

SERVED: July 5, 2005

NTSB Order No. EA-5166

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 28th day of June, 2005

_____)	
Petition of)	
)	
CARY A. NIEHANS,)	
)	Docket SM-4616
for review of the denial by the)	
Administrator of the Federal)	
Aviation Administration of the)	
issuance of an airman medical)	
certificate.)	
_____)	

OPINION AND ORDER

Petitioner appeals the October 20, 2004, Order of Administrative Law Judge William A. Pope, II, dismissing petitioner's challenge of the Administrator's denial of his application for airman medical certification. We deny the appeal.¹

¹ The law judge's Order Granting Administrator's Motion for Summary Judgment, Denying Petitioner's Cross-Motion for Summary Judgment and Dismissing Petitioner's Supplemental Petition is attached.

The Administrator has declined to reissue petitioner an unrestricted medical certificate based on the opinion of Federal Air Surgeon Jon L. Jordan that petitioner does not qualify for the reasons set forth in Federal Aviation Regulations ("FARs") sections 67.107, 67.207 and 67.307. Specifically, Dr. Jordan found that petitioner has a history of alcohol dependence without satisfactory clinical evidence of recovery, as well as a history of substance (alcohol) abuse.² The issue before us is whether the law judge properly disposed of this matter by granting summary judgment in favor of the Administrator.³

² The Administrator's Medical Standards and Certification regulations (14 C.F.R. Part 67) provide, as pertinent, that no person will be issued a medical certificate (respectively, first-, second-, and third-class certification) where there is an established medical history or clinical diagnosis of, "[s]ubstance dependence, except where there is established clinical evidence, satisfactory to the Federal Air Surgeon, of recovery, including sustained total abstinence from the substance(s) for not less than the preceding 2 years." Alcohol is an included "substance," according to the regulation, and "dependence" is defined (among other criteria not relevant to this proceeding) as, "a condition in which a person is dependent on a substance, as evidenced by ... [i]ncreased tolerance[.]" FAR §§ 67.107(a)(4), 67.207(a)(4) and 67.307(a)(4). In addition, the regulations require that an applicant shall not have engaged in, "substance abuse within the preceding 2 years[.]" "Substance abuse" is defined (among other criteria not relevant to this proceeding) as, "[u]se of a substance in a situation in which that use was physically hazardous, if there has been at any other time an instance of the use of a substance also in a situation in which that use was physically hazardous[.]" FAR §§ 67.107(b)(1), 67.207(b)(1) and 67.307(b)(1).

³ Although not germane to our resolution of this appeal, we note that Dr. Jordan first denied petitioner's medical application on April 2, 2004, solely on the basis of his finding of alcohol dependence. Subsequently, after petitioner filed his

The law judge's ruling addressed only petitioner's alcohol abuse.⁴ In terms of medical qualification cases, where the Board's only function is to ascertain the existence of a disqualifying condition cited by the Administrator, the law judge correctly framed the issue: whether petitioner, in the two-year period before his August 5, 2003, medical application, used

(..continued)

Petition for Review and the Administrator filed an answer to that Petition, Dr. Jordan amended the denial letter on August 5, 2004, to include substance abuse as an independent basis for disqualification. Prior to the law judge's issuance of his Order, which is the subject of petitioner's appeal, the parties supplemented their filings, and petitioner amended his Petition, to include the substance abuse issues raised by Dr. Jordan's amended denial letter.

