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PILOT MEDICAL CERTIFICATION—PROCEDURES AND RECENT DEVELOPMENTS

Mark T. McDermott* and Richard J. Sherback**

I. Introduction

The procedural and substantive law of pilot medical certification has experienced an explosion of activity in recent years. Courts have declared medical standards invalid, enjoined the use of certain Federal Aviation Administration ("FAA") certification practices, and recognized causes of action for money damages based on FAA negligence in medical certification proceedings. Additionally, major changes in the standards and procedures have been implemented by the FAA. Moreover, the National Transportation Safety Board ("NTSB") has issued an unprecedented number of controversial administrative

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119
appellate decisions. The NTSB's rules of practice in certification appeal proceedings have also been substantially modified. These and other developments make a discussion of this area of the law particularly timely. This article outlines the underlying law and procedures and discusses recent developments.

II. LAW AND PROCEDURES

A. Medical Certification Requirements

Due to safety considerations, the FAA wields enormous power over the licensing of professional and nonprofessional pilots. The Federal Aviation Act of 1958 empowers the FAA to issue or deny airman certificates. The statute also gives the FAA power to amend, modify, suspend or revoke existing certificates, and to reexamine holders of existing certificates.

Any individual serving as a pilot-in-command or as a required flight crew member must have a current pilot's cer-

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3 Id. § 1422(a).

4 Id. § 1429(a).
tificate⁵ and the appropriate current medical certificate.⁶

There are three classes of medical certificates.⁷ In order
to serve as a pilot-in-command of an air carrier aircraft, or
as second-in-command of an aircraft in a flag or supple-
mental air carrier or in a commercial operator operation
that requires three or more pilots, an individual must hold
a valid airline transport pilot certificate.⁸ A valid airline
transport pilot certificate must be accompanied by a first-
class medical certificate.⁹ First-class medical certificates
have a duration of six months.¹⁰ Many air carriers, by
company rule, require first-class airman medical certifica-
tion for all pilots, regardless of whether they serve as pi-
lot-in-command. Similarly, many corporations by
company policy, require first-class medical certification
for all of the company’s corporate pilots, even though
only second-class certification is required by FAA
regulation.

Any other commercial flying requires the pilot to hold a
valid commercial pilot certificate.¹¹ A commercial pilot
certificate must be accompanied by at least a second-class
airman medical certificate.¹² Second-class medical certifi-
cates have a duration of twelve months.¹³ All other pilots
are required to hold a valid private pilot certificate.¹⁴ A
private pilot certificate requires at least a third-class air-
man medical certificate.¹⁵ Third-class airman medical cer-
tificates have a duration of twenty-four months.¹⁶

⁵ 14 C.F.R. § 61.3(a) (1984).
⁶ Id. § 61.3(c).
⁷ Id. §§ 67.13-67.17.
⁸ Id. § 121.437(a).
⁹ Id. § 61.151(e).
¹⁰ Id. § 61.23(a)(1).
¹¹ Id. §§ 61.118, 121.437(b) & (c).
¹² Id. § 61.123(c).
¹³ Id. § 61.23(b).
¹⁴ Id. § 61.3(a).
¹⁵ Id. § 61.103(c).
¹⁶ Id. § 61.23(c)(1).
B. Medical Standards

FAA regulations contained in Part 67 of title 14 of the Code of Federal Regulations list the qualifications for all classes of airman medical certificates. The standards for each class of certification with respect to certain medical conditions are generally parallel. Certain differences exist with respect to such areas as vision, hearing, the requirement for electrocardiograms and the maximum blood pressure limitations. For example, applicants for first-class certification are the only applicants required to undergo electrocardiograms on a routine basis. First-class applicants are required to undergo a resting electrocardiogram on the first examination following the applicant's thirty-fifth birthday and then on an annual basis after the applicant reaches age forty.

C. Certificate Actions By the FAA

1. Certificate Denials

Section 602 of the Act allows the FAA to deny airman medical certification. Consequently, denial actions are commonly referred to as Section 602 certificate actions. Medical certificates are of limited duration and expire automatically pursuant to the certificate's terms. Therefore, pilots must reapply for medical certification at regular intervals. These intervals may be as long as twenty-four months or as short as six months. At each of these intervals, the pilot faces the possibility of a denial and the loss

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17 Part 67 of 14 C.F.R. containing the various medical qualifications standards. The standards for first-class certification are contained in section 67.13, the standards for second-class certification are listed in section 67.15 and the standards for third-class certification are found in section 67.17.
18 14 C.F.R. §§ 67.13(b), 67.15(b), 67.17(b).
19 Id. §§ 67.13(c), 67.15(c), 67.17(c).
20 Id. §§ 67.13(e)(2), 67.15(e), 67.17(e).
21 Id. § 67.13(e)(4). There are no specific blood pressure requirements for second and third class certificates. See id. § § 67.15(e), 67.17(e).
22 Id. § 67.13(e)(2) & (3).
24 14 C.F.R. § 61.23.
of the right to fly. For professional pilots who must hold certification in order to earn a living, the pressure of having to reapply so frequently can be a tremendous emotional burden.

Applications for recertification are submitted to private physicians designated by the FAA as aviation medical examiners ("AME"). These private physicians review the information contained on the application form and examine the pilot based upon the guidelines issued by the FAA. Following the examination, the AME has the authority to issue certification, deny certification, or defer any ruling pending further review by the FAA. Even when the AME issues certification, the FAA has the right to review and may reverse the AME's decision within sixty days. If the FAA takes no action, then the AME's decision is considered to have been affirmed by the FAA.

2. Certificate Revocations

Section 609 of the Act empowers the FAA to amend, modify, suspend or revoke a medical certificate. This type of action is commonly referred to as a Section 609 action. For example, a Section 609 action is necessary when there is information indicating that the certificate holder may no longer be qualified for the certificate he or she holds. A medical certificate action by the FAA usually involves a revocation on an emergency basis. By definition, medical certificate actions involve allegations that the pilot is not presently qualified to fly. Consequently, immediate action is usually necessary.

Under the statute, the FAA has the discretion to declare a certificate action an emergency. This decision is an

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25 Id. § 67.23.
26 Id. § 67.25.
29 Federal Aviation Act § 609, 49 U.S.C. § 1429 (1982). Section 609 may be used to challenge a certificate after the sixty day review period has expired.
30 Id.
agency determination over which there is very little outside control. The FAA’s determination of emergency status is not subject to review by the NTSB. Although judicial review is available, the FAA’s finding will not be disturbed in the absence of a clear abuse of discretion.

If the FAA does not declare a certificate action an emergency, a pilot has a right to be heard before the FAA takes action. In addition, an appeal by the pilot to the NTSB stays the effectiveness of the action and the certificate remains effective during the proceeding. Conversely, in an emergency action the pilot does not retain possession of the certificate during the appellate proceeding. Thus, the statute imposes a strict time limit of sixty days for disposition of an appeal.

The majority of FAA actions against medical certificates proceed under Section 602. The FAA generally avoids the use of section 609 actions in medical cases for several reasons. First, reapplications for certification are required at frequent intervals. Second, adverse medical information does not usually come to the attention of the FAA until the time of a reapplication. Third, the burden of proof on appeal shifts from the applicant to the FAA in a Section 609 action.

3. Reexaminations

The FAA also has the authority to reexamine the medical qualifications of the holder of an existing medical certificate. To invoke this authority, the FAA requests the pilot to undergo testing or to provide other medical information. Refusal to undergo further medical testing or to submit to further medical documentation allows the FAA

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32 Nevada Airlines v. Bond, 622 F.2d 1017, 1020-21 (9th Cir. 1980).
33 Id. at 1020.
34 Id. at 1017; see also Air East v. NTSB, 512 F.2d 1227 (3d Cir.), cert. denied, 423 U.S. 863 (1975).
36 Id.
37 Id.
to suspend or revoke certification until such time as the
pilot complies with the request and the FAA has a chance
to review the additional data.\textsuperscript{38}

As in the case of any other suspension or revocation,
the pilot has a right to appeal the FAA’s action. On ap-
peal, however, the determinative issue is the reasonableness
of the FAA’s request based upon the facts known
about the certificate holder’s medical circumstances.\textsuperscript{39}
Consequently, it is difficult for the pilot to obtain an ap-
pellate decision disallowing an FAA request for medical
information or examination.

