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## Pilot Medical Certification: Current Standards and Procedures

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# PILOT MEDICAL CERTIFICATION: CURRENT STANDARDS AND PROCEDURES

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## I. INTRODUCTION

ON MARCH 19, 1996, the Federal Aviation Administration (FAA) published its final rule revising airman medical standards and certification procedures.<sup>1</sup> This rule also revised the duration of certain medical certificates. These revisions went into effect on September 16, 1996. The National Transportation Safety Board (NTSB) has also revised its rules of practice

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<sup>1</sup> See 14 C.F.R. pts. 61, 67 (1998).

and procedure.<sup>2</sup> Taken together, the changes implemented by the FAA and the NTSB have significantly altered the medical certification process faced by pilots today. The purpose of this Article is to examine the FAA's new medical standards and the current procedures and obstacles facing a pilot who has been denied medical certification by the FAA. The Article will also review several recent noteworthy medical certification cases.

## II. MEDICAL STANDARDS

The FAA has long had the sole authority to issue medical certificates. The Federal Aviation Act of 1958 authorizes the FAA to issue or deny airman certificates.<sup>3</sup> These certificates include both operational certificates (e.g., private pilot certificates, commercial pilot certificates (CPC), and air transport pilot certificates (ATP)), as well as medical certificates. The Act also authorizes the FAA to amend, modify, suspend, or revoke existing certificates.<sup>4</sup> Consequently, the FAA possesses a tremendous amount of regulatory authority over both private and commercial conduct in aviation.

The Federal Aviation Regulations (FARs) require that any individual serving as a pilot-in-command, or as a required flight crew member, hold a current pilot's certificate and the appropriate current medical certificate.<sup>5</sup> There are three classes of medical certificates. A pilot who is required to possess an ATP certificate must also possess a first-class medical certificate.<sup>6</sup> For such a pilot, the first-class medical certificate is valid for six months.<sup>7</sup> For the pilot who operates with a CPC, a first-class medical certificate is valid for twelve months.<sup>8</sup>

A pilot who otherwise operates commercially and holds a CPC must possess a second-class medical certificate.<sup>9</sup> Second-class medical certificates are also valid for twelve months.<sup>10</sup> If a pilot holds a second-class medical certificate and participates in non-commercial activities (i.e., those requiring a private or student

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<sup>2</sup> See *id.* pt. 61; 49 C.F.R. pt. 821 (1997).

<sup>3</sup> 49 U.S.C. § 44702 (1994).

<sup>4</sup> 49 U.S.C. § 44709 (1994).

<sup>5</sup> See 14 C.F.R. § 61.3(a), (c) (1998).

<sup>6</sup> See *id.* § 61.23(a)(1).

<sup>7</sup> See *id.* § 61.23(c)(i).

<sup>8</sup> See *id.* § 61.23(c)(ii).

<sup>9</sup> See *id.* § 61.23(a)(2).

<sup>10</sup> See *id.* § 61.23(c)(2)(i).

pilot certificate), the second-class medical certificate is valid for the same period of time as a third-class medical certificate.<sup>11</sup>

A pilot who holds a private pilot certificate must possess a third-class medical certificate.<sup>12</sup> Third-class medical certificates have two levels of duration. Third-class certificates issued to pilots under age forty are valid for three years, while certificates issued to pilots over forty years of age are valid for only two years.<sup>13</sup>

The FAA regulations in Part 67 of the Code of Federal Regulations list the medical standards and qualifications for all classes of medical certificates.<sup>14</sup> There are some differences in medical standards for each class of medical certification. For example, to hold either a first- or second-class medical certificate, a pilot must have 20/20 or better distant vision in each eye separately, with or without correction.<sup>15</sup> Third-class medical certificates require only that the pilot possess only a distant visual acuity of 20/40 or better in each eye separately, with or without corrective lenses.<sup>16</sup> Another example of differing medical standards is found in the requirement to submit to an electrocardiograph (ECG) examination. A pilot applying for a first-class medical certificate must submit to an ECG upon the first application after reaching thirty-five years of age and on an annual basis after reaching age forty.<sup>17</sup> There is no such requirement for either a second- or third-class medical certificate.<sup>18</sup>

Under the new medical standards, there are fifteen medical conditions that will disqualify a pilot from all classes of medical certification: (1) diabetes mellitus requiring hypoglycemic medication; (2) angina pectoris; (3) coronary heart disease that has been treated or, if untreated, that has been symptomatic or clinically significant; (4) myocardial infarction; (5) cardiac valve replacement; (6) permanent cardiac pacemaker; (7) heart replacement; (8) psychosis; (9) bipolar disorder; (10) personality disorder manifested by overt acts; (11) substance dependence; (12) substance abuse; (13) epilepsy; (14) disturbance of consciousness without satisfactory explanation of cause; and

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<sup>11</sup> See *id.* § 61.23(c)(2)(ii).