⁴ The law judge deemed the alcohol dependence issue superfluous in light of his ruling that the Administrator had demonstrated petitioner was not medically qualified on other grounds, i.e., alcohol abuse. The Administrator does not appeal this ruling, but petitioner argues that, even if we affirm the law judge's ruling as to the alcohol abuse, dismissal of his petition was nonetheless erroneous because, "there are clearly questions of fact about whether petitioner is alcohol dependent[.]" Petitioner's arguments on this point are inapposite because the independent basis for denial of his certificate, alcohol abuse, renders immaterial any otherwise legitimate issue of fact regarding alcohol dependence. Simply put, this proceeding is solely concerned with petitioner's August 5, 2003, medical application that triggered Dr. Jordan's denial letter, or, more specifically, whether there were medical grounds for the actions taken by the Administrator *on that application*. At this stage in the proceedings, the only basis for that denial is the Administrator's contentions regarding alcohol abuse. As the Administrator acknowledges in her appeal brief, petitioner is free to reapply for medical certification. If that application is subsequently denied by the Administrator (for alleged alcohol dependence, or for some other reason), we may review the matter if and when it is properly before us on a petition challenging any denial of that application.

alcohol in a situation in which that use was physically hazardous, and, if he did, whether there was ever any other circumstance where petitioner also used alcohol in a situation in which that use was physically hazardous. To resolve these questions, the law judge examined the record evidence, and, in particular, the evidence pertaining to two motor vehicle convictions.⁵ Upon finding that both motor vehicle actions, when considered together, demonstrated alcohol abuse within the terms of the Administrator's regulations, he ordered summary judgment for the Administrator.

Summary judgment is proper only where, "pleadings and other supporting documentation establish that there are no material issues of fact to be resolved," and the moving party -- in this case, the Administrator -- "is entitled to judgment as a matter of law." 49 C.F.R. § 821.17(d). It is indisputable that operating a motor vehicle while illegally under the influence of alcohol qualifies as, "[u]se of a substance in a situation in which that use was physically hazardous." The Administrator, however, argues that by the plain meaning of the regulation the

⁵ On December 14, 2000, petitioner was stopped by police, and subsequently pled *nolo contendere* to charges of DUI and refusal to submit to a required alcohol testing. On January 31, 2002, petitioner was also stopped by police, and subsequently pled *nolo contendere* to a charge of reckless driving. The record also contains information about a third motor vehicle action, from 1977, but the law judge discarded that information as unreliable and likely irrelevant. The Administrator does not challenge that ruling.

relevant inquiry is simply whether there are, as she claims here, "at least two instances involving petitioner's use of alcohol in a physically hazardous situation, i.e., the operation of a motor vehicle, one of which having occurred within the preceding two years." Administrator's Motion for Summary Judgment at 7.

Indeed, the Administrator specifically argues that she is, "not seeking to confirm whether petitioner has ever been convicted for alcohol-related offenses or whether the convictions are valid."

Id.

Petitioner, on the other hand, argues that neither of the cited motor vehicle actions involved "use" of alcohol within the meaning of FAR sections 67.107(b)(1), 67.207(b)(1) and 67.307(b)(1). Petitioner seems to argue, essentially, that it is necessary to show, "proof of intoxication, DUI and/or mental impairment due to alcohol use," in order to invoke the alcohol abuse regulations. In the context of a ruling on a motion for summary judgment, the pleadings and supporting evidence pertaining to disputed material facts, if any, must be viewed in the light most favorable to petitioner.

The two motor vehicle actions at issue occurred on January 31, 2002, and December 14, 2000. Petitioner does not deny that in the 2002 instance he was arrested for driving under the influence of alcohol ("DUI"). More importantly, petitioner admits that in the related criminal court proceeding he

subsequently pled *nolo contendere* to, among other things, refusal to submit to required alcohol testing and DUI.⁶ In the 2000 instance, petitioner was also stopped and suspected of DUI, but he refused to submit to alcohol testing, and ultimately, pled *nolo contendere* to a lesser charge of reckless driving.⁷

Petitioner denies that he drank alcohol in a manner or quantity before either traffic stop to constitute "use" of alcohol in a "physically hazardous" situation.

