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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	
UNITED STATES COAST GUARD	:	
	:	DECISION OF THE
vs.	:	
	:	COMMANDANT
LICENSE NO. 691817	:	
	:	ON APPEAL
	:	
Issued to: Ronald P. Williams, Appellant	:	NO. 2575
	:	

This appeal is taken in accordance with 46 U.S.C. 7702 and 46 C.F.R. 5.701.

By order dated November 7, 1994, an Administrative Law Judge of the United States Coast Guard at Mobile, Alabama revoked Appellant's License based upon finding the *use of a dangerous drug* charge proven. The single specification supporting the charge alleged that on or about May 12, 1994, Appellant wrongfully used cocaine as evidenced by a drug test and the urine specimen collected on that date.

The hearing was held at Mobile, Alabama on August 12, 1994. Appellant elected to represent himself and entered a response denying the charge and the specification.

During the hearing, the Coast Guard Investigating Officer (hereinafter "Investigating Officer") introduced into evidence 10 exhibits, and the testimony of five witnesses. All of the witnesses testified via telephone. In defense, Appellant offered into evidence 10 exhibits.

After the hearing, the Administrative Law Judge rendered a Decision which concludes that the charge and specification were found proved. On November 7, 1994 the Administrative Law Judge issued a written order revoking Appellant's License No. 691817.

Appellant filed a timely appeal on December 20, 1994, and after receiving an extension, completed his appeal on March 27, 1995. Therefore, this appeal is properly before the Commandant for review.

APPEARANCE: Appellant, *pro se*.

FINDINGS OF FACT

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At all relevant times, Appellant was the holder of the above captioned License. On May 12, 1994, Appellant provided a urine specimen for a pre-employment drug screening. The specimen was provided to Mr. Mosley of Drug Regulations Compliance, Inc. Prior to becoming a specimen collector, Mr. Mosley underwent an extensive 30-day training program under the instruction of Mr. Myers, the president and chief executive officer of Drug Regulations Compliance.

Mr. Mosley provided Appellant with a specimen container and accompanied him to the public rest room where the specimen was collected. In the rest room, Appellant used a private stall while providing the specimen. Appellant then provided the required urine specimen to Mr. Mosley who initiated the chain of custody procedures by affixing an identification label with a pre-printed specimen identification number to the side of the container.

The drug testing custody and control form was completed and verified by Appellant. Appellant acknowledged that the specimen container was sealed in his presence with a tamperproof seal and that the information provided on the control form and specimen container was correct. This acknowledgment was reflected by Appellant's signature on the donor certification line of the drug testing custody and control form.

Subsequently the urine specimen was collected by courier and delivered to Damon/Metpath Clinical Laboratories, a Substance Abuse and Mental Health Service Administration (SAMSHA) certified drug testing facility. Appellant's urine specimen tested positive for cocaine metabolites in both the initial screening and confirmation tests. The test results were forwarded to Medical Review Services where Dr. Pflug was assigned as Medical Review Officer. After reviewing the custody and control form, conducting an initial interview with Appellant, and investigating Appellant's allegations that the specimen was collected incorrectly, Dr. Pflug verified the test as positive.

Appellant learned of the positive test results on May 24, 1994. On July 25, 1994, Appellant, of his own volition, submitted to a hair analysis drug test. The results of this test were negative for cocaine.

BASES OF APPEAL

Appellant asserts the following bases of appeal from the decision of the Administrative Law Judge:

1. The Administrative Law Judge improperly allowed telephonic testimony of the specimen collector

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and therefore the Appellant was denied due process;

2. The record fails to establish the minimum regulatory requirements of the collection procedure of Appellant's specimen;

3. The Administrative Law Judge improperly rejected evidence of the Medical Review Officer's conflict of interest; and

4. The Administrative Law Judge improperly rejected evidence of a radioimmunoassay hair analysis.

OPINION

I

Appellant asserts that he was denied due process because the Administrative Law Judge allowed the specimen collector to testify via phone, rather than requiring in person testimony. [Transcript (TR) at 17]. Appellant relies on 46 C.F.R. 5.519(2) to support this contention. However, this section of the regulations only entitles a respondent to have witnesses subpoenaed, as Appellant was notified at the hearing. [TR at 7]. It does not guarantee the right to confront the witnesses in person. Furthermore, it is established by regulation and case law that telephonic testimony is acceptable in these proceedings. 46 C.F.R. 5.535(f); Appeal Decision 2476 (BLAKE), *aff'd* NTSB Order No. EM-156 (1989), *aff'd Blake v. Department of Transp.*, NTSB, No. 90-70013 (9th Cir. 1991).

