

an evaluation of the weight of the evidence in the record. We disagreed with the law judge's conclusion that "the totality of the evidence" showed petitioner was not alcohol dependent, and we explained the basis for our differing conclusion. We did not reverse a credibility finding made by the law judge, nor does it appear that his decision rests on such a finding.

Our review of the law judge's decision in this case is consistent with the Administrative Procedure Act, which states, "on appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit issues on notice or by rule." 5 U.S.C. § 557(b).¹ Our rules of practice state that, on appeal, the Board will consider only whether: (1) the law judge's findings are supported by a preponderance of the reliable, probative and substantial evidence; (2) the conclusions are made in accordance with law, precedent and policy; (3) the questions on appeal are substantial; and (4) any prejudicial errors have occurred. 49 C.F.R. § 821.49(a). Petitioner has not pointed to any departure from this standard.

Petitioner also asserts that the Board engaged in impermissible speculation by noting that it was possible the federal air surgeon could have issued a final denial on the basis of petitioner's apparent refusal to supply a requested substance abuse/dependency evaluation. (NTSB Order No. EA-5176 at 11.)

¹ See also *A Guide to Federal Agency Adjudication*, Michael Asimow, Editor (2003) at 93-4, published by the American Bar Association's Section of Administrative Law and Regulatory Practice, which explains,

Agency heads or other reviewing authorities owe no obligation to pay deference to initial decisions. Where the agency and the ALJ disagree on issues of law, facts, discretion, or policy, a court reviews the decision of the reviewing authority, not the ALJ's decision. At the same time, however, the initial decision is part of the record for purposes of judicial review. The reviewing authority must therefore explain its rejection of the initial decision. Most important, with respect to issues of credibility (particularly credibility judgments based on the demeanor of witnesses), if the reviewing authority disagrees with the initial decision, this disagreement detracts from the substantiality of the evidence supporting the agency's decision. Nevertheless, the agency heads or other reviewing authority are empowered to reverse an initial decision, even on a matter of witness credibility, if it finds the testimony implausible and if it justifies its departure from the initial decision. [Footnotes omitted.]

This comment was made in the context of noting that the FAA's chief psychiatrist had recommended a denial on this basis, a factor the law judge considered significant in reaching his conclusion that the FAA had not proved its case. However, since the chief psychiatrist's recommendation was apparently superceded by a decision to deny the application on a different basis (i.e., the federal air surgeon's determination that petitioner had a history of alcohol dependence), our observation was merely dicta, and was clearly not necessary to our decision in the case. Petitioner appears to have misconstrued our statement that, "it is clearly within the Federal Air Surgeon's discretion to deny an application on any supportable basis, even if another basis exists that might also be valid." We upheld the FAA's denial on the basis cited in the denial letter (disqualification under 14 C.F.R. § 67.307(a)(4)) and no other. Petitioner is incorrect in suggesting that our decision was based on speculation and not, "on the actual evidence in this case."

In sum, petitioner has not demonstrated any error in our decision.

ACCORDINGLY, IT IS ORDERED THAT:

The petition for reconsideration is denied.

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