⁶ Petitioner argues that, because he pled *nolo contendere* to the 2002 charges, the law judge impermissibly relied on the fact that he pled to a DUI charge, as well as the allegations that formed the basis of those charges, in reaching his decision. In his filings in opposition to the Administrator's Motion for Summary Judgment, and incorporated by reference in his appeal brief, petitioner argues that his purported .207 g/210L blood alcohol concentration after the 2002 traffic stop -- which was recorded by police during the first test administered before petitioner refused a second, required confirmatory test -- was not litigated in the criminal proceedings, or a basis for his *nolo contendere* plea, and, therefore, should not have been considered by the law judge. Petitioner also submitted purported expert opinion that the .207 g/210L blood-alcohol measurement is "invalid and unreliable," and could not have resulted from the quantity and timing of alcohol consumption claimed by petitioner prior to the 2002 traffic stop. As we shall explain, these arguments are unavailing.

⁷ Petitioner claims that on the occasion of his 2000 traffic stop he was neither legally intoxicated nor consuming alcohol in a "physically hazardous" situation. He claims to have had only several drinks over several hours, and argues that, in fact, the DUI charges were dropped and he pled *nolo contendere* to a charge of reckless driving. He submitted an affidavit from the prosecuting attorney at the time of the 2000 charges stating he, "would not have allowed a defendant arrested for a DUI offense ... to plead to reckless driving ... unless I determined that the evidence ... was insufficient to result in a [DUI] conviction." Again, these arguments are not dispositive of the legal issues raised by this appeal.

We turn first to the Administrator's interpretation of her alcohol abuse regulatory standard, for our determination of this legal issue governs the materiality of various facts petitioner alleges are in dispute (mostly about the quantity of alcohol consumed and the contemporaneousness of that consumption with the motor vehicle actions). "The Board is ... bound by all validly adopted interpretations of laws and regulations the Administrator carries out unless the Board finds an interpretation is arbitrary, capricious, or otherwise not in accordance to law." 49 U.S.C. § 44703(c)(2). We must also defer to the Administrator's regulatory interpretations that are developed and enforced in an adjudication proceeding such as this one, so long as such interpretations are not unreasonable and are consistent with the wording of the regulations. Administrator v. Kraley, NTSB Order No. EA-4581 at 4 (1997); Hinson v. National Transportation Safety Board, 57 F.3d 1144, 1148 (D.C. Cir. 1995).

The Administrator interprets the regulatory language here at issue ("use of a substance in a situation in which that use was physically hazardous") to include alcohol use, regardless of whether that use was illegal or resulted in a conviction, in a situation that involves operation of a motor vehicle. We see no reason not to defer to the Administrator's interpretation of her regulation. We therefore review the record, and the law judge's decision, in this context and specifically reject petitioner's

fundamental argument that the Administrator must show that petitioner was legally intoxicated or mentally impaired by alcohol at the time of both motor vehicle actions that underlie her denial of medical certification.

We find no error in the law judge's finding that the 2002 motor vehicle action was sufficient to show that petitioner used alcohol in a situation in which that use was physically hazardous. Petitioner was found guilty of DUI, and, therefore, he clearly used alcohol in a situation that was physically hazardous. Petitioner's post hoc claims to have not consumed alcohol in a manner or degree that was "physically hazardous" under the circumstances does not generate a material factual dispute.⁸ See also Administrator v. Babb, NTSB Order No. EA-4664 at 2-3 (1998) (the Board cannot entertain collateral attacks on a criminal conviction).

Similarly, petitioner's claim that his *nolo contendere* plea cannot be used in this federal administrative proceeding is unavailing. See Myers v. Secretary of Health and Human Services, 893 F.2d 840, 844-845 (6th Cir. 1990) (convictions pursuant to pleas of *nolo contendere* were properly considered in an

⁸ We note in this regard that the results of the unconfirmed blood alcohol test, which petitioner contests, are not relevant to the DUI conviction or to our opinion. Simply put, the exact quantity of alcohol consumed, and the degree of petitioner's impairment, is not material, particularly in light of the DUI conviction.

