

SERVED: March 16, 1998

NTSB Order No. EA-4642

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 26th day of February, 1998

Petition of)
)
ELMER ALLEN PROPST)
)
for review of the denial by) Docket SM-4244
the Administrator of the)
Federal Aviation Administration)
of the issuance of an airman)
medical certificate.)

ORDER TO SHOW CAUSE

On July 17, 1997, petitioner appealed two orders issued by Administrative Law Judge William A. Pope, II, dated May 23, 1997 and June 18, 1997, granting the Administrator's motion to dismiss these proceedings for lack of jurisdiction, on the basis that the instant petition is not for review of a final order of the Administrator.¹ On August 15, 1997, the Administrator filed a reply brief, arguing that the law judge's orders should be affirmed.

The documents before us suggest that this case should be remanded to the law judge for a hearing, and that this hearing should be limited to a determination of whether petitioner is qualified to hold an airman medical certificate under Federal Aviation Regulation (FAR) §§ 67.15 and 67.17(d)(1)(ii), 14 C.F.R. Part 67.² We recognize, however, that by doing so we would be

¹ Copies of the law judge's orders are attached.

² Now codified as FAR §§ 67.207(c) and 67.307(c).

asserting jurisdiction by finding that a final denial was constructively issued by the Federal Air Surgeon, as a result of his failure to act on petitioner's August 21, 1996 application, within what we view as a reasonable period of time. Therefore, we ask the Administrator to show cause why the Board should not construe the Federal Air Surgeon's failure to take final action from June 30, 1997 to the present time, as a *de facto* final denial, so as to confer the Board with jurisdiction to review this petition. We will explain.

As previously noted, on August 21, 1996, petitioner applied for a second-class airman medical certificate. The Aviation Medical Examiner who took his application withheld issuance pending further examination, and forwarded the application to the Manager, Medical Review Branch, FAA Aeromedical Certification Division. On November 21, 1996, petitioner received a letter from the Medical Review Branch Manager advising him that he was not qualified to hold a medical certificate under FAR §§ 67.15 and 67.17(d)(1)(ii), because of petitioner's "history of a personality disorder."³ Petitioner was also advised that this decision was not final, since it was "subject to reconsideration under 14 C.F.R. § 67.27."⁴ Administrator's Reply Brief at 2. Petitioner requested reconsideration. On January 13, 1997, the decision of the Medical Review Branch Manager was upheld by the Manager of the Aeromedical Certification Division, who advised petitioner of that decision.

According to the Administrator, petitioner was further advised by the Manager of the Aeromedical Certification Division that "reconsideration was available any time the petitioner had significant medical evidence for review." Reply Brief at 3. When petitioner inquired as to what that evidence might be, his application was forwarded to the Federal Air Surgeon. The Administrator contends that this request for information, dated January 28, 1997, was a request for further reconsideration, a fact that petitioner denies. On March 6, 1997, petitioner filed this petition for review.

On May 22, 1997, the FAA Chief Psychiatrist acknowledged receipt of petitioner's application and requested that petitioner submit current psychiatric and psychological evaluations. On June 13, 1997, petitioner essentially replied that he would not comply with the request. On June 24, 1997, the FAA Chief Psychiatrist

³ See discussion of petitioner's medical qualifications, *infra*.

⁴ FAR § 67.27 provided at the time that the Manager, Aeromedical Certification Division, among others, was delegated the authority to issue final denials except where the denial was based on certain subsections, including FAR § 67.17(d)(1)(ii). As to those specified subsections, only the Federal Air Surgeon could issue final denials.

again wrote to petitioner, asking petitioner to reconsider his decision, and explaining to petitioner that he could not be considered for either an unrestricted or a restricted medical certificate without the requested information. On June 30, 1997, petitioner replied that if his application could not be reviewed without a new evaluation, "you have denied my medical, and you should state so without delay." Appendix to Petitioner's Appeal Brief.

Petitioner has yet to receive a response to this demand for a final denial. In fact, nothing in the Board's file indicates that the matter was ever forwarded to the Federal Air Surgeon for final disposition, and according to a document appended to petitioner's pleadings it appears that his application may have been returned to the Aeromedical Certification Branch, notwithstanding the Administrator's argument to the Board herein that only the Federal Air Surgeon may dispose of this application. Therefore, we request of the Administrator her explanation as to why we should not view this situation as resulting in the constructive issuance of a final order.