D. \textit{Remedies Following FAA Certificate Actions}

1. \textit{Reconsideration}

When the FAA takes a certificate action against a pilot,
a number of remedies are available. First, the pilot must
determine if the action is a final agency action. A denial
by an AME is not considered to be a final appealable or-
der of the FAA under Section 602.\textsuperscript{40} If the pilot does not
request review by the FAA within thirty days of an AME
denial, the application is considered to have been with-
drawn.\textsuperscript{41} A request for reconsideration of an AME denial
usually will be reviewed by either a Regional Flight Sur-
geon (who is a full-time employee of the FAA) or by FAA
physicians at the Civil Aeromedical Institute in Oklahoma
City, Oklahoma. These individuals have authority to issue
a final denial under certain subsections of the medical
regulations.\textsuperscript{42} If any other subsections of the medical reg-
ulations are involved, a final denial must be issued by the
Federal Air Surgeon.\textsuperscript{43}

A request for reconsideration is important because the

\textsuperscript{38} 14 C.F.R. § 67.31 (1984).

\textsuperscript{39} Petition of Wyche, 2 NTSB 325, 326-27 (1973).

\textsuperscript{40} \textit{See} 14 C.F.R. § 67.27(b)(1) (1984).

\textsuperscript{41} \textit{Id.} § 67.27(a).

\textsuperscript{42} Section 67.27(b)(3) of 14 C.F.R. lists the subsections under which these indi-
viduals do not have final denial authority.

\textsuperscript{43} 14 C.F.R. § 67.27(b) (1982).
Federal Air Surgeon may reverse the lower level decision and order that certification be issued. At the reconsideration stage, the assistance of an attorney may be helpful to the pilot. An attorney can ensure that the FAA has all of the relevant facts and that sufficient medical documentation has been supplied. In addition, the presence of an attorney generally causes the FAA to consider the case more carefully, in light of a potential legal challenge. A request for reconsideration is absolutely necessary since a final denial is a prerequisite to the pilot’s right to review by the NTSB.

2. Certification by Special Issuance or by Exemption.

Once the FAA has made a final determination of disqualification under the regulations, a pilot may apply to the FAA for special issuance certification. Section 67.19 authorizes the FAA to issue a certificate to a pilot who does not meet the medical standards if the pilot demonstrates that, given his medical circumstances, he can achieve a degree of safety equal to that guaranteed by the regulations. In connection with the special issuance procedures, a medical flight or practical test may be required by the FAA. For example, the FAA may require the pilot to undergo a practical test designed to assess the ability of a pilot with a visual deficiency to adequately compensate for the visual defect during flight operations. Previously, special issuance certification was used almost exclusively for cases involving the need for a practical test. In fact, special issuance certificates were not available to pilots disqualified on the basis of one of the so-called nine specifically disqualifying conditions.

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46 Id.
47 Id.
48 Section 67.19(d) of 14 C.F.R., as it existed prior to May 17, 1982, specified this restriction. The nine disqualifying conditions were: (1) personality disorders, (2) psychosis, (3) alcoholism, (4) drug dependency, (5) epilepsy, (6) unexplained disturbance of consciousness, (7) myocardial infarction, (8) angina pectoris or
The FAA may impose operational limitations under special issuance procedures. For example, a pilot may be forbidden from operating an aircraft at night. Formerly, the FAA commonly issued medical certificates to commercial pilots limiting the job functions the pilot was permitted to perform. For example, a pilot may be given a certificate, valid for flight engineer duties only. This was known as a functional limitation.

In *Delta Air Lines, Inc. v. United States*, the United States District Court for the Northern District of Georgia held the FAA's authority under Section 67.19 did not include the authority to dictate job functions within the cockpit. An order enjoining the FAA from issuing any further functionally limited certificates was issued. After *Delta*, the number of limited certificates granted by the FAA to commercial pilots was severely reduced between May 16, 1980, the date of the *Delta* decision, and May 17, 1982, the effective date of a new FAA regulation which supposedly remedied the situation.

FAA Amendment No. 67-11 revised Section 67.19. Previously, a majority of the medical certificates issued under an exception to the regulations had been processed under the FAA's authority to issue exemptions. In the preamble to the rule, the FAA indicated that after May 17, 1982, exceptions to the medical standards would be granted under the new special issuance procedures rather than under the old exemption procedures. The FAA stated that cases would be processed more quickly under the new special issuance procedures.

In practice, over the last three years, it has become ap-

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other evidence of coronary heart disease, and (9) diabetes mellitus which requires medication for control. *Id.*


52 *Id.*

53 *Id.* at 920.


parent that the revision amounted to a cosmetic name change. The undesirable characteristics of the exemption process still exist, and cases now take as long, if not longer, to process. The prior exemption process was severely criticized by the Delta court. The court's decision enjoined the FAA from using any further exemptions without proper findings. Additionally, the FAA's exemption authority may be exercised only when the exemption in question is found to be "in the public interest." The court held that the FAA had seriously misconstrued the meaning of "in the public interest."

The FAA system for granting exceptions has many undesirable features. These features have led at least one court to state, in dictum, that the FAA's procedures do not comport with due process. An application for special issuance certification involves the submission of written documentation together with the results of any additional medical testing required by the FAA. The case is then privately reviewed either by the Federal Air Surgeon's panel of medical consultants or by an individual FAA medical consultant. In contrast to NTSB procedure, the pilot has no right to a hearing and may not appear in person. The pilot receives a short written notice of the Federal Air Surgeon's decisions, usually several months later.

While the FAA's denial of special issuance certification is subject to judicial review by the United States courts of appeal, such review is limited. Because the decision is a

56 Delta Air Lines, 490 F. Supp. at 920.
59 This process was formerly called the exemptions process. It has now been renamed the special issues process.
60 Jensen v. FAA, 641 F.2d 797, 799, vacated as moot, 680 F.2d 593 (9th Cir. 1982).
61 Coppenbarger v. FAA, 558 F.2d 836 (7th Cir. 1977); Graham v. NTSB, 530 F.2d 317, 320 (8th Cir. 1976).
62 49 U.S.C. § 1486 (1982). See Keating v. FAA, 610 F.2d 611, 612 (9th Cir. 1979); Gray v. FAA, 594 F.2d 793, 795 (10th Cir. 1979); Rombough v. FAA, 594 F.2d 893, 895 (2d Cir. 1979); Starr v. FAA, 589 F.2d 307, 310 (7th Cir. 1978).
matter of agency discretion and no factual hearing is held, the standard of review is the arbitrary and capricious, abuse of discretion standard.\footnote{Keating, 610 F.2d at 612.} Obviously, it is quite difficult for a pilot to obtain judicial relief, particularly in light of the vague standards used by the FAA and the lack of a formal record.\footnote{Jensen, 641 F.2d at 799.}