<sup>12</sup> See *id.* § 61.23(a)(3).

<sup>13</sup> See *id.* § 61.23(c)(3)(ii)(A), (B).

<sup>14</sup> 14 C.F.R. pt. 67 (1998).

<sup>15</sup> See *id.* §§ 67.103, 67.203.

<sup>16</sup> See *id.* § 67.303(a).

<sup>17</sup> See *id.* § 67.111(b)(1), (2).

<sup>18</sup> See *id.* §§ 67.211, 67.311.

(15) transient loss of control over nervous system functions without satisfactory explanation of cause.<sup>19</sup>

Significantly, the FAA's new medical standards have increased the number of medical conditions that are per se disqualifying. As will be discussed later, pilots may appeal to the NTSB when the FAA denies their applications for medical certification,<sup>20</sup> but the NTSB's jurisdiction is limited to deciding whether a pilot is qualified under the existing medical standards.<sup>21</sup>

For example, a pilot who has suffered a myocardial infarction has a technical right to appeal to the NTSB should the FAA deny medical certification.<sup>22</sup> But the NTSB could not offer any relief to the pilot because, unless he or she can prove that a myocardial infarction did not occur (which is unlikely), the pilot does not meet the FAA's medical standards.<sup>23</sup> On the other hand, if the FAA disqualifies a pilot on grounds of alcoholism (i.e., for substance abuse), the pilot could appeal to the NTSB and prevail if the pilot can prove that he or she is not a substance abuser. Substance abuse is an example of a medical condition whose diagnosis could be reasonably questioned based on conflicting medical evidence.<sup>24</sup>

The current medical standards also contain a "catch-all" regulation for each class of medical certification that allows the FAA to deny medical certification if the FAA finds circumstances that warrant a belief that a pilot is medically unfit to fly. Described as "General Medical Condition," the regulations provide that the FAA will deny medical certification if the pilot suffers from an:

organic, functional, or structural disease, defect, or limitation that the Federal Air Surgeon, based on the case history and appropriate, qualified medical judgment relating to the condition involved, finds—(1) [m]akes the person unable to safely perform the duties . . . of the airman certificate applied for or held; or (2) [m]ay reasonably be expected . . . to make the person unable to perform those duties or exercise those privileges.<sup>25</sup>

The General Medical Condition standards encompass the medical conditions that most frequently cause a pilot to be denied medical certification. The catch-all standards also contain, for

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<sup>19</sup> See *id.* pt. 67.

<sup>20</sup> See *infra* notes 56-64 and accompanying text.

<sup>21</sup> See 49 U.S.C. § 44703(a) (1994).

<sup>22</sup> See *id.* § 44703(c)(1).

<sup>23</sup> See *id.* § 44703(c)(2).

<sup>24</sup> See *id.*

<sup>25</sup> 14 C.F.R. §§ 67.113(b), 67.213(b), 67.313(b) (1998).

the first time, regulations specifically pertaining to disqualifying medications.<sup>26</sup>

### III. CERTIFICATION PROCEDURES

A pilot who meets the FAA's medical standards is entitled to the appropriate medical certificate.<sup>27</sup> The medical certification process requires that the applicant permit the FAA to have access to the pilot's driving history through the National Driver Register.<sup>28</sup>

As previously discussed, the FAA has the authority to (a) deny a pilot's application for medical certification and (b) suspend or revoke an existing medical certificate. The FAA's denial of an application for medical certification is often referred to as a section 602 proceeding because section 602 of the Federal Aviation Act of 1958 authorizes the FAA to deny a certificate application.<sup>29</sup> Similarly, section 609 of the Act authorizes the FAA to suspend or revoke an existing certificate.<sup>30</sup> Therefore, suspensions or revocations initiated by the FAA are commonly referred to as section 609 proceedings.

The FAA obviously does not have enough of its own personnel to examine each pilot who applies for a medical certificate. Therefore, the FAA designates private physicians to serve as Aviation Medical Examiners (AMEs). The pilot applicant must complete an application form and submit to an AME physical examination.<sup>31</sup> Along with the guidelines found in Part 67, the FAA provides each AME with a text containing information to adhere to in reviewing each applicant.<sup>32</sup>

The AME is authorized to issue the appropriate certificate immediately upon the completion of the examination if the pilot is found to meet the FAA's medical standards.<sup>33</sup> Likewise, the AME can deny certification if he or she finds that the standards are not met.<sup>34</sup> As a practical matter, an AME may defer issuing the certificate and forward the application to the FAA's Aero-

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<sup>26</sup> *See id.*

<sup>27</sup> *See id.* § 67.3.

<sup>28</sup> *See id.* § 67.7.

<sup>29</sup> *See* 49 U.S.C. § 44702 (1994).

