UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	ON APPEAL
	:	NO. 2665
MERCHANT MARINER DOCUMENT	:	
Issued to: Dieter P. Dubroc	:	

This appeal is taken in accordance with 46 USC § 7701 *et seq.*, 46 CFR Part 5, and 33 CFR Part 20.

By a Revocation Order[1] (hereinafter "Default Order") dated September 14, 2004, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at Norfolk, Virginia, revoked the Merchant Mariner Document (hereinafter "MMD") of Mr. Dieter P. Dubroc (hereinafter "Respondent") upon a finding of default in a proceeding that alleged, as the basis for revocation, *use of or addiction to the use of dangerous drugs*. The Complaint alleged that on June 11, 2003, Respondent submitted to a random drug test and provided a urine sample that tested positive for the presence of cocaine metabolite.

[1] A review of the record shows that the ALJ called his final order a "Revocation Order." A review of the ALJ's Order shows that it would, irrespective of the sanction imposed, be better termed a "Default Order." Therefore, this decision refers to the ALJ's Order as a "Default Order."

PROCEDURAL HISTORY

The instant case is the result of a Default Order issued by the ALJ. Therefore, it will be helpful to discuss the procedural progression of the case which is as follows:

- July 17, 2003—the Coast Guard filed a Complaint against Respondent's MMD alleging, due to a positive test result, that Respondent was a user of, or was addicted to the use of, dangerous drugs [Complaint at 2]
- July 22, 2003—Complaint received at Respondent's address of record
- August 11, 2003—Respondent's Answer due (no Answer was received)
- August 5, 2004—the Coast Guard filed a Motion for Default Order [Default Order at 1; Motion for Default Order at 1-2]
- September 14, 2004—Default Order issued by ALJ [Default Order at 1-2]
- October 12, 2004—Respondent files a timely "Notice of Appeal," via a letter postmarked October 8, 2004, with the ALJ Docketing Center [Respondent's Notice of Appeal at 1-2]

Coast Guard regulations require that an individual applying for an appeal submit both a Notice of Appeal and an Appeal brief. 33 C.F.R. § 20.1001; 33 C.F.R. § 20.1003. Although Respondent failed to file an Appellate Brief in this case, due to the extensive nature of Respondent's Notice of Appeal, it will be treated as both the required Notice of Appeal and Appeal Brief. Therefore, this appeal is properly before me.

FACTS

At all times relevant herein, Respondent was the holder of a Coast Guard issued merchant mariner credential. [RO at 2; 46 C.F.R § 5.57(b)]

On June 11, 2003, Respondent submitted to a random drug test. [RO at 2; Complaint at 2] Respondent provided a urine sample to Mr. Juan Canales of Global Safety and Security. [Default Order at 2; Complaint at 2] At that time, Respondent signed a Drug Testing Custody and Control Form which certified, among other things, that Respondent provided a urine sample for testing. [Default Order at 2; Complaint at 2] Subsequent testing of Respondent's urine specimen revealed that it was positive for the presence of cocaine metabolite. [Default Order at 2; Complaint at 2]

BASES OF APPEAL

This appeal has been taken from the order of the ALJ finding Respondent to be in default in a proceeding that alleged use of or addiction to the use of dangerous drugs. On appeal, Respondent raises seven assignments of error and two bases of appeal not specifically annotated as such. Because many of Respondent's arguments are based upon similar legal theories and require similar legal analysis, I have combined several of Respondent's bases of appeal. Therefore, Respondent's consolidated bases of appeal are as follows:

I. *The ALJ's default order should be set aside because Respondent was not provided with the opportunity to appear at a hearing and present his defense, call witnesses, cross examine witnesses, present evidence of rehabilitation and testify on his own behalf.*

II. *Respondent was denied due process because he was not able to afford an attorney and the ALJ failed to appoint an attorney on Respondent's behalf.*

OPINION

I.

The ALJ's default order should be set aside because Respondent was not provided with the opportunity to appear at a hearing and present his defense, call witnesses, cross examine witnesses, present evidence of rehabilitation and testify on his own behalf.

