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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD v. MERCHANT MARINER CREDENTIAL Issued to: DOUGLAS SCOTT ROBB	: : : : : : : : : : :	DECISION OF THE VICE COMMANDANT ON APPEAL NO. 2735

APPEARANCES

For the Government:
Jennifer A. Mehaffey, Esq.

For Respondent:
James W. Alcantara, Esq.

Administrative Law Judge:
Michael J. Devine

This appeal is taken in accordance with 46 U.S.C. Chapter 77, 46 CFR Part 5, and 33 CFR Part 20.

On January 14, 2021, an Administrative Law Judge (ALJ) of the United States Coast Guard issued a Decision and Order (D&O), finding proved the Coast Guard's Complaint against the Merchant Mariner Credential of Respondent Douglas Scott Robb, and ordering the revocation of Respondent's credential.

The Coast Guard Complaint charged Respondent with use of a dangerous drug, based upon a positive result in a government-mandated random drug test.

Respondent appeals.

FACTS

At all times relevant to these proceedings, Respondent was the holder of a Merchant Mariner Credential issued to him by the United States Coast Guard. [D&O at 4, 24.]

On August 31, 2018, Respondent was a crewmember of the SLNC PAX, which had been selected for random drug testing. [D&O at 4.] On August 31, 2018, Respondent provided a urine sample to a certified specimen collector. [*Id.*] He signed the Federal Drug Testing Custody and Control Form (CCF), and initialed the seals that are intended to be placed on the specimen bottles while the seals were still attached to the CCF. [*Id.* at 5.] The collector poured Respondent's sample into two specimen bottles and sealed the bottles in Respondent's presence. [*Id.*]

Respondent's specimen was tested by a laboratory accredited to perform drug testing comporting with Department of Transportation (DOT) standards. The laboratory determined that Respondent's sample was positive for amphetamines at a level of 552 ng/mL and for methamphetamines at a level of 9057 ng/mL, exceeding the cut-off levels for positive tests found in DOT regulations. [D&O at 6, 25.]

On September 21, 2018, a Medical Review Officer (MRO) interviewed Respondent and asked him if he had been prescribed any medication that might have caused a positive result for methamphetamine. [D&O at 6.] Respondent answered in the negative, but stated that he had used an over-the-counter Vicks inhaler before being tested. [*Id.*]

On September 21, 2018, the MRO certified that Respondent's urine had tested positive for amphetamines and methamphetamines. [D&O at 6.]

PROCEDURAL HISTORY

The Coast Guard filed a complaint against Respondent's Merchant Mariner Credential on

October 22, 2019. The complaint alleged use of a dangerous drug, based on the positive result of the August 31, 2018 random drug test. Respondent filed an Answer on November 6, 2019, admitting all jurisdictional allegations and denying most factual allegations.

Hearing was held on July 23, 2020, and September 22, 2020, by telephone and videoconferencing technology (Zoom for Government). The ALJ issued his D&O on January 14, 2021. He found the charge of use of a dangerous drug proved, and imposed the mandatory sanction of revocation. [D&O at 25.]

Respondent appealed, and perfected his appeal by filing an appellate brief on March 15, 2021. The Coast Guard filed a reply brief on April 19, 2021, and this appeal is properly before me.

BASES OF APPEAL

Respondent raises the following issues on appeal:

I. *The ALJ's Ultimate Findings of Fact and Conclusions of Law Nos. 5 and 8 are not supported by substantial evidence.*

II. *The ALJ abused his discretion by relying upon inherently incredible testimony.*

OPINION

Under the ALJ's Ultimate Findings of Fact and Conclusions of Law, the following appear:

5. Respondent's urine specimen tested positive for amphetamines and methamphetamines. . . .

8. The Coast Guard has proven by a preponderance of reliable, probative and credible evidence that Respondent was a user of dangerous drugs.

Respondent argues in essence that the ALJ's finding that "Respondent's urine specimen tested positive" (No. 5) was unsupported because given his use of a Vicks inhaler, the tested specimen should have had different characteristics than the reported test results indicated, and

therefore the specimen could not have been his specimen; and the collection process was unreliable so that misidentification of the specimen was possible. Hence, he argues, the finding that the allegation against him was proven (No. 8) was also unsupported. His argument is unconvincing.