<sup>30</sup> *See id.* § 44709.

<sup>31</sup> *See* FAA Form 8500-8.

<sup>32</sup> *See* 14 C.F.R. pt. 67 (1998); *see also* FAA Guide for Aviation Medical Examiners (1996) [hereinafter FAA Guide].

<sup>33</sup> *See* FAA Guide at 3.

<sup>34</sup> *See id.*

medical Certification Division.<sup>35</sup> The FAA will then decide if the pilot meets its medical standards.<sup>36</sup>

Even if the AME issues a medical certificate after examining a pilot, the FAA retains the right to deny the application and reverse the AME within sixty days of the AME's issuance.<sup>37</sup> If the FAA requests further medical information or testing, the sixty day period is tolled.<sup>38</sup> After sixty days, if the FAA believes that the pilot is not medically qualified, then the FAA must either suspend or revoke the medical certificate issued by the AME.<sup>39</sup> The type of certificate action (section 602 vs. section 609) is important. Should the matter be litigated before the NTSB, the burden of proof differs between section 602 and Section 609 proceedings.<sup>40</sup>

In many instances, the AME will work with the FAA to resolve any medical issues that arise during the application process. A medical condition that is disqualifying per se precludes the AME from exercising any discretion in issuing a medical certificate.<sup>41</sup> From the pilot's perspective, it is critical to accurately and honestly answer questions on the application form and those raised by the AME. Part 67 contains specific prohibitions against the making of either fraudulent or intentionally false statements in the application for a medical certificate.<sup>42</sup> The sanctions for doing so include the suspension or revocation of both medical and operating certificates in addition to criminal sanctions.<sup>43</sup>

Although an AME may deny a pilot's application for medical certification, the pilot may request reconsideration by the Federal Air Surgeon.<sup>44</sup> The request must be made within thirty days of the AME's denial.<sup>45</sup> The request for reconsideration is reviewed by either a Regional Flight Surgeon or by FAA physicians at the Aeromedical Certification Division.<sup>46</sup> In certain cases, these individuals have the authority to issue a final denial. Otherwise, only the Federal Air Surgeon has the authority to

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<sup>35</sup> See *id.*

<sup>36</sup> See 14 C.F.R. § 67.401 (1998).

<sup>37</sup> See *id.* § 67.407(c).

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See 49 U.S.C. §§ 44702, 44709 (1994).

<sup>41</sup> See 14 C.F.R. §§ 67.101, 67.201, 67.301 (1998).

<sup>42</sup> See *id.* § 67.403.

<sup>43</sup> See *id.*; see also 18 U.S.C. § 1001 (1994).

<sup>44</sup> See 14 C.F.R. § 67.409 (1998).

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

issue a final denial.<sup>47</sup> Requesting reconsideration is important because a final denial is a prerequisite to having the matter reviewed by the NTSB.

A pilot who receives a final denial from the FAA has the right to reapply for medical certification at any time after the denial is issued. As a practical matter, unless there is a change in the pilot's medical condition, repeated applications will most likely not be successful. A pilot who has been denied medical certification will also want to avoid the creation of a history of repeated denials.

If the FAA finds that a pilot is unqualified under its medical standards, the pilot may request that the FAA issue an Authorization for Special Issuance of a Medical Certificate.<sup>48</sup> Referred to as a "special issuance," this medical certification is solely within the discretion of the Federal Air Surgeon.<sup>49</sup> There is no hearing at which the pilot can appear to present evidence.<sup>50</sup> The burden is on the pilot to prove to the FAA that he or she can safely operate under the requested medical certificate.<sup>51</sup> The FAA will often request that the pilot provide additional medical information or undergo additional testing before deciding whether to grant a special issuance. While a pilot may appeal a denial of special issuance certification to the United States courts of appeal, the breadth of judicial review is severely limited. Special issuance is a matter of the FAA's discretion and is therefore subject to review under the arbitrary and capricious standard.<sup>52</sup>

In lieu of a special issuance, the Federal Air Surgeon may opt to grant a Statement of Demonstrated Ability (SODA).<sup>53</sup> A SODA may be issued to a pilot who suffers from a disqualifying condition that would ordinarily preclude medical certification but is found to be static or nonprogressive. The grant of a SODA also requires that the Federal Air Surgeon find that the pilot can safely perform his or her flying duties. Upon the expiration of a SODA, an AME is precluded from issuing a new med-

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<sup>47</sup> See *id.* § 67.409(b).

<sup>48</sup> See *id.* § 67.401(a).

<sup>49</sup> See *id.*

<sup>50</sup> See *id.* § 67.401(c).

<sup>51</sup> See *id.*

<sup>52</sup> See *Keating v. F.A.A.*, 610 F.2d 611, 612 (9th Cir. 1979).