Moreover, we believe jurisdiction should be asserted over this matter because the Administrator's position here raises serious substantive issues concerning petitioner's medical qualifications. FAR §§ 67.15 and 67.17(d)(1) provided at the time of petitioner's application, in pertinent part, as follows:

(d) *Mental and neurologic--(1) Mental.* (i) No established medical history or clinical diagnosis of any of the following:

(a) A personality disorder that is severe enough to have repeatedly manifested itself by overt act.

(b) A psychosis...

(ii) No other personality disorder, neurosis, or mental condition that the Federal Air Surgeon finds-

(a) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(b) May reasonably be expected, within 2 years after the finding, to make him unable to perform those duties or exercise those privileges;

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

As previously noted, the Administrator argues that the Board lacks jurisdiction here because the denial of petitioner's application by the Manager of the Aeromedical Certification Division was based on a "history of a personality disorder" that is disqualifying under 14 C.F.R. §§ 67.15 or 67.17(d)(1)(ii). Such a determination differs significantly from the position taken with

regard to petitioner's earlier applications, which were all denied because of a specifically disqualifying condition, i.e., a history or clinical diagnosis of psychosis.⁵

In sum, the Administrator appears to have abandoned the determination that petitioner once suffered a psychosis. That being the case, we believe petitioner is now entitled the opportunity to show that he does not have a personality disorder, neurosis, or other mental condition that is otherwise disqualifying under FAR § 67.15(d)(1)(ii) or § 67.17(d)(1)(ii). The Federal Air Surgeon's failure to dispose of the current application has thus far prevented petitioner from availing himself of this opportunity, and under the circumstances it is the Board's view that petitioner should be provided a hearing without any further delay.

⁵In Administrator v. Propst, 1 NTSB 1248, *reconsideration denied*, 1 NTSB 1247 (1971), the Board upheld the Administrator's emergency order, suspending petitioner's commercial pilot certificate on evidence that petitioner was not qualified to hold a medical certificate by virtue of a medical history or clinical diagnosis of psychosis. At that time, the Board noted in its decision, FAR § 67.15(d)(1)(ii) provided for disqualification of an applicant because of a medical history or clinical diagnosis of a psychotic disorder. *Id.* at 1249, n.6. In Petition of Propst, 2 NTSB 2228, 2229, *reconsideration denied*, 2 NTSB 2231 (1976), the Board upheld the dismissal of a petition for review of the denial of a new application for medical certification, finding that the doctrine of *res judicata* barred another review of the "identical issue" of whether petitioner has an established medical history or clinical diagnosis of psychosis. The Board noted that once an established history or clinical diagnosis of psychosis has been found, "no airman medical certificate may **ever** be granted." *Id.* at 2228. (Emphasis added). The decision also notes that the Federal Air Surgeon's denial in 1975 is based on petitioner's "established medical history of a nervous disorder and failure to qualify under sections 67.15 and 67.17(d)(1)(ii)." And, the decision notes, an established medical history or clinical diagnosis of "a psychosis," is "identical" to "a psychotic disorder." *Id.* at 2228, n.3. In Administrator v. Propst, 3 NTSB 368 (1977), the doctrine of *res judicata* was again applied against petitioner because of his "history of psychosis." And, in Administrator v. Propst, 4 NTSB 1259 (1984), *res judicata* again barred review of the underlying facts supporting the emergency revocation of a medical certificate that had been surreptitiously obtained by petitioner.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator shall show cause, within 30 days from the date of this order, as to why the Board should not construe the Federal Air Surgeon's failure to act on petitioner's August 21, 1996 application as a final denial;

2. The petitioner shall have 30 days from the date of service of the Administrator's response to file a reply; and

3. If the Administrator fails to timely show cause as required in paragraph 1 of this order, this matter will be remanded to the law judge for a hearing on whether petitioner is qualified to hold an airman medical certificate under FAR §§ 67.15 and 67.17(d)(1)(ii). [Now FAR §§ 67.207(c) and 67.307(c)].

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above order.