A credentialed mariner who has used, or is addicted to, a dangerous drug, shall have his credentials revoked unless he "provides satisfactory proof that [he] is cured." 46 U.S.C. § 7704(b). Failure of a drug test mandated under 46 CFR Part 16 results in a presumption that the donor used dangerous drugs. 46 CFR § 16.201(b). The Coast Guard may establish a *prima facie* case of drug use by demonstrating that: (1) the respondent was the person who was tested for dangerous drugs; (2) the respondent failed the test; and (3) the test was conducted in accordance with Coast Guard drug testing regulations at 46 CFR Part 16 and applicable Department of Transportation (DOT) regulations at 49 CFR Part 40. *Appeal Decision 2560 (CLIFTON)* at 8, 1995 WL 17010110 at 7*; Appeal Decision 2704 (FRANKS)* at 9, 2014 WL 4062506 at 7 (clarifying that, to establish a *prima facie* case, a government-mandated test must be both properly ordered, under Part 16, and properly conducted, under Part 40).

If the Coast Guard presents substantial, reliable, and probative evidence of the three elements, a presumption of drug use has been established, and the burden shifts to the respondent to provide evidence rebutting the presumption. *Appeal Decision 2603 (HACKSTAFF)* at 4, 1998 WL 34073115 (citing *Appeal Decision 2592 (MASON)* at 5, 1997 WL 33480820 at 4). "If the respondent produces no evidence in rebuttal, the ALJ may find the charge proved on the basis of the presumption alone." *Id.* (citing *Appeal Decision 2555 (LAVALLAIS)* at 3, 1994 WL 16009226 at 2).

In this case, the ALJ concluded that the Coast Guard established a *prima facie* case, resulting in a presumption of drug use, and that Respondent failed to rebut it. Respondent asserts that the ALJ erred in concluding that the first element of the *prima facie* case was met, in that the evidence was insufficient to show that the tested specimen had been provided by him.

L-type and D-type methamphetamine.

Respondent testified that, as he had told the MRO, he used a Vicks inhaler while traveling to the SLNC PAX the day before the random drug testing. [Tr. Day 2 at 115, 144, 149-150.] The MRO testified that a Vicks inhaler can cause the presence of "L type" methamphetamine in a person's urine sample, but does not cause the presence of "D type" methamphetamine. [D&O at 17.] He testified that certain prescription medications can cause the presence of "D type" methamphetamine. [*Id.*] He further testified that Respondent's specimen showed the presence of 95% "D type" and 5% "L type." [*Id.*] The witness from the testing laboratory testified to the same effect. [Tr. Day 2 at 67.] The latter also testified that the D-methamphetamine result (95%) indicated that the specimen contained a Schedule Two controlled substance that would require a valid prescription. [Tr. Day 2 at 67, 73-74.][1]

The MRO testified that use of an inhaler containing L-methamphetamine would be expected to cause test results of more than 5% L-methamphetamine. [Tr. Day 2 at 118.] Respondent contends that the absence of high levels of L-methamphetamine "brings into question whether the tested sample belonged to" Respondent. However, there is no evidence on how the use of both an inhaler and a source of D-methamphetamine would be manifested in test results. The MRO testified that he did not assume Respondent had not used an inhaler, but focused on the D-methamphetamine test result, for which Respondent did not provide an explanation; the L-methamphetamine result was "very minor and of no consequence in this report." [Tr. Day 2 at 119, 129.] There is nothing to indicate that the MRO's assessment that the L-meth result was of no consequence was faulty, and there is no reason, beyond speculation, to believe the results signify that the tested sample did not belong to Respondent.

To put it another way, there is no reason to reject the ALJ's observation: "Neither the MRO nor the undersigned ALJ are obligated to believe Respondent's contention that he was using the inhaler or that his alleged use of an inhaler would have contradicted the results determined by [the testing laboratory]." [D&O at 24.] This is so whether or not Respondent was

[1] He further stated that a manufacturing process is unlikely to produce 100% D-methamphetamine. [Tr. 2 at 74.]

aware of the chemical details of methamphetamine and tests therefor.[2]

Reliability of collection process

Respondent testified that the collector diverged from the requirements in several respects while collecting his sample, and another crewmember from the ship similarly testified as to the collection of that crewmember's sample. He argues that the collector's testimony tending to show that the collection process was properly conducted was inherently incredible and the process was unreliable.

Respondent testified that the collector had him initial the seals while they were still attached to the CCF, and allowed him to leave the collection site before he saw his specimen poured into the tubes and sealed. [Tr. Day 2 at 140.]

49 C.F.R. § 40.71(b)(5)-(7) requires the collector to seal the specimen bottles and then have the employee initial the seals.