3. Review by the NTSB

(a) General

By far the most important remedy available to a pilot is review by the NTSB. Since 1966,\footnote{When the NTSB was created by the Department of Transportation Act of 1966, 49 U.S.C. §§ 1651-1659 (1982), the NTSB assumed the responsibilities for reviewing FAA certification actions on appeal formerly discharged by the Civil Aeronautics Board. 49 U.S.C. § 1655(d) (1982). The Independent Safety Board Act of 1974, 49 U.S.C. §§ 1901-1907 (1982), removed the NTSB from the Department of Transportation and made the NTSB an independent federal executive agency. This change had no effect on the NTSB’s review of FAA certificate actions. 49 U.S.C. § 1903(a)(9)(1982).} the NTSB has had the authority to review FAA certificate actions under either Section 602 or Section 609 when such actions are contested by a pilot.\footnote{Prior to April 1, 1975, this authority was contained in 49 U.S.C. § 1655(d). It is now contained in 49 U.S.C. § 1903(a)(9) (1982).} The most common type of certificate action reviewed by the NTSB is the denial of certification under Section 602. For the reasons discussed above, it is far less common for the NTSB to review revocations or suspensions under Section 609.\footnote{See supra notes 29-37 and accompanying text for a discussion of Section 609.} When the NTSB reviews a revocation or suspension, it generally involves a case designated as an emergency proceeding by the FAA. In terms of NTSB review, there are several important differences between Section 602 and Section 609 actions. In a Section 602 proceeding, the burden of proof is on the pilot.\footnote{49 C.F.R. § 821.25 (1984). See Dodson v. NTSB, 644 F.2d 647, 650 (7th Cir. 1981); Day v. NTSB, 414 F.2d 950, 952 (5th Cir. 1969); Doe v. FAA, 412 F.2d 674, 677 (8th Cir. 1969).} Conversely, the burden of proof is on the FAA in
a Section 609 proceeding.\textsuperscript{69} In close cases, the placement of the burden of proof may be determinative.\textsuperscript{70} In Section 602 proceedings, the pilot does not hold the medical certificate during the pendency of the action. Conversely, the pilot retains his or her certification and the FAA's action is stayed during the pendency of the Section 609 action,\textsuperscript{71} unless the FAA designates the Section 609 action as an emergency action, in which case the FAA's action is not stayed. However, the entire appeal proceeding must be completed within sixty days.\textsuperscript{72}

(b) Rules of Practice

The NTSB has enacted procedural rules for the conduct of certificate proceedings.\textsuperscript{73} The NTSB has recently made major revisions in its rules of practice.\textsuperscript{74} In this section, references will be made to the relevant rules of practice as they currently exist. A subsequent section of this article discusses the important rule changes.\textsuperscript{75}

The NTSB's rules of practice apply to each of the types of proceedings mentioned above, with a few exceptions. Those exceptions include procedures unique to Section 602 actions,\textsuperscript{76} the procedures unique to Section 609 actions,\textsuperscript{77} and the procedures unique to Section 609 emergency actions.\textsuperscript{78}

(c) Initiation of Proceedings.

NTSB review is initiated by filing a petition for review

\textsuperscript{69} 49 C.F.R. § 821.32 (1984).
\textsuperscript{70} See, e.g., Day, 414 F.2d at 952.
\textsuperscript{71} 49 U.S.C. § 1429(a) (1982); 49 C.F.R. § 821.30(c) (1984).
\textsuperscript{72} See infra notes 220-227 and accompanying text for a discussion of these changes.
\textsuperscript{73} 49 C.F.R. §§ 821.1-821.64 (1984).
\textsuperscript{76} Id. §§ 821.30-821.33.
\textsuperscript{77} Id. §§ 821.54-821.57.
within sixty days after service of a FAA denial under Section 602,\textsuperscript{79} twenty days after service of a FAA suspension or revocation notice under Section 609,\textsuperscript{80} or ten days after service of an emergency suspension or revocation notice under Section 609.\textsuperscript{81} After initiation, a case is assigned to an administrative law judge ("ALJ"). That ALJ retains authority over the case until such time as the case is appealed to the full NTSB.\textsuperscript{82}

(d) \textit{Hearing}

After a case is assigned to an ALJ, it is scheduled for a hearing. In a Section 602 hearing, the statute provides that the hearing shall be held "at a place convenient to the applicant's place of residence or employment."\textsuperscript{83} No parallel statutory guidance exists for Section 609 hearings. The NTSB rules of practice provide some additional guidelines for both Section 602 and Section 609 hearings. The rules provide that the hearing must be set "at a reasonable date, time, and place" and that "due regard shall be given to the convenience of the parties with respect to the place for the hearing."\textsuperscript{84} The recent revision of the NTSB rules of practice added an additional requirement of thirty days notice of the hearing date, unless the parties waive notice.\textsuperscript{85} The revised rules also list factors which the ALJ may take into consideration in determining the

\textsuperscript{79} Id. § 820.24(a).
\textsuperscript{80} Id. § 821.30(a).
\textsuperscript{81} Id. § 821.55(a).

\textsuperscript{82} The NTSB's Office of Administrative Law Judges has five ALJs. Three ALJs are based in Washington, D.C., and are responsible for all cases arising from thirty-seven states in the Eastern United States as well as the District of Columbia, the Virgin Islands and Puerto Rico. One ALJ is based in Denver, Colorado, and is responsible for all cases arising from the eleven states within his region of the United States. One ALJ is based in Los Angeles, California, and is responsible for all cases arising in California, Hawaii, Guam, and all Pacific American Protectorates. The number of ALJs may be reduced from five to three as part of the budget reduction package for fiscal year 1986.

\textsuperscript{83} 49 U.S.C. § 1422(b) (1982).
\textsuperscript{85} Id.
reasonableness of the time and location of the hearing.\textsuperscript{86}

Hearings can be, and frequently are, held on several dates and in more than one location.\textsuperscript{87} In medical certification cases, it is usually most economical to hold the hearing at a site convenient to the expert medical witnesses rather than convenient to the parties. While it is usually necessary for the parties and their attorneys to attend the entire hearing, this is not true of witnesses. ALJs are usually quite cooperative in attempting to arrange for busy expert medical witnesses to attend only that portion of the hearing in which the particular witness is testifying. Holding a hearing at a site where the witness conducts his or her medical practice helps to facilitate this goal.

Prior to the hearing, the ALJ is empowered to perform various functions including the power to rule on motions and to conduct prehearing conferences.\textsuperscript{88} Prior to the recent revision of the NTSB’s rules of practice, the rules provided little guidance concerning pretrial discovery. Depositions were the only form of discovery permitted by the old rules. Depositions could be by either oral examination or written interrogatories. Depositions could only be taken upon motion granted by the ALJ.\textsuperscript{89}

Even though the prior rules did not specifically address pretrial discovery, the NTSB permitted, and encouraged, various types of discovery.\textsuperscript{90} The NTSB has traditionally referred to the Federal Rules of Civil Procedure for guidance concerning discovery. In recent years, the use of formal discovery has become more prevalent in medical cases. Orders issued by the NTSB compelling discovery and imposing sanctions for noncompliance have evidenced an endorsement of the discovery provisions of the Federal Rules.\textsuperscript{91}

\textsuperscript{86} Id.
\textsuperscript{87} 49 C.F.R. § 821.37(b) (1984).
\textsuperscript{88} 49 C.F.R. § 821.35(b) (1984).
\textsuperscript{89} See 49 C.F.R. § 821.19 (1983), as it existed prior to August 10, 1984.
\textsuperscript{90} See, e.g., Petition of Seiler, NTSB Order No. EA-1562 (Mar. 10, 1981), reconsideration denied, NTSB Order No. EA-1617 (June 5, 1981), in which the FAA failed
The NTSB's revised rules of practice contain some important changes in discovery. Although these changes will be discussed later in the article, it bears mention at this point that the rules now allow depositions to be taken without motion. The revised rules also provide for interrogatories. The revised rules stop short of adopting all of the discovery provisions of the Federal Rules of Civil Procedure, but the revised rules specify that the provisions of the Federal Rules of Civil Procedure may be used as a general guide in proceedings before the NTSB.

As a general proposition, both the rules of procedure and the rules of evidence are relaxed in a NTSB proceeding. For example, hearsay evidence is admissible in administrative proceedings. The hearsay character of the evidence is only relevant to the weight attached to the evidence. However, it is important that attorneys argue specific points of the rules of evidence when appropriate during NTSB proceedings. A proper application of these rules will, at the very least, assist the ALJ in assigning relative weight to the evidence.