Additionally, Appellant raised no objection to the Administrative Law Judge's decision to allow the telephonic testimony at the hearing. [TR at 17]. Absent clear error, Appellant is precluded from raising the issue on appeal unless an objection was raised at the hearing.

46 C.F.R. 5.701(b); Appeal Decisions 2458 (GERMAN); 2376 (FRANK); 2384 (WILLIAMS); 2463 (DAVIS); 2504 (GRACE); 2524 (TAYLOR). Accordingly, Appellant's assertion is without merit.

II

Appellant asserts that the collection procedures did not fully comply with the regulatory requirements, and thus the results of the drug test are invalid. First, Appellant contends that the specimen collector neglected to post the public rest room against access during the collection as required by 49 C.F.R. 40.25(b)(2). Second, he

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contends that the chain of custody was broken because the control forms were left in the office while the Appellant and the specimen collector were in the rest room collecting the sample.

I concur with the Appellant that the applicable guidelines state that a public rest room be posted prior to collecting a sample. The regulations also state that the purpose for this requirement is to "avoid embarrassment to the employee or distraction of the collection site person." 49 C.F.R. 40.25(b)(2). In the instant case, the record reflects that the Appellant's privacy was maintained during the collection because the Appellant used a private stall while providing the sample and no one else entered the rest room during the collection. [TR at 37, 59]. Further, the specimen collector, Mr. Mosley, was not distracted from his duties. The record shows that he made an inspection of the stall where the collection was taken and added the bluing agent to the toilet. [TR at 37, 59]. Therefore, the error of not posting the rest room was harmless since it did not violate the integrity of the specimen.

Appellant's second assertion of faulty collection procedures also fails. He relies on 49 C.F.R. 40.25(f)(25)(i) for the proposition that the specimen control forms must accompany the specimen collector into the rest room while the specimen is being collected. However, the regulations indicate that the chain of custody begins when the actual specimen is presented to the collection personnel, not when the Appellant was provided with an empty container. 49 C.F.R. 40.25(f)(25). Furthermore, 49 C.F.R. 40.25(f)(25)(ii) requires collection personnel to remain at the collection site only after the specimen is presented to them.

The record indicates that after the specimen was presented to Mr. Mosley, sufficient safeguards and procedures were employed to ensure a proper chain of custody and an unadulterated specimen. Not the least of these safeguards is the fact that the Appellant witnessed the entire chain of custody procedure and then certified by his signature that the tamperproof seal on the sample he provided matched the number on the custody control form. [TR at 37-38, 40-43].

In any event, the sufficiency of the chain of custody applies only to the weight given to the evidence, not its admissibility. Appeal Decisions 2476 (BLAKE), 2542 (DEFORGE), United States v. Shackleford, 738 F.2d 776 (11th Cir. 1984). The conclusions of the Administrative Law Judge in this matter will not be overturned unless they are without support in the record and inherently incredible. Appeal Decisions 2542 (DEFORGE),

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2424 (CAVANAUGH), 2423 (WESSELS), 2422 (GIBBONS). As noted above, the record contains sufficient testimony to support the findings of the Administrative Law Judge that the specimen collection complied with the chain of custody procedures in 49 C.F.R. 40.25.

[TR at 36-38, 40-42, 102-105].

My determination on this basis of appeal is consistent with my prior decisions holding that minor technical infractions of the regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity. Appeal Decisions 2522 (JENKINS), 2537 (CHATHAM), 2541 (RAYMOND), *aff'd* NTSB Order No. EM-175 (1994); 2546 (SWEENEY), *aff'd* NTSB Order No. EM-176 (1994).

