

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

COMPLAINANT

vs.

JAMES BRUCE HOCKING

RESPONDENT

DOCKET NO: 2010-0133
CG ENFORCEMENT ACTIVITY NO: 3569505

DECISION & ORDER

DATE ISSUED: JANUARY 4, 2011

ISSUED BY: HON. MICHAEL J. DEVINE
ADMINISTRATIVE LAW JUDGE

APPEARANCES:

FOR COMPLAINANT

GARY F. BALL, ESQ.
ERIC A. BAUER, SENIOR INVESTIGATING OFFICER
UNITED STATES COAST GUARD
SUSPENSION & REVOCATION NATIONAL CENTER OF EXPERTISE
100 FORBES DRIVE
MARTINSBURG, WV 25404

FOR RESPONDENT

WILLIAM HEWIG, III, ESQ.
KOPELMAN & PAIGE, P.C.
101 ARCH STREET
BOSTON, MA 02110

Table of Contents

I.	Preliminary statement.....	4
II.	Findings of Fact.....	7
III.	Discussion.....	10
	A. General.....	10
	B. Incompetence.....	11
	C. Medical Standards Established by the Coast Guard.....	13
	D. Respondent Does Not Meet the Medical Standards Established by the Coast Guard.....	14
	E. The Medical Standards Established by the Coast Guard and the determination not to grant a waiver are entitled to deference.....	17
	F. Respondent's Allegations that the Coast Guard's actions in denying his waiver request violate the rehabilitation act and the U.S. Constitution do not present a defense to incompetence or any basis to circumvent the Medical Standards Established by the Coast Guard.....	20
	G. The Coast Guard did not present evidence sufficient to demonstrate that Respondent is unfit to perform duties for all positions that require service under an MMD.....	22
IV.	ULTIMATE FINDINGS OF FACT & CONCLUSIONS OF LAW.....	24
V.	CONCLUSION.....	25
VI.	SANCTION.....	25

VII.	ORDER.....	26
VIII.	ATTACHMENT A: Witness & Exhibit Lists.....	28
IX.	ATTACHMENT B: District Court Order.....	31
X.	ATTACHMENT C: Parties' Proposed Findings of Fact.....	34
XI.	ATTACHMENT D: Parties' Proposed Conclusions of Law.....	46
XII.	ATTACHMENT E: Notice of Appeal Rights.....	51

I. PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated the above-captioned administrative action seeking revocation of Respondent James Bruce Hocking's (Respondent) Coast Guard-issued Merchant Mariner's Document (MMD) and Coast Guard-issued Merchant Marine License (MML) (collectively referred to as Coast Guard-issued credentials). This action is brought pursuant to the legal authority codified at 46 U.S.C. §7703(4) and the underlying regulations as set forth in 46 C.F.R. Part 5.

On March 23, 2010, the Coast Guard filed a Complaint against Respondent's Coast Guard-issued credentials averring Respondent to be physically incompetent and unfit to perform the merchant mariner duties associated with his Coast Guard-issued credentials due to an underlying cardiac condition, including the fact that he has an Implantable Cardioverter-Defibrillator (ICD). As alleged in the Complaint, on April 2, 2009, letter from the National Maritime Center (NMC) advised Respondent that he was not medically fit to perform merchant mariner duties. The Coast Guard further alleged that Respondent committed incompetence by continuing to serve as Master of the M/V NANTUCKET on multiple occasions between May 18, 2009, and May 31, 2009, while medically unfit.

On April 9, 2010, Respondent filed an Answer wherein he admitted the jurisdictional allegations and admitted, in part, and denied, in part, the factual allegations of the Complaint. More specifically, Respondent averred that the occasions at issue occurred during the pendency of his April 25, 2010, request for reconsideration of the NMC's finding that he was not medically fit for duty. However no law or regulation provides any valid legal defense based on seeking reconsideration. Respondent denied

the Coast Guard's allegations that he is not medically fit and further denied that he is medically incompetent. In addition, Respondent asserted matters labeled as affirmative defenses, which are addressed infra.

On April 12, 2010, the Chief Administrative Law Judge (CALJ) assigned the instant matter to the undersigned Administrative Law Judge (ALJ) for adjudication. On April 21, 2010, the parties participated in a pre-hearing telephone conference during which time preliminary matters were discussed and the hearing of this matter was set to commence on June 30, 2010, in Boston, Massachusetts.

On June 2, 2010, the Coast Guard moved for summary decision contending that there was no material issue of fact at issue, to wit: Respondent's continued operation of the M/V NANTUCKET, despite receiving notification that he was found medically unfit to perform merchant mariner duties, constituted incompetence. On June 11, 2010, Respondent filed a response in opposition to the Coast Guard's motion for summary decision and a counter motion for summary decision. On June 22, 2010, the court issued an Order denying the parties' respective motions for summary decision. The court observed that while the Respondent's medical condition was not in dispute, that fact alone was not considered sufficient to dispose of the matter by means of summary decision. Accordingly, the court held that both motions were denied without prejudice pending a hearing and full development of the facts. The parties were encouraged to develop the record through medical testimony or other evidence that would further explain the written documentation regarding Respondent's condition, how such a condition may affect Respondent's fitness for duty and whether Respondent's condition constitutes incompetence. Also on June 22, 2010, the parties submitted a joint motion

seeking to continue the instant matter because Respondent had filed a civil action regarding the Coast Guard's action to revoke his license in the United States District Court in Boston, Massachusetts. The continuance was granted.