Coast Guard regulations allow, as occurred in this case, an ALJ to issue a Default Order when a Respondent fails to either file an Answer in a case or to appear at a scheduled hearing or conference. 33 C.F.R. § 20.310. The record shows that both the Complaint and the Coast Guard's Motion for Default Order—which Respondent was procedurally required to Answer—were properly served on Respondent. Respondent failed, in all respects, to properly respond to those documents. In such circumstances, the Coast Guard's regulations require the ALJ, upon finding Respondent in default, to issue a decision against Respondent. 33 C.F.R. § 20.310(d); *See also* Appeal Decisions 2645 (MIRGEAUX) and 2647 (BROWN). Although an ALJ may, "for good cause shown," set aside a Default Order, the record shows that on appeal, Respondent offers no explanation for his failure to respond to either the Coast Guard's Complaint or its Motion for Default Order. Pursuant to 33 C.F.R. § 20.310(c), "[d]efault by respondent constitutes…an admission of all facts alleged in the complaint and a waiver of his or her right to a hearing on those facts." *See also* Appeal Decision 2645 (BROWN).

By being in Default, Respondent waived his right to a hearing in this matter and is deemed to have admitted to all of the facts alleged in the complaint. 33 C.F.R. § 20.310(c). Contrary to Respondent's assertions, therefore, he was neither denied a hearing by the ALJ, nor prevented from calling witnesses, cross examining witnesses, presenting documents or testifying on his own behalf. Instead, by virtue of his own failure to avail himself to the proceedings, Respondent waived the right to a hearing. Accordingly, Respondent's first assignment of error is without merit.

II.

Respondent was denied due process because he was not able to afford an attorney and the ALJ failed to appoint an attorney on Respondent's behalf.

Appellant next contends that he was denied due process because he could not afford an attorney and one was not provided to him. [Notice of Appeal at 2] Respondent's assertion, in this regard, is not persuasive.

Prior Commandant Decisions on Appeal show that it is not the responsibility of the Coast Guard to either ensure or mandate that Respondent have counsel. *See, e.g.*, Appeal Decisions 2561 (CARTER), 2327 (BUTTS), 2242 (JACKSON & GAYLES), and 1826 (BOZEMAN). Moreover, Coast Guard suspension and revocation proceedings are administrative proceedings conducted pursuant to the Administrative Procedure Act (hereinafter "APA"). *See* 46 U.S.C. § 7702(a); 46 C.F.R. § 5.501; 5 U.S.C §§ 551-559. While section 555(b) of the APA states that a party has a right to be represented by an attorney of his or her choosing, the APA does not confer a statutory right to an attorney at government expense. *See* 5 U.S.C. § 555(b); *Father & Son Lumber & Bldg. Supplies, Inc. v. Nat'l Labor Relations Board*, 931 F.2d 1093, 1096-97 (6th Cir. 1991); see also *Backer v. Comm'r*, 275 F.2d 141, 143-44 (5th Cir. 1960); *Collins v. Commodity Futures Trading Comm'n*, 737 F. Supp. 1467, 1483 (N.D. Ill 1990); *see also Patel v. United States*, 803 F.2d 804, 806 (5th Cir. 1986); *Grover v. United States*, 200 Ct. Cl. 337, 346-48 (1973). Therefore, although the Coast Guard is required to notify a Respondent that he or she may have counsel or other representation during these proceedings, neither the applicable procedural rules nor the APA require that the Coast Guard or the ALJ ensure that Respondent is appointed counsel prior to the initiation of suspension and revocation

action. Appeal Decision 2561 (CARTER); 46 C.F.R. 5.107(b)(2). Therefore, because the Coast Guard fulfilled its duty to notify Respondent of his right to representation, Respondent's concerns that he could not afford an attorney and that an attorney was not provided to him are ill-suited for this appeal. 33 C.F.R. 20.301; 46 C.F.R. 5.107(b)(2).

CONCLUSION

The findings of the ALJ had a legally sufficient basis. The ALJ's decision to issue a Default Order was not arbitrary, capricious, or clearly erroneous. Because competent, substantial, reliable, and probative evidence existed to support the ALJ's decision to grant a Default Order, I find Respondent's bases of appeal to be without merit.

ORDER

The order of the ALJ, dated at Norfolk, Virginia, on September 14, 2004, is **AFFIRMED.**

Signed at Washington, D.C. this 7th of August, 2007.