The NTSB's jurisdiction in medical certification cases extends only to a determination of an individual's qualifications under existing certification standards. The NTSB's jurisdiction in these cases does not, for example, extend to reviewing challenges to the validity of the medical standards. Additionally, the NTSB's jurisdiction does not extend to reviewing denials of exemptions from

to properly respond to interrogatories concerning opinions held by the FAA's expert medical witness despite a judge's order compelling such a response. The NTSB upheld the judge's sanction excluding the use of the witness' testimony during the hearing.

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92 See infra notes 221-224 and accompanying text for a discussion of the changes in NTSB discovery procedure.
94 Id.
96 Petition of Ewing, 1 N.T.S.B. 1192, 1197-98 (1971).
98 Watson v. NTSB, 513 F.2d 1081, 1082 (9th Cir. 1975); Petition of Berry, NTSB Order No. EA-1868 at 4 (Feb. 18, 1983).
the regulations99 or denials of special issuance certification.100

As a practical matter, a pilot with an uncontested history of a specifically disqualifying condition cannot present his or her case to the NTSB. Under the statute, such a pilot has a technical right to appeal to the NTSB; however, the NTSB’s jurisdiction is limited to deciding whether the pilot is qualified under the existing medical standards.101 If the pilot does not deny a history of a specifically disqualifying condition, then the NTSB must rule against the pilot. For example, in Jensen v. FAA,102 the court reviewed the validity of the FAA’s alcoholism regulation. The underlying decision by the NTSB involved a judgment against the pilot due to an uncontested history of alcoholism.103 The NTSB’s ruling was not questioned by the court.104

During a hearing before the NTSB, each party has a right to present his or her case by oral and documentary evidence, to submit evidence in rebuttal, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.105 A party must establish his or her case by a preponderance of the evidence.106

99 Coppenbarger v. FAA, 558 F.2d 836, 839-40 (7th Cir. 1977).
100 As discussed above, special issuance certification under 14 C.F.R. § 67.19 (1984) has been used by the FAA in lieu of exemptions since May 17, 1982. To date there are no decisions interpreting the NTSB’s jurisdiction as it relates to reviewing denials of special issuance certification. At the same time, there is no reason to believe that the rationale used by the court in Coppenbarger, 558 F.2d at 839-40, with respect to exemptions is not equally applicable to special issuance situations.
102 641 F.2d 797 (9th Cir. 1981), vacated as moot, 680 F.2d 593 (9th Cir. 1982).
103 Id.
104 A similar result was obtained in Petition of Berry, NTSB Order No EA-1868 (Feb. 18, 1983), in which the NTSB granted a summary judgment due to an uncontested history of coronary artery bypass surgery. Berry was decided after a May 17, 1982 rule change which made a history of coronary artery bypass surgery automatically disqualifying. For a discussion of this change, see supra notes 49-62, and accompanying text.
106 Id. § 821.49(a) (1984). See Walters v. McLucas, 597 F.2d 1230, 1232 (9th Cir. 1979).
During a hearing in a medical certification case, it is absolutely essential that the pilot present testimony of at least one, but preferably several, expert medical witnesses. The expert medical witnesses should be highly qualified and preferably board certified in the appropriate medical specialty. This "battle of experts" places a financial burden on the pilot. The expenses of FAA experts are paid by government funds. The pilot must pay witness expenses out of his or her pocket. In the case of a professional pilot, the individual is not working due to the loss of his or her certificate. Thus, a professional pilot must fight the FAA with severely restricted financial resources.

(e) Initial Decision and Appeal

At the close of the NTSB hearing, the ALJ is required to issue an initial decision. The judge's initial decision becomes the final decision of the NTSB if neither party files a notice of appeal within ten days or if the NTSB, on its own initiative, does not disturb the decision within twenty days. An ALJ's final decision is binding upon the parties to the case but is not binding precedent on the NTSB in any other case. If the ALJ's decision is appealed by a party or reviewed by the NTSB on its own initiative, the effectiveness of the ALJ's order is automatically stayed pending resolution of the appeal.

Appeals to the NTSB are presented by written brief.

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107 See, e.g., Petition of Blaetz, NTSB Order No. EA-964 (Feb. 24, 1977), in which the decision went against the pilot primarily because he presented no medical testimony.
108 See, e.g., Petition of Burney, NTSB Order No. EA-1311 (Aug. 21, 1979), in which the decision went against the pilot primarily because the witness the pilot presented in a coronary artery bypass surgery case, was a general practitioner and not a cardiologist.
110 Id. § 821.47.
111 Id. § 821.43.
112 Id.
113 Id.
114 Id. § 821.48.
and occasionally by oral argument.\textsuperscript{115} As with all other appellate panels, the NTSB is bound by the record;\textsuperscript{116} however, the NTSB is not bound by the substantial evidence test. The NTSB is free to reexamine the evidence and make its own factual determination as to where the preponderance of the evidence lies.\textsuperscript{117} A majority of the NTSB is required to affirm or reverse a decision of the ALJ.\textsuperscript{118}

(f) Reconsideration

After the NTSB decides the appeal, the rules of practice provide that either party may petition for reconsideration.\textsuperscript{119} Such petition must be filed within thirty days\textsuperscript{120} and it operates as an automatic stay of the effectiveness of the NTSB's decision.\textsuperscript{121} Petitions for reconsideration are generally not successful and are not necessary for a NTSB decision to be considered a final decision.

(g) Judicial Review

The United States courts of appeal have jurisdiction to review all final NTSB decisions.\textsuperscript{122} A petition for judicial review must be filed within sixty days.\textsuperscript{123} Only the pilot

\begin{footnotesize}
\begin{enumerate}
\item Id. § 821.48(g).\textsuperscript{115}
\item Id. § 821.40.\textsuperscript{116}
\item Id. § 821.49(a).\textsuperscript{117}
\item Cf. Petition of McHenry, NTSB Order No. EA-1476 at 2 (Aug. 28, 1980) (Order On Reconsideration), rev'd on other grounds, McHenry v. Bond, 668 F. 2d 1185 (11th Cir. 1982). At this time, the NTSB operates with a minimum quorum of three members. In fact, G.H. Patrick Bursley's term expired on December 31, 1984, but he remains in office pending the appointment of a successor. President Reagan appointed Vernon L. Grose as a member during a Senate recess in December 1983. The 98th Congress adjourned in October 1984 without acting on the recess appointment. Consequently, the recess appointment expired. The President appointed Mr. Grose in January 1985, but he has not yet been confirmed by the Senate. The other vacancy was created by the resignation of Donald D. Engen, who is now Administrator of the FAA.\textsuperscript{118}
\item 49 C.F.R. § 821.50(a) (1984).\textsuperscript{119}
\item Id. § 821.50(b).\textsuperscript{120}
\item Id. § 821.50(f).\textsuperscript{121}
\item 49 U.S.C. §§ 1486(a), 1903(d) (1982).\textsuperscript{122}
\item Id.\textsuperscript{123}
\end{enumerate}
\end{footnotesize}
has standing to file a petition for judicial review. Venue is proper in the court of appeals for the circuit in which the pilot resides, in which the pilot's principal place of business is located, or in the United States Court of Appeals for the District of Columbia Circuit. Filing an appeal with the court of appeals does not automatically stay the NTSB ruling; a stay must be requested from the court.

The Court's authority to review factual determinations is limited, since the court must affirm factual determinations if they are supported by substantial evidence. A court of appeals has never overturned a factual finding by the NTSB, and this is not likely to change. However, the court's authority to review legal issues is not as limited. A court is free to decide all relevant questions of law and constitutionality in all challenges to the validity of the regulations even if such challenges were not originally raised before the NTSB.