III

Appellant asserts that because the Medical Review Officer (MRO), Dr. Pflug, has a financial interest in a company that provides rehabilitative services to persons who test positive for drugs, the MRO did not carry out his duties as required by the regulations. Essentially, the Appellant contends that Dr. Pflug's company *could* stand to profit if Appellant lost his license in this proceeding. Appellant alleges that he was contacted by Dr. Pflug's company, Medical Review Services, and solicited to purchase their services in an attempt to get his license back. [TR at 111-112]. Appellant's assertion is without support in the record. First, there is no evidence that Dr. Pflug was biased in his review of the test results. In fact, the evidence is to the contrary. The record reflects that Dr. Pflug competently carried out his prescribed duties as MRO. [TR at 91-94]. Dr. Pflug further acted on Appellant's behalf by contacting Drug Regulation Compliance to investigate allegations of improper testing procedures. [TR at 94, 97]. Second, there is no evidence supporting Appellant's statement, made in his closing argument, that he was solicited by Medical Review Services. Third, there is no evidence that Medical Review Services, and therefore Dr. Pflug, would actually profit from Appellant's need for rehabilitative services. It is well established that questions involving the credibility of a witness, even in light of allegations of bias and self interest, are best decided by the Administrative Law Judge who presides at the hearing. Appeal Decisions 2017 (TROCHE), *aff'd* NTSB Order No. EM-49 (1976); 2253 (KIELY); 2279 (LEWIS); 2290 (DIGGINS); 2395 (LAMBERT). The Administrative Law Judge's determination will be upheld absent a showing that he was

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arbitrary and capricious. *Id.* Here, the record contains substantial evidence that Dr. Pflug correctly carried out his duties, and there is no evidence that his actions were in any way adversely or improperly affected by his financial interests.

IV

Appellant's final assertion is that the Administrative Law Judge did not consider evidence of a negative radioimmunoassay hair (RIAH) analysis collected on July 25, 1994. I agree that the language of the Administrative Law Judge's Decision and Order (D&O) implies that this evidence was not considered because of its unproven reliability and the fact that RIAH is not authorized by any relevant regulation. [D&O at 8-12]. Under the guidelines of the Administrative Procedure Act (APA), which apply to this proceeding, "*any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.*" 5 U.S.C. 556(e)(emphasis added); 46 U.S.C. 7702. The fact that the regulations only provide for urine testing does not vitiate the broad APA standards for the admissibility of evidence. Because the Administrative Law Judge did not make any findings in regard to evidence of the negative RIAH analysis, it may have been improperly excluded. It is also unclear if the RIAH evidence was not considered because it was believed to be irrelevant or immaterial.

The APA provides that the agency review may be taken *de novo*. 5 U.S.C. 557(b). Thus, I have the authority to alter or modify the findings based on the record. 46 C.F.R. 5.705(a). Because the RIAH evidence in this case is entirely documentary, I find it unnecessary to remand the record to the Administrative Law Judge and I will modify the findings as needed. Appeal Decisions 2275 (ALOUISE), 2289 (ROGERS).

A preliminary issue concerning the RIAH evidence must be addressed first. Under the APA and applicable regulations, "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the *exclusive* record for decision. . . ." 5 U.S.C. 556(e)(emphasis added); 46 C.F.R. 5.563(c). "A sanction may not be imposed or rule or order issued except on consideration of the *whole* record. . . ." 5 U.S.C. 556(d) (emphasis added). In coming to a decision on the credibility of the RIAH analysis, the Administrative Law Judge considered evidence not contained in the record. [D&O at 8-11]. Although this issue

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was not raised on appeal, I raise it here *sua sponte* because it was clear error and the Appellant did not have the benefit of counsel in preparing his appeal. Appeal Decision 2168 (COOPER).

The Administrative Law Judge considered evidence on the validity of hair analysis from two treatises¹ and one professional article² that were not offered by either party. If the Administrative Law Judge intended to take official notice of these materials, such a finding is lacking. Even so, "[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." 5 U.S.C. 556(e). Coast Guard regulations further require that the opportunity for rebuttal be on the record. 46 C.F.R. 5.541. Neither party was afforded an opportunity to rebut the non-record evidence considered by the Administrative Law Judge. Therefore, these additional materials should not have been considered. Accordingly, my *de novo* review is limited to the documents entered into the record at the hearing.

The standard of proof for suspension and revocation proceedings is that findings must be "supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. 556(d); 46 C.F.R. 5.63. This has been interpreted to establish a preponderance of the evidence standard of proof. Stedman v. Securities and Exch. Comm'n, 450 U.S. 91 (1981); Appeal Decision 2468 (LEWIN). I find that the evidence in the record supports a finding that the results of the urine drug test are more reliable than Appellant's negative RIAH analysis.

