 2704 (FRANKS) (2014) at 5-10.

In his D&O, the ALJ specifically addressed each of the three elements of a *prima facie* case. With regard to the first element, that Respondent was tested for a dangerous drug, the ALJ noted: that Respondent admitted taking a drug test in his Answer; that the DTCCF verified that Respondent submitted to a drug test; and that the collector of Respondent's urine sample testified that Respondent provided a properly obtained urine sample on the relevant date. [D&O at 13] With regard to the second element, that Respondent tested positive for a dangerous drug, the ALJ noted: that Quest Diagnostics, a certified laboratory, tested Respondent's urine sample and found it to be positive for the presence of cocaine metabolites; that the Coast Guard presented testimonial evidence (the Lab Director's testimony) and eight exhibits (CG Ex. 6-12; CG Ex. 14) to support a conclusion that the laboratory met all DOT requirements in its operation and practices; that a confirmatory test, conducted by a second DOT-certified laboratory, Clinical Reference Laboratory, confirmed the presence of cocaine metabolite in Respondent's urine sample[1]; and that a MRO verified Respondent's test results as positive. [D&O at 14] Finally, in addressing the third element, that the drug test was conducted in accordance with 46 C.F.R. Part 16, the ALJ found that Respondent was properly selected for random drug testing in accordance with 46 C.F.R. § 16.230(c). [D&O at 14-15] Based upon these conclusions, the ALJ found: "The United States Coast Guard has established each of the three factors necessary for a *prima facie* case by a preponderance of the evidence. They are entitled to the presumption that Respondent is a user of dangerous drugs." [D&O at 15]

These findings are supported by the record. Even though the Coast Guard did not introduce a full laboratory "litigation package" into evidence, the testimony and exhibits presented support the ALJ's conclusion that a *prima facie* case of drug use was established.

[1] Respondent also contends that the confirmatory test is insufficient to support a *prima facie* case of drug use because the confirming laboratory is told that a sample has tested positive before it actually tests the sample, and hence the confirmatory test does not establish anything other than what it is told, that the sample is positive. Respondent's contention is unpersuasive, and there is nothing in the record to suggest that the confirming laboratory failed to properly conduct independent testing of Respondent's sample. Rather, the record shows that such testing was conducted in accordance with the applicable DOT regulations.

In its Reply Brief, the Coast Guard argues that the introduction of a full "litigation package" is unnecessary in these proceedings and requests that I hold that "the laboratory report, itself, once it was signed by the MRO, constitute[s] proof adequate to shift to appellant the burden of going forward with evidence." Reply Brief at 4-5. In arguing that position, the Coast Guard cites *Commandant v. Sweeney*, NTSB Order No. EM-176, 1994 WL 475814, in which the National Transportation Safety Board observed, "[I]t seems to us that the laboratory report itself, once it was signed by the MRO, constituted proof adequate to shift to appellant the burden of going forward with evidence that the positive finding of marijuana metabolites in his urine was not the product of a wrongful use of the drug." The context of this statement was the appellant's argument that the Coast Guard's case against him, alleging use of a dangerous drug, was deficient because it did not establish the qualifications of various individuals involved in the testing and analysis of his urine sample.

I understand the Coast Guard to be proposing that an MRO-signed laboratory report would fulfill the second element and part of the third element of the *prima facie* case.

The Coast Guard is correct that the introduction of a full laboratory "litigation package" was unnecessary here to establish a *prima facie* case of drug use, given that the Coast Guard's extensive presentation of witnesses and other evidence so abundantly satisfied its burden. The Coast Guard's evidentiary strategy in a case like this with a *pro se* Respondent who has contested whether discovery was adequate, and who submitted an ambiguous answer, served the interests of fairness although it may have exceeded the minimum showing required for a *prima facie* case. It is the ALJ in the first instance who must consider the evidence and decide whether it is sufficient in the circumstances to prove the Coast Guard's case and I am reluctant to impose a heavy hand on the ALJ's discretion, as the Coast Guard suggests. In this case, a preponderance of the evidence established a *prima facie* case of drug use without the introduction of a "litigation package," but with a number of witnesses and exhibits, just as occurred in Appeal Decision 2546 (SWEENEY) (1992), the case cited above by the Coast Guard. The same might not be true in another case where different testimony and exhibits are introduced and different issues are joined. The Coast Guard should prepare a legally sufficient case in each proceeding, by whatever combination of witnesses

and exhibits may be available and convenient to meet the modest burden that is required to prove a *prima facie* case.[2]

III.