III. Recent Developments

A. Statutory Law

Recently, airman medical certification proceedings have been directly affected by the Equal Access to Justice Act ("EAJA"). The EAJA provides for the award of attorney fees and other expenses to small businesses and individuals of limited financial resources who successfully oppose a federal agency in litigation where the agency

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126 Id. § 1486(d).
127 Id. 1486(e). See Dodson v. NTSB, 644 F.2d 647, 650 (7th Cir. 1981); Doe v. FAA, 412 F.2d 674, 677 (8th Cir. 1969).
128 See 5 U.S.C. § 706 (1982), which sets out the matters which are properly within the court's scope of review.
129 See, e.g., Jensen v. FAA, 641 F.2d 797 (9th Cir. 1981), vacated as moot, 680 F.2d 593 (9th Cir. 1982); Graham v. NTSB, 530 F.2d 317 (8th Cir. 1976).
130 Doe v. CAB, 356 F.2d 699, 701 (10th Cir. 1966).
takes a position which is "not substantially justified." Agencies covered by the EAJA are required to enact regulations implementing the legislation. The NTSB has enacted such regulations.

In terms of claims filed and number of awards, the NTSB was very active in the first three years the EAJA was in force. Unfortunately for the majority of pilots involved in medical certification proceedings, the NTSB took the position that EAJA applied only to Section 609 actions. The NTSB's interpretation was based upon 5 U.S.C. § 504, which provided that "an adjudication . . . for the purpose of granting or renewing a license" is not covered by the EAJA. Thus, the EAJA offered protection only to pilots involved in the small number of medical certification proceedings brought under Section 609.

The EAJA expired by its own terms on September 30, 1984. The EAJA would have been extended and made permanent by a bill which was vetoed by President Reagan in November 1984. That bill would have made a number of changes in the EAJA, the discussion of which is beyond the scope of this article. One provision, however, bears mention. It would have had the effect of making the ALJ's decision the final agency decision on an EAJA claim. By contrast, the NTSB's present procedure allows EAJA decisions by ALJs to be appealed to the NTSB. While the NTSB rules are not explicit, such an appeal is presumably necessary in order to exhaust administrative remedies before seeking judicial review. A new version of the EASA was recently enacted by Congress and President Reagan signed it on August 5, 1985.

140 See infra notes 216-218 and accompanying text for a discussion of EAJA decisions.
B. Court Decisions

1. Delta Air Lines v. United States

*Delta Air Lines v. United States,*\(^\text{140}\) drastically altered the law of airman medical certification. Many of the developments discussed in this article were either directly or indirectly precipitated by *Delta.*\(^\text{141}\) Some changes are still pending. Consequently, the full impact of *Delta* is still not known. The *Delta* decision enjoined the FAA from (1) issuing certificates by exemptions from the medical regulations unless such exemptions are based upon proper findings that they are in the general public interest, (2) issuing medical certificates which contain limitations on the job functions the pilot may perform in the cockpit, and (3) issuing medical certificates, under the special issuance procedures of the regulations to individuals disqualified because of one of the nine specifically disqualifying conditions.\(^\text{142}\)

Beyond its immediate injunctive effect, the *Delta* decision led to a controversial regulatory amendment known as FAA Amendment No. 67-11.\(^\text{143}\) That amendment, among other things, (1) changed the system by which the FAA processes certification under exceptions to the medical standards,\(^\text{144}\) (2) conferred on the FAA the authority to impose limitations of the job functions a pilot may perform in the cockpit,\(^\text{145}\) (3) drastically changed the cardiovascular standards for airman medical certification,\(^\text{146}\) (4) drastically altered the alcoholism standard for airman


\(^{141}\) See *supra* notes 50-53 and accompanying text.

\(^{142}\) See *supra* note 48 and accompanying text for a list of the nine disqualifying conditions.

\(^{143}\) See *supra* note 54 and accompanying text and *infra* notes 196-210, and accompanying text for a discussion of the new FAA cardiovascular policy.

\(^{144}\) See *supra* notes 54-64 and accompanying text for a discussion of FAA Amendment No. 67-11.


\(^{146}\) See *infra* notes 196-210 and accompanying text for a discussion of the new FAA cardiovascular standards.
medical certification,\textsuperscript{147} (5) led to a comprehensive review of the standards for airman medical certification,\textsuperscript{148} and (6) precipitated a court challenge.\textsuperscript{149}

2. Jensen v. FAA

\textit{Jensen v. FAA}\textsuperscript{150} commenced as a Section 602 airman medical certificate proceeding. The pilot was denied certification because he had an admitted history of alcoholism. FAA regulations provided for disqualification upon a showing of a history of alcoholism without regard to the pilot’s current medical condition.\textsuperscript{151} The NTSB had no choice but to rule against the pilot based upon the medical records and the pilot’s admission.\textsuperscript{152}

On appeal to the United States Court of Appeals for the Ninth Circuit, the pilot challenged the validity of the regulation. The NTSB had no jurisdiction to entertain a challenge to the regulation’s validity,\textsuperscript{153} and thus the question was presented to the court for review for the first time.\textsuperscript{154} The court declared the regulation invalid because it conflicted with the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970.\textsuperscript{155} That law provided that no person may be denied or deprived of a federal license solely on the basis of a history of alcoholism.\textsuperscript{156} Following the \textit{Jensen} decision, the

\begin{footnotes}
\item[147] See \textit{infra} notes 150-157 and accompanying text for a discussion of the new alcohol standard.
\item[148] See \textit{infra} notes 231-233 and accompanying text.
\item[150] 641 F.2d 979 (9th Cir. 1981), \textit{vacated as moot}, 680 F.2d 593 (9th Cir. 1982).
\item[152] See \textit{supra} notes 102-104 and accompanying text.
\item[153] See \textit{supra} note 98 and accompanying text for a discussion of the NTSB’s limited jurisdiction.
\item[154] See \textit{supra} note 130 and accompanying text.
\end{footnotes}
FAA revised its regulation. The revision is part of FAA Amendment No. 67-11, effective May 17, 1982. Now, an applicant with a medical history of alcoholism is qualified if that person can show clinical evidence of recovery, including abstinence from alcohol for not less than two years.

3. Schwartz v. Helms

In response to *Delta Air Lines, Inc. v. United States*, the FAA revised its longstanding cardiovascular standard for airman medical certification. In *Schwartz v. Helms*, the petitioners were airline pilots adversely affected by the change. The petitioners argued that the new cardiovascular standard improperly limited an applicant's right to NTSB review and was arbitrary and capricious since it was not supported by medical or scientific evidence in the rulemaking record.

Under the former cardiovascular standard, disqualification was not automatic based solely on a history of coronary heart disease. Instead, angina pectoris or other evidence of coronary heart disease was disqualifying only if the condition could reasonably be expected to lead to myocardial infarction. Under the revised cardiovascular standard, disqualification is automatic based upon history alone in any case in which an individual has coronary heart disease that: (1) has been treated, (2) is symptomatic, or (3) is clinically significant.

As discussed above, the NTSB's jurisdiction to review pilot medical certification cases is limited to the pilot's

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157 For a discussion of the FAA's new alcoholism regulation and the use which has been made of it since its enactment see Powell, McDermott and Crawford, *supra* note 1, at 136.
159 712 F.2d 633 (D.C. Cir. 1983).
160 *Id.* at 636.
161 *Id.* at 635.
162 Day v. NTSB, 414 F.2d 950, 951 (5th Cir. 1969).
qualifications under the existing standards.\textsuperscript{164} Therefore, since a history of coronary heart disease is automatically disqualifying, meaningful review by the NTSB is eliminated. The NTSB has no alternative but to rule against a pilot who has a history of a disqualifying condition. The only relevant issue before the NTSB in such a case is the medical history of the individual.