<sup>53</sup> See 14 C.F.R. § 67.401(b).

ical certificate if the pilot's medical condition as described in the SODA has adversely changed.<sup>54</sup>

#### IV. REMEDIES AVAILABLE TO THE PILOT

A pilot who has been denied medical certification by the FAA has several avenues of recourse. As discussed above, the first option is to wait and see if the disqualifying medical condition changes. Upon new medical information and testing, the pilot can reapply after his or her circumstances improve.<sup>55</sup> A more immediate remedy to the pilot is an appeal to the NTSB. By law, the NTSB is authorized to review decisions of the FAA that deny an application for a certificate or suspend or revoke an existing certificate.<sup>56</sup> The majority of medical certification cases reviewed by the NTSB are those in which the FAA has denied an application (e.g., section 602 proceedings).

In some medical certification cases, the FAA suspends or denies the certificate (e.g., section 609 proceedings). For example, if the FAA becomes aware of a change in a pilot's health condition that would disqualify the pilot, or discovers that the pilot has falsified information on his or her medical application, the FAA could initiate proceedings to suspend or revoke the certificate.<sup>57</sup> A pilot can appeal an FAA order of suspension or revocation of a medical certificate to the NTSB.<sup>58</sup> The FAA is also authorized to proceed on an emergency basis in suspending or revoking a certificate.<sup>59</sup> In a section 609 proceeding, if the FAA chooses not to proceed on an emergency basis, the pilot retains the use of his or her certificate during the appeal to the NTSB.<sup>60</sup> If the FAA proceeds on an emergency basis, however, the emergency order of suspension or revocation is effective immediately, and the pilot cannot use his or her certificate while the matter is being reviewed by the NTSB.<sup>61</sup> In those cases where the FAA declares that an emergency exists, the appeal to the NTSB must be disposed of in sixty days.<sup>62</sup>

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<sup>54</sup> See *id.*

<sup>55</sup> See *id.* § 67.3.

<sup>56</sup> See 49 U.S.C. § 44709(d) (1994).

<sup>57</sup> See, e.g., *F.A.A. v. Caufield*, 5 N.T.S.B. 121 (1985).

<sup>58</sup> See 49 U.S.C. § 44709(d).

<sup>59</sup> See *id.* § 44709(c).

<sup>60</sup> See *id.*

<sup>61</sup> See *id.* § 44709(c)(1).

<sup>62</sup> See *id.* § 44709(c)(2).

When a pilot appeals to the NTSB, the Board acts in a judicial capacity to review the FAA's decision to deny an application for a medical certificate or suspend or revoke an existing certificate. In a section 602 proceeding, the pilot bears the burden of proving that he or she is qualified under the regulations to possess a medical certificate.<sup>63</sup> Conversely, in a section 609 proceeding, the burden of proof rests with the FAA to prove that the suspension or revocation was justified.<sup>64</sup>

#### A. NTSB PRACTICE AND PROCEDURE

On November 15, 1994, the NTSB issued a revision of its rules of practice and procedure.<sup>65</sup> The revision affects a number of procedures utilized in both section 602 and section 609 proceedings.

A pilot may appeal to the NTSB by either filing a petition for review or notice of appeal with the NTSB's Office of Administrative Law Judges.<sup>66</sup> In section 602 proceedings, the petition must be filed within sixty days after the FAA's final denial.<sup>67</sup> In section 609 proceedings, the pilot must file the notice of appeal within twenty days of service of the FAA's suspension or revocation notice.<sup>68</sup> Additionally, if the section 609 proceeding is initiated by the FAA on an emergency basis, the pilot must file a notice of appeal within ten days after service of the FAA's notice.<sup>69</sup>

Cases are assigned to individual administrative law judges (ALJs). The NTSB currently has four ALJs. The NTSB has divided the continental United States into four circuits, with each ALJ responsible for cases arising out of his delegated circuit. Two ALJs are based in Washington, D.C. and are responsible for Circuit I (fifteen northwestern states plus the District of Columbia) and Circuit II (eleven southeastern states). One ALJ is based in Denver, Colorado, and is responsible for cases arising from Circuit III (nine western and mid-western states). One ALJ is based in Arlington, Texas, and is responsible for cases arising from Circuit IV (thirteen mid-country states). Cases arising out of Alaska, Hawaii, Puerto Rico, and the Virgin Islands are di-

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<sup>63</sup> See 49 C.F.R. § 821.25 (1996).

<sup>64</sup> See *id.* § 821.32.

<sup>65</sup> See *id.* § 821.24(a).

<sup>66</sup> See *id.* §§ 821.24(a), 821.30(a).

<sup>67</sup> See *id.* § 821.24(a).

<sup>68</sup> See *id.* § 821.30(a).