administrative proceeding); Cf. Administrator v. Piperata, 2 NTSB 979, 980-981 (1974) (holding that a *nolo contendere* plea is properly considered a "conviction" for purposes of FAR reporting requirements). Indeed, in the present proceeding, which is concerned with matters of aviation safety, the issue is not whether petitioner is or was guilty of criminally operating a motor vehicle while intoxicated, but, rather, whether a preponderance of the material, reliable and probative evidence sufficiently demonstrates that the Administrator had adequate justification for her medical determination that petitioner abused alcohol. Petitioner's arrest, and subsequent *nolo contendere* plea to the 2002 DUI charge, was in that context properly considered by the law judge as evidence of use of alcohol in a situation that is physically hazardous.⁹

Turning to the 2000 motor vehicle action, the Administrator contends, and contended before the law judge, that petitioner's

⁹ We acknowledge some judicial debate regarding collateral use of *nolo contendere* pleas. See, e.g., United States v. Poellnitz, 372 F.2d 562, 565-570 (3rd Cir. 2004) (including cases cited therein). However, the Federal Rules of Evidence ("FRE"), which in our proceedings serve only as non-binding guidance (see Administrator v. Comer, NTSB Order No. EA-3967 (1993) at 3), only proscribe the admission of a plea of *nolo contendere* in "civil or criminal" proceedings, not, as the Myers Court observed, in administrative proceedings. FRE 410; Myers at 844. And our procedural rules state that, "all material and relevant evidence should be admitted." 49 C.F.R. 821.38. Thus, we find the approach in Myers to be more persuasive and germane to our proceedings, particularly where, as here, we are reviewing the Administrator's safety-related determinations regarding petitioner's medical fitness for duty as an airman.

uncontested reckless driving at a time when he admittedly had consumed alcohol is sufficient to show that he used alcohol in a situation that was physically hazardous. This interpretation is not unreasonable, and we therefore sustain the law judge's determination that the 2000 motor vehicle action supported summary judgment as well. It cannot be disputed that reckless driving is a physically hazardous situation, and the uncontested facts show that petitioner was convicted of reckless driving after a *nolo contendere* plea. See Myers at 845 ("[i]t is well-settled that a plea of *nolo contendere* constitutes an admission of every essential element of the offense that is well pleaded in the charge") (internal quotations and citations omitted). The Administrator's position that petitioner's admitted consumption of alcohol in the circumstances is within the ambit of the regulation is not unreasonable, or otherwise not entitled to our deference. To be sure, we think such an interpretation has limits -- for example, it might not be reasonable if the alcohol was not consumed somewhat contemporaneously with a hazardous situation -- but not on the facts of this case. Petitioner's counsel represented that petitioner would testify under oath that, prior to the traffic stop on December 14, 2000, petitioner:

left home intending to have dinner at a local restaurant, but the kitchen had closed before he ordered food; while there, he met some friends and consumed two glasses of red wine; they subsequently decided to go dancing;

there he consumed one twelve ounce beer; when he left to go to a store to buy food, he was stopped just after leaving the parking lot; he was asked to take a breathalyzer test but he refused thinking the recent consumption of the beer might skew the test and that he had evidence of how much he had to drink that night[.]

Administrator's Motion for Summary Judgment, Attachment 3.

Given petitioner's admitted alcohol consumption prior to his reckless driving, and the Administrator's validly-adopted interpretation of her alcohol abuse regulatory standard, we discern no material factual dispute regarding whether petitioner used alcohol in a situation that was physically hazardous. Accordingly, he is disqualified for medical certification under sections 67.107(b)(1), 67.207(b)(1) and 67.307(b)(1).

Petitioner demonstrates no basis for us to conclude that the law judge improperly granted the Administrator's motion for summary judgment.

ACCORDINGLY, IT IS ORDERED THAT:

1. Petitioner's appeal is denied; and
2. The law judge's Order Granting Administrator's Motion for Summary Judgment, Denying Petitioner's Cross-Motion for Summary Judgment and Dismissing Petitioner's Supplemental Petition is affirmed.

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order.