Airmen who have undergone coronary bypass surgery are now automatically disqualified. Although such airmen make up only a small subset of the total group adversely affected by the FAA’s revision, they provided the primary motivation for the FAA’s revision. In eight of thirteen cases reviewed by the NTSB on this question, airmen who underwent coronary artery bypass surgery regained certification.\textsuperscript{165}

The \textit{Schwartz} court recognized that the FAA changed the cardiovascular standard solely to eliminate NTSB review.\textsuperscript{166} However, the \textit{Schwartz} court refused to hold the FAA’s motive improper. The court found that the review statute\textsuperscript{167} permits the FAA to intentionally limit the scope of the NTSB review.\textsuperscript{168} Consequently, the court upheld the revised cardiovascular standard. This ruling has grave consequences for pilot review rights since it seems to give the FAA license to make similar changes in other standards.\textsuperscript{169}

4. \textit{Harr v. United States}

\textit{Harr v. United States}\textsuperscript{170} began as a Section 602 action. The applicant obtained recertification. The FAA initially disqualified the applicant under two specific medical regu-

\textsuperscript{164} See supra notes 65-72 and accompanying text for a discussion of the ability of the NTSB to review pilot qualifications. See also \textit{Schwartz}, 712 F.2d at 637.
\textsuperscript{165} See, e.g., Petition of O’Neil, NTSB Order No. EA-1785 (May 13, 1982).
\textsuperscript{166} \textit{Schwartz}, 712 F.2d at 637.
\textsuperscript{167} 49 U.S.C. § 1422 (1982).
\textsuperscript{168} \textit{Schwartz}, 712 F.2d at 637.
\textsuperscript{169} For a discussion of the FAA’s new cardiovascular standard and its ramifications, see McDermott, \textit{NTSB Appeal Rights Eliminated}, supra note 1, at 1.
\textsuperscript{170} 705 F.2d 500 (D.C. Cir. 1983).
MEDICAL CERTIFICATION

On the eve of the NTSB hearing, the FAA alleged additional reasons for disqualification. Additionally, the FAA claimed that it had failed to confer with its medical witnesses until a few days before trial. There was a continuance and the pilot suffered additional lost wages and litigation expenses.

After returning to work, the pilot sued the government for damages under the Federal Tort Claims Act ("FTCA"). The pilot claimed lost wages and expenses, including additional attorney fees. The trial judge granted a motion to dismiss based upon the discretionary function exception to the FTCA. On appeal, the court reversed the dismissal, holding that the discretionary function exception did not apply since the FAA breached its duty to apply the medical certification regulations in a careful manner. The court found that a cause of action exists if the FAA either (1) denies certification without a reasonable medical basis or (2) fails to discover and inform the pilot of the FAA’s position in a timely manner so as not to damage the pilot. Even if the FAA’s ultimate decision is “discretionary” within the meaning of the discretionary function exception, the court noted that only the ultimate judgment is protected. Substandard medical or administrative conduct is not exempt from FTCA remedies.

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171 Id. at 501.
172 Id.
173 Id. at 502.
174 Id.
176 Harr, 705 F.2d at 502.
177 Id. at 505. The discretionary function exception to the FTCA is found at 28 U.S.C. § 2680(a) (1982).
178 Harr, 705 F.2d at 505-06. This duty was previously recognized in Beins v. United States, 615 F.2d 591 (D.C. Cir. 1982); and Duncan v. United States, 355 F.Supp. 1667 (D.D.C. 1973), but neither of these cases involved an allegation of negligence by a government attorney.
179 Harr, 705 F.2d at 504.
180 Id. at 505-06.
181 Id. at 505-06, relying on, Beins v. United States, 695 F.2d 591, 604-05 (D.C. Cir. 1982). The FAA apparently has not heeded the Harr court’s admonishment. In Petition of Hutchinson, NTSB Order No. EA-2059 (Sept. 4, 1984), the FAA
5. McHenry v. Bond

McHenry v. Bond\textsuperscript{182} involved an airline pilot denied recertification by the FAA because he had experienced transient global amnesia ("TGA").\textsuperscript{183} TGA is a neurological condition characterized by isolated incidents of short-term memory loss, with a low rate of recurrence.\textsuperscript{184} The FAA asserted that the pilot experienced a disturbance of consciousness without satisfactory medical explanation, which is grounds for disqualification under federal regulations.\textsuperscript{185}

On review, the ALJ found that the pilot had suffered an isolated occurrence of TGA. The ALJ held, on the basis of NTSB precedent,\textsuperscript{186} that TGA provided a satisfactory explanation for the isolated disturbance of consciousness.\textsuperscript{187} On appeal, four members of the NTSB unanimously overruled the precedent case and reversed the decision of the ALJ.\textsuperscript{188} Later, the same four NTSB members were evenly divided on the question of the pilot’s petition for reconsideration.\textsuperscript{189} Since a majority is necessary to reverse a prior decision, the NTSB allowed the earlier decision to stand.\textsuperscript{190} The pilot filed a petition for review by the United States Court of Appeals for the Eleventh Circuit.\textsuperscript{191}

The court found that the NTSB’s decision was unsupported by substantial evidence.\textsuperscript{192} Specifically, the NTSB

\begin{footnotesize}
\begin{enumerate}
\item McHenry, 668 F.2d at 1189-93.
\item Petition of Weddle, 1 NTSB 1933 (1972).
\item Id. at 1189.
\item 14 C.F.R. § 67.13(d)(2)(i)(b) provides that in order to obtain a first class medical certificate, an applicant must have no established medical history or clinical diagnosis of "a disturbance of consciousness without satisfactory medical explanation of the cause."
\item Id.
\item Id. at 1189-93.
\item Id. at 1190.
\end{enumerate}
\end{footnotesize}
failed to "explain its departure from precedent, and ade-
quately explain the rationale of its decision, [which] are
prerequisites to a judicial finding that an agency's action is
not arbitrary and capricious." The court found the de-
parture from precedent disturbing since it conflicted with
related cases decided subsequent to the precedent case.
The court reversed and remanded the decision to the
NTSB for further proceedings to clarify its standard.

C. Administrative Decisions

1. Coronary Artery Disease

As discussed above, the FAA amended its cardiovascu-
lar standard effective May 17, 1982. The amendment
was designed to limit NTSB review in medical certification
cases involving coronary artery disease. The amend-
ment has achieved that purpose. Under the prior stan-
dard, only a myocardial infarction resulted in automatic

195 Id. at 1192-93.
194 The subsequent related case was Petition of Mosely, 2 NTSB 1824 (1975). The McHenry court interpreted Mosely as standing for the proposition that proof of the underlying cause of disturbance of consciousness is not necessary if (1) the disturbance can be diagnosed as a medically accepted phenomenon, and (2) a reliable analysis of future risk can be made.
195 McHenry, 668 F.2d at 1194. The NTSB subsequently reaffirmed the approach taken in Mosely, 12 NTSB 1824, but reversed the judge's finding on re-
mand that the pilot in McHenry had met his burden of proof under the Mosely test. Petition of McHenry, NTSB Order No. EA-1982 (April 9, 1984). For a discussion of the the concurring opinion filed by NTSB member Donald D. Engen, now Admin-
istrator of the FAA, see infra notes 236-238 and accompanying text.
196 See supra notes 195-210 and accompanying text for a discussion of the new FAA cardiovascular policy.
197 See supra note 166 and accompanying text.
198 The impact on NTSB review is exemplified by the actual experience during the first year of the new standard's operation, i.e., from May 1982 until May 1983. During that period, the new standard necessitated the termination of approxi-
mately fifty cases without hearings. See, e.g., Petition of Berry, NTSB Order No. EA-1868 (Feb. 10, 1983). Since there are normally fewer than 200 medical cases pending before the NTSB at any one time, the dismissal of approximately fifty cases represented the dismissal of twenty-five percent of all of the pending medi-
cal cases. Each of these cases involved an airman who formerly could take his or her case to a hearing before the NTSB, but who is now denied the right to NTSB review. In Berry, the NTSB held that, inasmuch as the airman had undergone treatment for cardiovascular disease, there was no genuine issue to be litigated and dismissal was proper. NTSB Order No. EA-1868 at 4.
dis dismissal. Any applicant with coronary artery disease but with no myocardial infarction was allowed to litigate the issue of whether he could reasonably be expected to have a myocardial infarction. Under the current standard, an applicant with coronary artery disease is automatically disqualified if the disease has been (1) treated, (2) is symptomatic, or (3) is clinically significant.