<sup>69</sup> See *id.* § 821.55(a).

vided among the four ALJs. FAA emergency actions place a great strain on the NTSB's workload due to the sixty-day-disposition deadline. Therefore, in emergency proceedings, cases are often assigned to the ALJ who is most readily available to conduct a hearing, regardless of geographic location.

As previously mentioned, the majority of medical certification cases are section 602 proceedings. Once a pilot files a petition for review with the NTSB, the FAA must file an answer within twenty days.<sup>70</sup> In its answer, the FAA must affirmatively deny each allegation made by the pilot.<sup>71</sup> The answer should contain the specific grounds in Part 67 upon which the FAA is basing its denial of medical certification.<sup>72</sup> In those cases where the pilot has received a final denial from the FAA, but has requested a special issuance, the NTSB will "hold a petition for review in abeyance pending" the FAA's ruling on the special issuance request, or "for 180 days from the date of the . . . initial certificate [action] . . . whichever occurs first."<sup>73</sup> In those medical cases where the certificate action is a section 609 proceeding, the FAA is required to file its complaint with the NTSB within ten days after the service date of the pilot's notice of appeal.<sup>74</sup> The content of the complaint should be the same as the order of suspension or revocation sent to the pilot by the FAA.<sup>75</sup> The pilot then files his answer to the FAA's complaint. The answer will admit or deny each allegation set forth in the complaint. Affirmative defenses must be pleaded at this time<sup>76</sup> and failure to do so may result in an unintentional waiver of certain defenses.<sup>77</sup>

In proceedings before the NTSB, the FAA is represented by attorneys from its Office of Chief Counsel. Depending on the nature of the case (section 602 or section 609), the matter will be handled by an FAA attorney working out of one of the FAA's nine regional offices or out of the FAA's headquarters in Washington, D.C.

The ALJ assigned to a particular case will schedule an evidentiary hearing. Notice of the hearing must be served on the par-

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<sup>70</sup> See *id.* § 821.24(c).

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> *Id.* § 821.24(d).

<sup>74</sup> See *id.* § 821.31(a).

<sup>75</sup> See *id.*

<sup>76</sup> See *id.* § 821.31(c).

<sup>77</sup> See *id.*

ties at least thirty days prior to the scheduled hearing date.<sup>78</sup> The rules provide that in setting the location for the hearing, "due regard shall be given to the convenience of the parties and to conservation of Board funds."<sup>79</sup> Hearings can be held on several dates and in more than one location.

The NTSB's revised rules of practice and procedure contain rules pertaining to pre-hearing discovery. These rules apply to both section 602 and section 609 proceedings. Oral depositions may be taken by either party of any person without leave of the NTSB.<sup>80</sup> Parties may obtain information from an opposing side through the use of traditional discovery tools, such as written interrogatories and requests for admission.<sup>81</sup> While the Federal Rules of Civil Procedure are not controlling in proceedings before the NTSB, the rules of practice provide that they are to be "instructive."<sup>82</sup> Traditionally, the ALJs of the NTSB have relied heavily on the Federal Rules for guidance in the resolution of discovery disputes. Due to the limitations posed by having parties who are often located in different regions of the country, such pre-hearing disputes are routinely resolved through the use of telephone conferences between the ALJ and opposing counsel.

The revised rules provide that a party's failure to comply with an ALJ's order compelling discovery "may result in a negative inference against that party . . . , a preclusion order, or dismissal."<sup>83</sup> The NTSB's rules provide for motions practice.<sup>84</sup> A party seeking an order from an ALJ before the hearing may file a written motion. The opposing party has fifteen days from the date of service of the motion to file an answer in support or opposition.<sup>85</sup> Unless requested by the ALJ, oral argument is not heard on motions.<sup>86</sup> A party whose motion was denied may appeal the ALJ's ruling to the NTSB before the NTSB's consideration of the whole case, only with the permission of the ALJ and only in "extraordinary circumstances."<sup>87</sup>

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<sup>78</sup> See *id.* § 821.37(a).

<sup>79</sup> *Id.*

<sup>80</sup> See *id.* § 821.19(a).

<sup>81</sup> See *id.* § 821.19(b).

<sup>82</sup> *Id.* § 821.19(c).

<sup>83</sup> *Id.* § 821.19(d).

<sup>84</sup> See *id.* § 821.14(a).

<sup>85</sup> See *id.* § 821.14(c).

<sup>86</sup> See *id.* § 821.14(d).

<sup>87</sup> *Id.* § 821.16.

