

SERVED: October 27, 2006

NTSB Order No. EA-5255

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 24th day of October, 2006

_____)	
MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17433
v.)	
)	
ELIZABETH A. SWAIN,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge William A. Pope, II, issued on November 2, 2005, following an evidentiary hearing.¹ By that decision, the law judge found that respondent intentionally falsified two applications for medical certification, and affirmed revocation of all her airman certificates. We deny the appeal.

In her complaint, the Administrator charged respondent with

¹ The initial decision, an excerpt from the hearing transcript, is attached.

violating section 67.403(a) of the Federal Aviation Regulations (14 C.F.R. Part 67), in connection with five alleged intentionally false or fraudulent statements on her medical applications of June 7, 2003,² and June 7, 2004.³ Specifically, and for each of the two applications, she was charged with falsely answering "no" to questions on the applications asking (1) whether she had ever been admitted to a hospital; and (2) whether she had ever been diagnosed with a mental disorder of any sort. She was also charged, in connection with the 2004 application, with falsely answering "no" to a question asking whether she had visited health professionals. The Administrator sought revocation of all her airman certificates.

The complaint was filed following a May 28, 2003 incident when respondent was found on the edge of the roof of a seven-story Holiday Inn. She was uncooperative with police, who removed her from the roof and brought her to Jackson Memorial Hospital. Respondent remained at the hospital for three days, and during that time she signed an application for voluntary admission for mental illness and to receive medication treatment. She also signed the hospital's specific authorization form for

² Respondent states that the correct date is June 17, 2003. The copy of the actual application is difficult to read, but the distinction is not material to our opinion or our resolution of this appeal.

³ Section 67.403(a) provides that no person may make or cause to be made a "fraudulent or intentionally false statement on any application for a medical certificate or a request for any Authorization for Special Issuance...under this part[.]"

"Psychotropic Medications." Respondent received anti-psychotic medication, and participated in psychotherapy. She was advised by a physician to not fly for a month, and to continue to receive treatment from a psychiatrist or a psychologist. Eight days after being discharged from the hospital, respondent applied, on June 7, 2003, for an airman medical certificate.

Respondent claimed that she did not know she was in a hospital, and did not know that she had been diagnosed with a mental disorder.⁴ She claimed that she believed she had merely been temporarily detained by the police. She denied providing intentionally false answers on either medical application.

The law judge found that respondent made three intentionally false (as opposed to fraudulent) statements on the two applications regarding whether she had been diagnosed with a mental disorder, and had also made an intentionally false statement on the 2003 application regarding the failure to report the hospital admission.⁵ He dismissed the charge that she had failed to report her admission to the hospital in 2004, as she had clearly marked "yes" in that box, and dismissed the charge regarding non-reporting of the visits to certain health

⁴ This case is *not* about whether respondent really has a mental disorder, but whether she was hospitalized and given a diagnosis of one.

⁵ He found that, on the 2003 application, respondent knew she should have reported her diagnosis of psychosis. On the 2004 application, he found that she should have reported that fact as well as her 2004 admission to the hospital.

professionals.⁶

On appeal, respondent claims that the law judge's decision is not supported by the evidence. We disagree. The proof needed to support a charge of intentional falsification is: 1) a false representation; 2) in reference to a material fact; and 3) made with knowledge of its falsity. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976), citing Pence v. United States, 316 U.S. 332, 338 (1942). The law judge thoroughly reviewed the evidence, and carefully explained the basis for his conclusions and the reasons why he did not believe respondent's explanations of events.⁷

The law judge specifically found that respondent's denial of knowing of any negative mental health diagnosis or that she had been admitted to a hospital were "simply not credible." Tr. at 228. He stated:

I further find that contrary to her denials, she had actual knowledge that her answers were false. I do not believe her explanations. I observed her testimony to be rambling, evasive and conflicting at times but more significantly, to be simply incredible in view of the overwhelming evidence to the contrary.

⁶ Because the Administrator did not appeal these dismissals they are not before us for review, but we note that unappealed law judge decisions are not precedent for the Board. 49 C.F.R. 821.43.

⁷ Respondent also continues to claim that there actually was no diagnosis of psychosis or mental disorder, but, in part on the basis of the evidence described above, the law judge correctly found otherwise. See Initial Decision at Transcript (Tr.) 232-233.

Id. at 229. Credibility determinations by the law judge are not reversed unless they are arbitrary, capricious, or inherently incredible. Administrator v. Smith, 5 NTSB 1560, 1563 (1986), and cases cited there. There is more than adequate evidence in the record to show that the representations were false, that the issues were material to respondent's fitness to hold a medical certificate,⁸ and that the representations were made with knowledge of their falsity.⁹ Respondent provides no basis for us to overturn the law judge's negative assessment of the credibility of her exculpatory testimony, and, therefore, the record meets the standard articulated in Hart v. McLucas and supports the Administrator's charges.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The revocation of respondent's airman certificates

⁸ See, e.g., 14 C.F.R. §§ 67.107, 67.207, and 67.307.

⁹ Although not necessary to our opinion, we note that at least two other items in the record and discussed by the law judge support the Administrator's complaint. First, respondent neglected to indicate on the 2004 application that she had taken Synthroid since she had filled out the last application. Although she had stopped taking it in July 2003, that month was covered by the June 2004 application. Second, she visited Drs. Hill and Haberman in January 2004. Whether she should have reported that or not, those visits could not have but helped to indicate that she had been diagnosed with a mental disorder of some kind and was directed to see these two doctors so they could perform further evaluation.

shall begin 30 days after the service date indicated on this opinion and order.¹⁰

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN and HIGGINS, Members of the Board, concurred in the above opinion and order.

¹⁰ For the purpose of this order, respondent must physically surrender her certificates to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).