Pilots who have had coronary artery bypass surgery have been significantly affected by the rule change. Prior to the change, eight of the thirteen cases presented to the NTSB on this issue were decided in favor of the pilot. Since May 17, 1982, when the standard was changed, no pilot with a history of coronary artery bypass surgery has survived a motion for summary judgment.

Since the rule change, litigation before the NTSB involving coronary artery disease has centered around two issues: (1) is there an “established medical history or clinical diagnosis” of coronary artery disease and if so, (2) is the disease “clinically significant?” The issue of “established medical history or clinical diagnosis” is most critical in situations in which there has been no “treatment” or “symptoms.” In such cases, there is usually no diagnosis in the medical records, since the treating physician had no reason to suspect coronary heart disease. The airman may have undergone a required FAA test,

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199 See supra note 162 and accompanying text.
200 See supra note 163 and accompanying text for a discussion of the current standards.
201 See supra note 165 and accompanying text for a discussion of these thirteen cases. See also Petition of Anzer, NTSB Order No. EA-1708 (Nov. 3, 1982); Petition of O'Neil, NTSB Order No. EA-1785 (May 13, 1982); Petition of Larson, NTSB Order No. EA-1724 (Jan. 15, 1982); Petition of Black, NTSB Order No. EA-1704 (Nov. 16, 1981); Petition of Nagle, NTSB Order No. EA-1671 (Sept. 15, 1981); Petition of Schmalz, NTSB Order No. EA-1661 (Aug. 24, 1982), reconsideration denied, NTSB Order No. EA-1716 (Nov. 27, 1981); Petition of Spivey, NTSB Order No. EA-1440 (Aug. 6, 1980), reconsideration denied, NTSB Order No. EA-1506 (Aug. 24, 1981); Petition of Schwartz, NTSB Order No. EA-1331 (Oct. 19, 1979, reconsideration denied, NTSB Order No. EA-1366 (Jan. 21, 1980); Petition of Burney, NTSB Order No. EA-1311 (Aug. 21, 1979); Petition of Tucker, NTSB Order No. 1156 (July 12, 1978); Petition of Barle, NTSB Order No. EA-1094 (Dec. 13, 1977); Petition of Blaete, NTSB Order No. EA-964 (Feb. 24, 1977).
202 See, e.g., Petition of Berry, NTSB Order No. EA-1868 (Feb. 18, 1983).
such as a resting electrocardiogram, which the FAA physicians interpret as abnormal. That finding, in turn, may form the basis for a request by the FAA for further testing. The results of these tests may be interpreted by the FAA physicians as showing "clinically significant" coronary heart disease. Recent decisions by the NTSB such as Falkner,\textsuperscript{203} have rejected the idea that a diagnosis rendered by a non-treating physician, called by the opposing party, is sufficient to constitute a clinical diagnosis.\textsuperscript{204} This is particularly true when the airman presents the testimony of at least one treating physician who asserts that the airman does not have clinically significant coronary heart disease.\textsuperscript{205}

Like the question of "clinical diagnosis," the issue of clinical significance is most critical where there has been no treatment or symptoms, since the case must automatically be decided against the pilot if there has been treatment or symptoms.\textsuperscript{206} In the cases with established coronary artery disease, but no treatment or symptoms, clinical significance depends upon the documentation of a seventy-five percent blockage of a major artery.\textsuperscript{207} This can rarely be documented without coronary angiogra-

\textsuperscript{203}NTSB Order No. EA-2018 at 13 (Jun. 29, 1984).
\textsuperscript{204}Id.
\textsuperscript{205}The conclusion that there is an "established medical history" must be based upon evidence that exists in the airman's medical background. It must include such things as the history compiled by a treating physician, a record of hospitalizations, laboratory test results, and diagnoses by treating physicians who have interpreted the medical tests and conducted a physical examination. See, e.g., Petition of Moss, 2 NTSB 1269, 1271 (1975); Petition of Roberts, 1 NTSB 1627, 1628 (1972); Petition of Day, 1 NTSB 359, 361 (1968), aff'd, Day v. NTSB, 414 F.2d 950 (5th Cir. 1969). The existence of an established medical history can be confirmed by the testimony of an FAA medical witness. Petition of Journic, NTSB Order No. EA-1705 at 5, n. 6 (October 29, 1981). However, such confirmation is not sufficient in absence of corroborating evidence in the medical background. Petition of Dennis, 2 NTSB 2145, 2147 (1976). The conclusion that there is a "clinical diagnosis" must be based on a diagnosis made by a treating physician in a hospital surrounding or based upon laboratory testing. See, e.g., Petition of Moss, 2 NTSB 1269, 1271 (1975); Petition of Engel, 2 NTSB 1097, 1098 (1974).
\textsuperscript{206}See supra note 202 and accompanying text.
\textsuperscript{207}See infra note 209 and accompanying text.
phy,\(^\text{208}\) which provides direct evidence of the structural or anatomic condition of the arteries. Where an angiography has demonstrated a seventy-five percent blockage, certification has been denied.\(^\text{209}\) Although there have been no reported cases, the inference is that in cases where the blockage is less that seventy-five percent, certification will be granted. The cases in which certification was granted did not involve angiography, and the pilot established through indirect evidence that there were no significant blockages.\(^\text{210}\)

2. Discovery

The NTSB’s revised rules of practice\(^\text{211}\) contain important changes in discovery,\(^\text{212}\) and these changes will be discussed later in the article.\(^\text{213}\) Previously, depositions were the only discovery device specifically addressed by the rules of practice.\(^\text{214}\) Nevertheless, the NTSB encouraged the use of discovery devices provided by the Federal Rules of Civil Procedure.

However, there have been no cases interpreting the new NTSB rules of discovery. The cases decided by the NTSB under the former rules of practice provide clear evidence of the NTSB’s policy of encouraging discovery. The most striking of these decisions is Petition of Seiler.\(^\text{215}\) The pilot in Seiler propounded interrogatories to the FAA seeking information concerning opinions of the FAA’s expert medical witness. Under the Federal Rules of Civil Procedure, such questions are commonly used. The FAA

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\(^{208}\) Coronary angiography is the radiographic visualization of the coronary arteries after intravascular injection of radio-opaque medium.

\(^{209}\) See Petition of Wunder, NTSB Order EA-2038 (July 20, 1984); Petition of Ridbery, NTSB Order No. EA-1976 (Feb. 10, 1984).

\(^{210}\) See Administrator v. Fulkner, NTSB Order No. EA-2018 (June 29, 1984); Petition of Wright, NTSB Order No. EA-2017 (June 19, 1984).

\(^{211}\) See supra note 74 and accompanying text.

\(^{212}\) See supra notes 92-95 and accompanying text.

\(^{213}\) See infra notes 221-224 and accompanying text.

\(^{214}\) See 49 C.F.R. § 821.19 (1983), as it existed prior to August 10, 1984.

contended that the questions were improper and refused to answer. The ALJ issued an order compelling the FAA to respond. The FAA failed to respond and the petitioner sought sanctions. The ALJ issued an order excluding the testimony of the witness. The case proceeded to hearing without the testimony of the FAA witness in question, and a decision in favor of the pilot was rendered. The NTSB affirmed the decision.

3. **EAJA Decisions**

As noted above, the NTSB has reviewed a number of EAJA claims. To date, twenty claims have been filed and seven have resulted in awards. The best known case is *Sottile v. Administrator*. *Sottile* involved a certificate revocation action against a flight instructor based upon allegedly fraudulent entries in a student logbook. Based upon such evidence, the ALJ found against the FAA and dismissed the charges against the flight instructor. The ALJ then granted the flight instructor's EAJA claim for attorney fees and expenses in the amount of $6,983.97. This award was affirmed by the NTSB on appeal after a full proceeding. The ultimate award of $11,663.12 included additional attorney fees for the appeal.