At the evidentiary hearing before the ALJ, rules of procedure and evidence are relaxed. For example, hearsay evidence is admissible provided that there are "acceptable circumstantial indicia of trustworthiness."<sup>88</sup> The rules only provide that the ALJ is authorized to exclude "unduly repetitious evidence."<sup>89</sup> In a section 602 proceeding, where the pilot bears the burden of proof, the pilot initiates the hearing by presenting his or her evidence first. The FAA then offers its case. In medical certification cases, it is critical for the pilot to offer expert medical evidence in support of his or her contention that he or she is qualified under the FAA's standards. The ALJ may only rule as to whether the pilot has met his burden of proof in showing that he is qualified under the existing standards.<sup>90</sup> In a section 609 proceeding, the FAA initiates the hearing by offering its evidence first. The party that bears the burden of proof must establish his or her case by a preponderance of the evidence.<sup>91</sup>

The NTSB's rules of practice require that the ALJ issue an initial decision upon the completion of the hearing.<sup>92</sup> If neither the FAA nor the pilot file an appeal from the decision, the decision is deemed final.<sup>93</sup> Appeals are initiated by the losing party filing a notice of appeal within ten days of the ALJ's initial decision.<sup>94</sup> Both sides then file their briefs. The rules provide for oral argument, but oral argument is rarely heard. The NTSB will consider (1) whether "the findings of fact [are] each supported by a preponderance of reliable, probative, and substantial evidence[;]" (2) whether the "conclusions [were] made in accordance with law, precedent, and policy[;]" (3) whether "the questions on appeal [are] substantial[;]" and (4) whether "any prejudicial errors occurred."<sup>95</sup> The revised rules also provide that the NTSB "on its own initiative may raise any issue, the resolution of which it deems important to a proper disposition of the proceedings."<sup>96</sup>

As with any final decision of a federal agency, a decision by the NTSB may be appealed to the appropriate U.S. court of ap-

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<sup>88</sup> *Id.* § 821.38(a).

<sup>89</sup> *Id.* § 821.38(b).

<sup>90</sup> *See* *Petition of John Doe*, 4 N.T.S.B. 84 (1983), *aff'd*, 732 F.2d 163 (9th Cir. 1984).

<sup>91</sup> *See* 49 C.F.R. § 821.49(a).

<sup>92</sup> *See id.* § 821.42(a).

<sup>93</sup> *See id.* § 821.43.

<sup>94</sup> *See id.* § 821.47(a).

<sup>95</sup> *Id.* § 821.49(a).

<sup>96</sup> *Id.* § 821.49(b).

peals.<sup>97</sup> A petition for judicial review must be filed within sixty days of a final agency decision.<sup>98</sup> In section 609 proceedings, both the pilot and the FAA may seek judicial review.<sup>99</sup> In section 602 proceedings, only the pilot may seek judicial review.<sup>100</sup> The court must affirm factual determinations if they are supported by substantial evidence.<sup>101</sup> In only one reported case, which did not involve medical certification, has a court of appeals granted a pilot's petition for review on grounds that the factual findings of the NTSB were not supported by substantial evidence.<sup>102</sup>

## V. NOTEWORTHY MEDICAL CERTIFICATION CASES

### A. *HINSON v. HOOVER*

Perhaps one of the most well-publicized airman medical certification cases in recent history, the case of *Hinson v. Hoover*, embroiled the FAA in a controversy involving Robert A. Hoover, one of America's most well known acrobatic pilots.<sup>103</sup> Hoover "is known as the 'Dean' of air show pilots."<sup>104</sup> At the age of seventy-two, while performing at an air show, two FAA Aviation Safety Inspectors witnessed his acrobatic routine. Based on those observations, the FAA began to investigate whether Hoover was medically fit to fly. The FAA requested that Hoover submit to neurological, psychological, and psychiatric evaluations and subsequently issued an emergency order of revocation on grounds that he suffered from a cognitive deficit. On appeal to the NTSB, the matter progressed as a section 609 proceeding.

Hoover prevailed at his hearing. Numerous expert medical witnesses testified on behalf of both Hoover and the FAA. The FAA appealed the ALJ's initial decision, which the NTSB reversed. In a decision that was critical of the ALJ's weighing of the evidence, the NTSB found that in its view, Hoover's "evidence merely suggests other explanations, and fails to rebut what we consider to be overwhelming evidence of cognitive deficit that makes [Hoover] unqualified to hold an unrestricted air-

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<sup>97</sup> See 49 U.S.C. §§ 1153(a), 44709(f) (1994).

<sup>98</sup> See *id.* § 1153(a).

<sup>99</sup> See *id.* § 1153(b), (c).

<sup>100</sup> See *id.*

<sup>101</sup> See *Sanchez v. N.T.S.B.*, 574 F.2d 1055, 1056 (10th Cir. 1978).

<sup>102</sup> See *Robinson v. N.T.S.B.*, 28 F.3d 210 (D.C. Cir. 1994).

<sup>103</sup> See *Hoover v. N.T.S.B.*, [Oct. 1992-July 1994 Transfer Binder] Av. L. Rep. (CCH) ¶ 23,154, at 14,718 (N.T.S.B. Feb. 18, 1994), *petition for review denied*, *Hoover v. N.T.S.B.*, 43 F.3d 712 (D.C. Cir. 1994).