The Investigating Officer offered two reports that question the reliability and acceptability of RIAH analysis. [Investigating Officer Exhibits 9, 10; TR at 136]. These documents point out serious problems with RIAH analysis including the lack of license and certification programs for RIAH laboratories, major uncertainties in the interpretation of results, lack of generally accepted studies verifying the technology, and the lack of information regarding the effect of external chemical treatments. *Id.* The consensus of both articles is that RIAH analysis is currently unproven as a method for drug detection.

Appellant relies on a 1990 court decision where RIAH analysis was accepted as some proof of evidence of drug use. United States v. Medina, 749 F. Supp. 59 (E.D.N.Y. 1990). [Respondent Exhibit F; TR at 131]. His reliance is misplaced for several reasons. First, Medina is distinguished from this case because in Medina, a positive RIAH analysis was used to prove drug *use*. Medina does not indicate whether a negative RIAH analysis may refute a positive urine drug test in an effort to prove *non-use*. Second, the Medina court required several threshold

¹ David G. Evans, Drug Testing Law, Technology, and Practice 5.03 (1993); Kevin B. Zeese, Drug Testing Legal Manual 2-40 (1993).

² National Institute on Drug Abuse (NIDA), Committee of Toxicology Scientists, Consensus 2 Cont. Opinion (1990).

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determinations before allowing the RIAH analysis.³ Appellant offered no evidence to support these threshold determinations in this case. Finally, even though the Medina court allowed the RIAH evidence, it also required additional corroborating evidence before reaching the conclusion the defendant used cocaine. Medina, 749 F. Supp. at 62. Thus, it was apparent that the District Court concluded that RIAH analysis has not reached the level of trustworthiness to stand on its own as proof of cocaine use. The scientific community obviously agrees because it continued to question the reliability of RIAH analysis even after the Medina decision. [Investigating Officer Exhibit 10].

The only substantive evidence of the reliability of RIAH analysis offered by the Appellant is from the company that owns the proprietary rights to RIAH. [Respondent Exhibits G-J; TR at 131]. This evidence does not provide a rigorous evaluation of the RIAH methodology, but more closely resembles promotional material or sales advertisements. Furthermore, the Appellant relies on the fact that the RIAH analysis allegedly covers the 90 day period before the test. [Respondent Exhibit G]. Therefore, he reasons that a negative RIAH analysis performed 75 days after a positive urine test indicates that he was drug free on the date of the initial test. [TR at 147-148]. However, the Appellant's own evidence indicates that the 90 day coverage only applies to an average person.⁴ [Respondent Exhibit I]. Appellant offered no evidence to prove that he meets the definition of an average person for the purposes of RIAH analysis. Additionally, Appellant offered nothing to prove that RIAH analysis is not affected by the application of external chemical treatments to the hair.

In summary, there are too many uncertainties in Appellant's RIAH evidence to convince me that it is reliable and that the time period covered by his RIAH analysis actually overlaps with the urinalysis screening. Therefore, I find that the record supports, by a preponderance of the evidence, placing reliance on the urine drug test over the RIAH analysis.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. With the exception of the consideration of RIAH analysis evidence from outside the record, the hearing was conducted in accordance with applicable laws and regulations. The apparent failure of the Administrative Law Judge to consider Appellant's evidence of a negative RIAH analysis was error. However, on *de novo* review, I conclude that the RIAH evidence in the record is not sufficient to rebut Appellant's use of drugs as shown by the

³ 1) Sample was properly obtained; 2) laboratory technique was sound; and 3) laboratory technique was accurate. Medina, 749 F. Supp. at 62.

⁴ According to the promotional material for RIAH, the hair of an average person grows at a rate of 1.3 cm/month, with an estimated variance of 0.2 cm/month, or 15%. Therefore, a 3.9 cm sample could represent a time period anywhere from 76.5 to 103.5 days. Appellant offered no evidence to establish the statistical reliability of the estimated 0.2 cm variance, or that this variance applies to someone with Appellant's characteristics.

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positive urinalysis.

ORDER

The decision of the Administrative Law Judge dated November 7, 1994, as modified by my supplemental findings and conclusions, and the reasoning therefore in this Decision, is AFFIRMED. The order of the Administrative Law Judge is AFFIRMED.

/S/ ROBERT E. KRAMEK
ADMIRAL, U.S. Coast Guard
Commandant

Signed at Washington, D.C. this 25th day of June, 1996.