D. **Administrative Regulations**

1. **NTSB**

Recent changes in the NTSB regulations which have an effect on airman medical certification proceedings include the NTSB's procedural regulations implementing the EAJA and the revised rules of practice in proceedings before the NTSB. A number of revisions in the NTSB

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216 See supra notes 131-138 and accompanying text for a discussion of the statutory framework of the EAJA.
219 See supra note 133 and accompanying text.
220 See supra notes 74-75, 92-95 and 219-223 and accompanying text for a discussion of the NTSB's procedural changes.
rules of practice have a significant impact on airman medical certification proceedings. The first revision relates to discovery. Prior to the revisions, the only discovery device specifically addressed in the regulations was the deposition. The revised rules specifically provide for depositions and interrogatories. In addition, other forms of discovery are presumably available since the revised rules state that the Federal Rules of Civil Procedure pertaining to depositions and discovery are used as a general guide to discovery practice and proceedings before the NTSB.

Furthermore, depositions may now be taken without a motion and order by the ALJ. This change facilitates the trial of proceedings before the NTSB, since discovery will be "self-executing." Such an approach is logical, since there is no reason to involve the ALJ as long as the opposing parties cooperate in discovery. If a dispute arises, the matter can then be brought before the ALJ through a motion to compel or a motion for a protective order. In any event, the NTSB's attempt to encourage discovery through the revised rules of practice is a beneficial development.

Another new provision of the rules requires ALJs to give the parties at least thirty days notice prior to the hearing date. The former rule required only that the parties be given "adequate" notice. The revised rule provides the ALJ with some flexibility in that he has the power to set a hearing on fewer than thirty days' notice if the parties agree.

Another significant new provision applies only to medical certification cases. It places restrictions on the pilot's use of evidence in such a proceeding. A pilot is not

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221 See supra note 89 and accompanying text.
223 Id.
224 See id. § 821.19 (1983) as it existed prior to August 10, 1984.
225 Id. § 821.37(a).
226 Id.
227 Id. § 821.24(e).
Medically permitted to introduce evidence of independent medical testing unless the evidence is submitted to the FAA at least thirty days prior to the hearing date. This is an undesirable change. There is no valid reason why only the pilot should be restricted with respect to the use of evidence. It may be desirable to provide for a new evidence cut-off date in advance of the hearing, but the rule should apply equally to both the pilot and the FAA.

2. FAA

Recent changes in FAA regulations have affected airman medical certification proceedings. The revised alcoholism standard,\(^{228}\) the revised cardiovascular standard,\(^ {229}\) and also the revised procedures for the consideration of requests for exceptions from the medical standards have significantly affected medical certification proceedings.\(^ {230}\) In addition, the FAA has announced that it intends to conduct a comprehensive review of the medical standards and to make appropriate changes.\(^ {231}\) In 1983, a contract was awarded to the American Medical Association ("AMA") for the purpose of having the AMA study the current standards and provide the FAA with recommendations. The AMA has two years to complete its work under the contract.

The AMA contract has been criticized by those who believe the extreme cost\(^ {232}\) is unwarranted when there are nearly one hundred fifty full-time physicians and twenty-four medical consultants on the FAA's staff. In addition, the critics point out that there are numerous aviation-minded physicians who would volunteer their time.\(^ {233}\) Additionally, many argue the two year review period is too long. Following the study period, the FAA must con-

\(^{226}\) See supra notes 150-157 and accompanying text.

\(^{227}\) See supra notes 140-169 and accompanying text.

\(^{228}\) See supra notes 54-58 and accompanying text.


\(^{230}\) The contract is for $697,882.

sider the AMA's recommendations and give a notice of proposed rulemaking. The public will then be given an opportunity to comment on that proposal. The comments will be analyzed by the FAA which will then develop the final rule. It is unlikely that the entire process can be completed in less than five years.

E. Agency Changes

No discussion of recent developments relating to airman medical certification would be complete without mention of the new FAA Administrator and the new Federal Air Surgeon. On April 10, 1984, Donald D. Engen became the Administrator of the FAA. Prior to that, he served as a member of the NTSB. During Mr. Engen's term with the NTSB, he became familiar with FAA medical certification cases.

Mr. Engen's opinions regarding the FAA standards are clear from a concurring opinion he filed as a NTSB member. The case involved one of the FAA's specifically disqualifying conditions. Mr. Engen voted with the majority and disqualified an airline pilot because of a history of a mild disturbance of consciousness which had occurred some seven years prior to the NTSB decision. In his concurring opinion, Mr. Engen stated:

I am constrained to vote with the majority because I am bound by the parameters of the existing system of FAA regulations of medical certification matters and NTSB review of the FAA medical certificate actions. I wish to state that I believe these regulations to be biased, rigid, and hence not in the best interest of safety and the public, which should be served by these regulations. The FAA is charged with the duty of promoting safety of flight of civil aircraft in air commerce, and is thus empowered and given the responsibility to determine the physical fitness of air-

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234 See supra note 118 discussing the appointment of Mr. Egan.
235 See supra notes 103-109 and accompanying text for a discussion of the initial decision process.
236 Petition of McHenry, NTSB Order No. EA-1982 (Apr. 9, 1984), (Engen, Member concurring).
men. But Congress's granting of this enormous power carried with it the equally enormous responsibility for the FAA to assure that the power was wielded wisely and judicially so as not to arbitrarily deprive an airman of the right to pilot an aircraft, whether for the purpose of making a living, traveling from place to place, or just enjoying the sport of flying. Thus, Section 602 of the FAA Act of 1958 granted the FAA the authority to impose on airmen only such limitations with regard to medical and other certificates as are "necessary to assure safety in air commerce."

It is my view that, with regard to certain issues in the medical certification area, FAA actions have reflected an inadequate respect for the responsibilities and limitations to which the agency is and ought to be subject. The regulation which has ensnared petitioner in this case is an example. It focuses on one event, one occurrence, and permits no analysis whatsoever of surrounding circumstances or subsequent events as mitigating factors. Petitioner here is disqualified because of one incidence of TGA occurring at a time when he was obviously ill (face flushed, pain, and headache). He has suffered no recurrences in seven years. And in the meantime he has been doing aerobatic flying (probably the most physically taxing of all types of flying) without any problem. Under the current rule, none of these factors can be considered as a mitigating factor by either the FAA or the NTSB. In my view that should be rectified. What we have here is a pilot fighting to return to flying because this is the way he makes his living, and the system, in a very cold, depersonalized way, simply rolls along, applying an arbitrary rule permitting no rational analysis of the safety impact presented by his circumstances, and in the process mowing down petitioner and others like him. I register my dissent—not with the conclusion of the majority in this case, but with the system which allows such a conclusion.237

Now that Mr. Engen has become Administrator of the FAA, he is in a position to improve the FAA's airman medical certification system. On October 1, 1984, Dr.

237 Id. at 18-19.
Homer L. Reighard, who was the Federal Air Surgeon for nearly ten years, retired. According to some observers, Dr. Reighard's departure signals a significant change in the policies of the Office of the Federal Air Surgeon, particularly in light of the comments made by Mr. Engen. Dr. Reighard was replaced by Mr. Engen's selection, Dr. Frank H. Austin, Jr. Already, Dr. Austin has made tremendous strides in terms of lessening administrative delays and avoiding overly restrictive certification decisions.

IV. Summary

The recent past has been a period of change with respect to the procedures and the substantive law relating to pilot medical certification. Further changes are pending. Because the situation is changing, attorneys providing legal representation to pilots should review the latest information before taking a position on behalf of a client.

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238 Aviation Daily, Aug. 9, 1984, at 222.
Comments