<sup>104</sup> *Id.*

man medical certificate.”<sup>105</sup> Reviewing the medical evidence de novo, the NTSB found the testimony of the FAA’s expert medical witnesses to be more persuasive than the expert medical witnesses who testified that Hoover was medically fit to fly.<sup>106</sup>

Hoover appealed the NTSB’s decision to the U.S. Court of Appeals for the D.C. Circuit. In an unpublished decision, the court denied Hoover’s petition for review and adopted the NTSB’s rationale as its own.<sup>107</sup> Hoover subsequently filed a petition for writ of certiorari with the Supreme Court of the United States.<sup>108</sup> Nevertheless, further judicial review proved moot as the FAA found that Hoover’s medical condition had “stabilized” and that he was entitled to a restricted second-class airman medical certificate.<sup>109</sup>

### B. *BULLWINKEL v. FAA*

In *Bullwinkel v. FAA*, the Seventh Circuit addressed a pilot’s challenge to the FAA’s denial of his medical certificate on grounds that the pilot took daily doses of lithium.<sup>110</sup> The pilot took the medication to control bipolar disorder. The FAA refused to grant the pilot’s application for a third-class medical certificate “due to [his] history of mood swings, attention deficit disorder, and the use of disqualifying medication (lithium and Ritalin).”<sup>111</sup> The pilot appealed to the NTSB, which held a hearing. Both the pilot and the FAA presented extensive medical testimony regarding bipolar disorder and lithium. The medical evidence established that the use of lithium itself could lead to symptoms of “lithium toxicity,” which could be disabling. Additionally, a bipolar individual consuming lithium could still suffer a sudden episode of the disorder known as a “breakthrough.” After finding that the use of lithium in the pilot’s case was an acceptable risk to aviation safety, however, the ALJ held that the pilot should have been granted an unrestricted medical certificate.<sup>112</sup>

On appeal, the NTSB agreed with the FAA and reversed the initial decision of the ALJ. The NTSB found that “given the

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<sup>105</sup> *Id.* at 14,724.

<sup>106</sup> *See id.* at 14,725.

<sup>107</sup> *See Hoover v. N.T.S.B.*, 43 F.3d 712 (D.C. Cir. 1994).

<sup>108</sup> *See Hoover v. N.T.S.B.*, 514 U.S. 1018 (1995).

<sup>109</sup> *See AOPA PILOT*, Dec. 1995.

<sup>110</sup> *Bullwinkel v. F.A.A.*, 23 F.3d 167 (7th Cir. 1994).

<sup>111</sup> *Id.* at 169.

<sup>112</sup> *See id.* at 170.

risks associated with ingestion of lithium—the possibility of breakthrough and of lithium toxicity—periodic monitoring would be necessary to ensure that Mr. Bullwinkel could safely perform the duties of a private pilot.”<sup>113</sup> The NTSB then concluded that this monitoring was inconsistent with the issuance of an unrestricted medical certificate.<sup>114</sup>

In his petition for review before the Seventh Circuit, the pilot argued that the NTSB’s approval of the FAA’s “no-lithium” rule was unlawfully developed through adjudication rather than formal rule making.<sup>115</sup> The pilot also argued that the “no-lithium” rule was not a reasonable interpretation of Part 67.<sup>116</sup> The court dispensed with the claim that the prohibition against lithium was an improperly developed policy, finding that the NTSB, through a series of previous cases, had consistently held that use of lithium precluded the issuance of an unrestricted medical certificate.<sup>117</sup>

But the Seventh Circuit did agree that the FAA’s “no-lithium” rule was an unreasonable interpretation of Part 67.<sup>118</sup> The regulation relied on by the FAA addressed only underlying conditions and not medications. The court found that it was unreasonable to rely on the pilot’s medication as a basis for denial of medical certification when the regulation was intended to disqualify pilots because of their medical condition (e.g., bipolar disorder).<sup>119</sup> The Seventh Circuit vacated and remanded the NTSB’s decision for further consideration.<sup>120</sup> The NTSB subsequently found that the pilot was entitled to medical certification.<sup>121</sup> Notably, the *Bullwinkel* decision is an example of how judicial review can check the FAA’s unreasonable interpretation of its own regulations.

### C. PETITION OF RUHMANN

In *Petition of Ruhmann*, a commercial airline pilot challenged the FAA’s denial of his application for an unrestricted first-class

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<sup>113</sup> *Id.*

<sup>114</sup> *See id.*

<sup>115</sup> *See id.* at 171.

<sup>116</sup> *See id.*

<sup>117</sup> *See id.*

<sup>118</sup> *See id.* at 173.

<sup>119</sup> *See id.*

<sup>120</sup> *See id.* at 174.