Whether the ALJ was correct to find that the Coast Guard established a prima facie case absent the testimony of two witnesses who, although placed on the Coast Guard's initial witness and exhibit list, were not called at the hearing

Respondent next argues that the ALJ erred in allowing the Coast Guard to amend its Witness List and request telephone testimony outside the timelines established within the applicable procedural regulations.

The hearing in this matter was set for October 23, 2012. On October 15, 2012, the Coast Guard filed an amended witness list and Motions for Telephonic Testimony. Pursuant to 33 C.F.R. § 20.309(d), a party is afforded ten days to respond to all motions filed by the opposition in these proceedings. Since the Coast Guard's motions were filed less than ten days prior to the hearing, Respondent was not afforded the full ten-day time period to respond to the Coast Guard's motions. Moreover, the ALJ responded to the Coast Guard's motion just two days later, without affording Respondent any significant response time. The ALJ acknowledged this defect but nonetheless granted the Coast Guard's motions via Order dated October 17, 2012.

Although the Coast Guard's motions were filed "late," the ALJ was well within his discretion to grant them. The use of telephonic testimony has long been allowed in these proceedings, at the ALJ's discretion. *See*, e.g., Appeal Decisions 2662 (VOORHEIS) (2007) and 2657 (BARNETT) (2006). Moreover, the record shows that Respondent did not object to either the Coast Guard's initial requests for telephonic testimony or the subsequent requests (until he filed his Appeal), despite the ALJ's invitation to do so when he granted the motions.

[2] The Coast Guard asserts that a litigation package can cost between $200 and $500. A litigation package might well obviate the need for some testimony that the Coast Guard might otherwise elect to use to establish a *prima facie* case. It might also preempt some issues, as demonstrated by this case. However, apparently a litigation package costs more than numerous telephone witnesses.

Beyond general umbrage with the late filing of the Coast Guard's Motions for Telephonic Testimony, Respondent contends that when the Coast Guard changed its witness list (deleting two witnesses previously listed and adding four others), "the respondent could not get the opportunity to subpoena these 2 most important and critical components". [Appeal Brief at 3] Respondent argues that he suffered injustice because he could not "subpoena" the witnesses that the Coast Guard had elected not to call. This argument is meritless. Respondent did not have a right to have the Coast Guard call witnesses whose testimony he desired. If he wanted the testimony of certain witnesses to be obtained, it was incumbent upon him to call them himself, as was his right. No doubt the ALJ would have accommodated a late request by Respondent, in view of the Coast Guard's late change to its witness list.

The record shows that the ALJ provided Respondent with a copy of the applicable procedural rules on July 31, 2012, when he scheduled the hearing in the matter. [Scheduling Order-Notice of Hearing dtd July 31, 2012] The record also shows that the ALJ explained these rules to Respondent and, more importantly, that the ALJ was constantly mindful of Respondent's status as a *pro se* litigant throughout the course of these proceedings. Although the ALJ explained the process to Respondent, he elected to call no witnesses and failed to file a witness and exhibit list prior to the hearing. Although Respondent could have sought the help of the ALJ in calling or subpoenaing witnesses, he did not do so. Having failed to avail himself of the full extent of his procedural rights, Respondent cannot now assert error where there was none.

IV.

Whether the record contains evidence of "judicial misconduct" to warrant the overturning of the ALJ's D&O

Respondent's final basis of appeal addresses what he calls "judicial misconduct." However, rather than referring to the conduct of the ALJ, that which would be considered judicial in nature, Respondent challenges the behavior of the Investigating Officer (hereinafter "IO") who commenced proceedings against him. Respondent argues that one IO in particular participated in a "wanton sinister scheme" to take away his mariner credential based on baseless allegations. [Appeal Brief at 1] Respondent goes so far as to suggest that the IO engaged in a "ploy to ensure

[his] absence at the hearing." [*Id.*] Respondent's complaints in this regard are unsupported by the record and meritless.

While it may very well be true that an IO and Respondent failed to engage in productive discussion prior to the hearing, Respondent has presented no evidence to support a conclusion that he suffered any harm as a result of any misunderstanding or failure to communicate. The record shows that the ALJ went to great lengths to ensure that Respondent received a full and fair hearing in this matter. Respondent's argument to the contrary is unsupported by the record and unpersuasive.

CONCLUSION

The ALJ's findings and decision were lawful, based on correct interpretation of the law, and supported by the evidence. The ALJ did not abuse his discretion. There is no reason to disturb the ALJ's Order.

ORDER

The ALJ's Decision and Order dated January 7, 2013, is AFFIRMED.

Peter V. Neffenger
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 3rd day of JUNE, 2015.