The collector testified that he did not recall what he did on that occasion in 2018 (twenty-three months before his testimony). [Tr. Day 1 at 23.] However, he testified to "his typical procedures, which are consistent with the requirements of 49 C.F.R. Part 40." [D&O at 22.] He further testified that he performed every step for all collections. [Tr. Day 1 at 33.] The ALJ found this testimony credible. [D&O at 22.] The collector admitted under cross-examination that he apparently diverged from the required procedures in this instance, in that he had donors sign seals while still attached to the CCF. [Tr. Day 1 at 37-38.] This, as the ALJ found, was "an administrative error that does not call into question the integrity of the specimen . . . ." [D&O at 23.] The collector specifically testified that the bottles were sealed in Respondent's presence. [Tr. Day 1 at 38.] The ALJ accordingly found that the bottles were sealed in Respondent's presence, as "corroborated by Respondent's signature on the form." [D&O at 23.][3] In a very

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[2] It appears that the ALJ was not making an explicit finding on Respondent's credibility at this point. He was noting, however, that additional evidence would have been needed before the use of an inhaler would make a difference.

[3] I need not decide whether the result would be different if the bottles had not been sealed in Respondent's presence.

similar case, the testimony of collection personnel "and most importantly, Appellant's own written certification," provided substantial evidence supporting the finding. *Appeal Decision 2527 (GEORGE)* at 4, 1991 WL 11007459 at 3.

As Respondent notes, the ALJ believed the collector's testimony, even though the collector "was forced to admit" that he had donors initial the seals while still attached to the CCF rather than after they were placed on the bottles. Respondent claims the collector lied and therefore all his testimony is inherently incredible. Yet there is no reason to believe that the collector offered an intentional falsehood. If he conveyed particulars that were inaccurate, this is far from establishing that all the content of his testimony was inherently incredible.

Respondent presented the testimony of another crewmember, who testified that the collector failed to follow the proper procedures in several respects. [D&O at 20.] The ALJ found the testimony only partly relevant and not persuasive. [D&O at 21.] He stated that while the other crewmember "may have had some concerns regarding the collection, none of them appear to provide a basis to find that the specimen integrity was somehow compromised." [D&O at 22.]

Concerning the respondent, the ALJ pointed out, "Respondent testified he had participated in over 60 drug tests. . . . Despite his familiarity with the process, Respondent did not make a complaint to the collector and insist on proper procedures when the collector allegedly committed significant errors. . . . I find the evidence shows that Respondent did not make a contemporaneous complaint regarding the process . . . ." [D&O at 22.] He went on to find Respondent's contentions about various diversions from the prescribed process not credible. [*Id.*]

The ALJ is given broad discretion to weigh evidence and decide factual matters. His findings of fact are entitled to great deference and will only be overturned if they are shown to be arbitrary and capricious or clearly erroneous. *Appeal Decision 2695 (AILSWORTH)* at 5, 2011 WL 6960129.

I conclude the ALJ did not abuse his discretion in relying on the collector's testimony. His findings of fact have not been shown to be arbitrary and capricious or clearly erroneous.

Respondent quotes the ALJ's statement, above, that the other crewmember "may have had some concerns regarding the collection" and argues, "The ALJ expressly concedes [the other crewmember] had legitimate concerns about the collection process . . . . This is where the ALJ's analysis should have ended. Whether the ALJ believes the integrity of [the crewmember's] urine sample might have been compromised is irrelevant." [Respondent's appeal brief at 6.] The precedents hold to the contrary. "Where technical infractions of the procedures in 46 CFR Part 16 and 49 CFR Part 40 occur, the testing procedure is not vitiated where the infractions do not breach the chain of custody or violate the specimen's integrity." *Appeal Decision 2728 (DILLON)* at 5, 2020 WL 3270610 at 3 (quoting *Appeal Decision 2614 (WALLENSTEIN)*, 2000 WL 33965627). *Accord*, Appeal Decision 2734 (NELSON) at 9, 2021 WL 2003578 at 7 (citing *Administrator v. Flores*, NTSB Order No. EA-5279, 2007 WL 1233533; *Appeal Decision 2688 (HENSLEY)*, 2010 WL 4607368).

In short, the fact that a crewmember had concerns about the collection process does not establish that the collection process was unreliable; the ALJ's findings were not arbitrary and capricious or clearly erroneous.

CONCLUSION

The ALJ's findings and decision were lawful, based on correct interpretation of the law, and supported by the evidence. The order imposed by the ALJ, revoking Respondent's Merchant Mariner Credential, was appropriate.

ORDER

The ALJ's Order dated January 14, 2021 is AFFIRMED.

Signed at Washington, D.C., this 17th day of August, 2021.