<sup>121</sup> *See* *Petition of Bullwinkel*, [vol. 2] Av. L. REP. (CCH) ¶ 23,278 (N.T.S.B. Nov. 10, 1994).

airman medical certificate.<sup>122</sup> The pilot had suffered from an arterial venous malformation (AVM), which is “a congenitally abnormal collection of arteries and veins in which high pressure arterial blood flows into veins, dilating both. Lack of oxygen starves surrounding brain tissue, which can cause seizures.”<sup>123</sup> The pilot underwent surgery to remove the AVM. After the surgery, he remained seizure-free and was not taking any anti-convulsant medication. The FAA refused to medically certify the pilot, and he appealed the matter to the NTSB.

Both parties presented conflicting medical testimony at the appellate hearing. The pilot offered the testimony of an expert medical witness in the field of neurosurgery and aviation safety. This physician testified that the surgical removal of the AVM had eliminated the risk of seizure due to blood loss and that the scarring caused by the surgery made it “very unlikely” that the pilot would undergo a further seizure event.

Both of the FAA’s expert medical witnesses radically disagreed with the pilot’s medical expert. Those physicians testified that the risk of another seizure due to the surgery scarring was great. Moreover, both witnesses for the FAA believed that the medical certification of the pilot was an unacceptable risk to aviation safety.

Ultimately, the NTSB agreed with the FAA. The NTSB found that the ALJ erred in finding that the pilot had met his burden of proving by a preponderance of the evidence that he was medically fit under the regulations.<sup>124</sup> The NTSB also found the FAA’s medical experts more persuasive than the pilot’s experts. In summarizing its rationale for dismissing the ALJ’s conclusion as to the weight of each side’s expert testimony, the NTSB commented that:

where the science and diagnostic procedures are as inexact as they are, and where the record reflects substantial concern by knowledgeable persons that [the pilot] may be at greater risk for seizures in the future than the population generally, we cannot find [the pilot] has shown himself by a preponderance of the evidence to be qualified for a medical certificate.<sup>125</sup>

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<sup>122</sup> Petition of Ruhmann, [Oct. 1992–July 1994 Transfer Binder] Av. L. REP. (CCH) ¶ 22,893 (N.T.S.B. Oct. 23, 1992).

<sup>123</sup> *Id.* at 14,096 n.7.

<sup>124</sup> *See id.* at 14,095.

<sup>125</sup> *Id.* at 14, 099.

The FAA's statement in the *Ruhmann* case is insightful. The NTSB's rationale suggests that a pilot can never prove his or her fitness to fly in the face of FAA expert testimony that a "substantial concern" exists over the pilot's ability to safely perform his or her flying duties.

#### D. PETITION OF WITTER

In *Petition of Witter*, the FAA sought to deny medical certification to a senior commercial airline pilot on grounds that he suffered from a personality disorder that severely manifested itself through overt acts and chronic sleep apnea.<sup>126</sup> Before the FAA's concern over his medical qualifications, the pilot had enjoyed twenty-eight years of professional flying during which his medical qualifications had never been questioned. Following a domestic dispute with his spouse, the pilot's employer requested that he undergo psychiatric and psychological examinations. It was from these evaluations that the pilot was first diagnosed with an alleged narcissistic personality disorder.

Relying on the domestic dispute and a cockpit incident during which the pilot had argued with his junior flight crew over aircraft operations, the FAA asserted that the pilot suffered from a personality disorder that was manifested by overt acts. Both the ALJ and the NTSB agreed with the pilot.<sup>127</sup>

At his hearing, the pilot presented expert medical testimony that the subjective diagnoses made regarding the existence of his personality disorder were not sustainable. Critical to the pilot's case was the fact that he had never been diagnosed with a personality disorder during the preceding twenty-eight years of professional flight. The FAA presented its expert testimony through both the physician retained by the pilot's employer, as well as its own expert psychiatrists and psychologists.

The ALJ found the evidence presented by the pilot to be more persuasive than the FAA's case.<sup>128</sup> The ALJ afforded significant weight to the physicians who had actually examined the pilot, rather than only his medical records. Although the FAA appealed, the NTSB adopted the findings of the ALJ and upheld the initial decision.<sup>129</sup>

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<sup>126</sup> *Petition of Witter*, N.T.S.B. Order No. EA-4500 (Nov. 15, 1996).

<sup>127</sup> *See id.* at 10.

<sup>128</sup> *See id.* at 22.

<sup>129</sup> *See id.*

## VI. CONCLUSION

The representation of pilots involved in medical certification disputes with the FAA involves combining advocacy skills with an understanding of the certification process. The FAA's new medical standards will surely lead to new judicial and administrative caselaw. In the coming years, the bounds of these regulations will be tested by both the FAA and the aviation community.

# **Comments**