On July 21, 2010, the United States District Court for the District of Massachusetts issued an Order denying Respondent's request for review of the Coast Guard's action declaring him medically unfit for merchant mariner duties and denying Respondent's Motion for an Injunction essentially because there was no final agency action on this matter.¹ The hearing date was subsequently rescheduled.

On September 23, 2010, the hearing of this matter commenced in Boston, Massachusetts. The proceeding was conducted in accordance with the Administrative Procedure Act (APA), as amended and codified at 5 U.S.C. §§551-59 and Coast Guard procedural regulations as set forth at 33 C.F.R. Part 20. Gary F. Ball, Esq. and Investigating Officer (IO) Eric A. Bauer, of the Coast Guard Suspension and Revocation National Center of Expertise, appeared on behalf of the Coast Guard. William Hewig, III, Esq. of Kopelman and Paige, P.C., appeared on behalf of Respondent.² One witness testified as part of the Coast Guard's case-in-chief; the Coast Guard offered fifteen exhibits into evidence, all of which were admitted.³ Respondent offered the testimony of five witnesses, as well as his own, and offered forty-one exhibits into evidence, all of which were admitted. Also admitted into the record were two ALJ Exhibits. ALJ

¹ A copy of the District Court's Order issued on July 21, 2010, is Attachment B of this Order.

² Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at ____). Citations referring to Coast Guard Exhibits are as follows: (CG Ex. 1, etc.). Citations to Respondent's Exhibits are as follows: (Resp. Ex. A, etc.). Citations to ALJ Exhibits are as follows: (ALJ Ex. I, etc.).

³ Prior to the commencement of the hearing, the parties stipulated as to the admissibility of exhibits. (Tr. at 13). However, as noted by the court at the outset of the hearing, "it [is] up to counsel . . . to demonstrate relevance and applicability" of the proffered evidence. The court placed particular emphasis upon the need for testimony to explain relevance of technical medical materials. (Tr. at 30, 32).

Exhibit I is Respondent's Motion for Directed Decision that was filed upon the completion of the Coast Guard's case-in-chief. The court denied Respondent's Motion. (Tr. at 171-175). At the conclusion of the parties' respective oral closing statements, the Coast Guard made an oral motion requesting Respondent's MML and MMD be retained pending the court's decision. ALJ Exhibit II is Respondent's written response to the Coast Guard's motion. The court denied the Coast Guard's Motion and permitted Respondent to retain his MML and MMD during the pendency of the issuance of a Decision and Order in the instant matter. (Tr. at 165-166, 290-293, 305-307).

On October 8, 2010, the parties were served with a copy of the transcript; and, in keeping with the parties' agreement at the close of the hearing, allowed fifteen days to submit a closing brief and proposed findings of facts together with conclusions of law, or both. Upon receipt of the parties' respective arguments, the court closed the administrative record herein as required by 33 C.F.R. §§20.709, 20.903.

II. FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire record taken as a whole.

1. The United States Congress has passed comprehensive legislation to promote safety of life and property at sea. See 46 U.S.C. Subtitle II.
2. The Coast Guard is the agency responsible for setting and enforcing standards for Merchant Marine Licenses and Documents including medical standards and guidelines for holders of Merchant Mariner Credentials. 46 U.S.C. Chapters 71 and 73.
3. The Coast Guard has published medical guidelines for Merchant Mariner credentials in Navigation and Inspection Circular 04-08. (CG Ex. 13)
4. The purpose of suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. § 7701 (a); 46 C.F.R. § 5.5.

5. At all times relevant herein, Respondent James Bruce Hocking is the holder of and acting under the authority of his Coast Guard-issued Merchant Mariner's License (MML) and Merchant Mariner's Document (MMD). (Answer; Tr. at 248, 288; Resp. Ex. E and F).
6. On December 4, 2008, Respondent submitted Form CG 719K, "Merchant Mariner Physical Examination Report" to the United States Coast Guard.
7. On March 23, 2010, the Coast Guard charged Respondent James Bruce Hocking with being medically unfit and thereby medically incompetent to perform duties as a licensed mariner.
8. Respondent James Bruce Hocking has a heart condition diagnosed as ischemic cardiomyopathy, which is a weakening of the heart muscles caused by lack of blood flow to the heart muscles. (Tr. at 59).
9. Ischemic cardiomyopathy can result in heart arrhythmia, sudden death and/or incapacitation. (Tr. at 60, 97-99).
10. In March 1995, Respondent James Bruce Hocking suffered an episode of ventricular tachycardia (VT). (Tr. at 251-252).
11. The term "ejection fraction" refers to "the percentage of the blood volume that's ejected on each stroke or each squeeze of the heart relative to the amount that comes into the heart." (Tr. at 77). An ejection fraction below the normal range is indicative of a heart that is not pumping as well as it should (Id.).
12. Normal ejection fraction is typically in the 55 to 60 percent range. (Tr. at 77).
13. Respondent James Bruce Hocking's ejection fractions have been measured at 45 percent, 38 percent, 35 percent and 32 percent. (Tr. at 78, 86-87, 88, 89; CG Ex. 6, 9).
14. People with ischemic cardiomyopathy and/or low ejection fractions "are at risk for sudden cardiac death due to the ventricular arrhythmias." (Tr. at 59-60, 88-90).
15. "In ventricular tachycardia, the ventricle beats on its own" whereas, "[n]ormally, electrical impulses travel from the upper chamber to the lower chamber." (Tr. at 73).
16. The danger of ventricular tachycardia is that it "presents a risk for sudden cardiac death and incapacitation." (Id.).

17. Ventricular tachycardia “can occur at any time independent of exertion . . . [i]t can occur while you’re out shopping; it can occur while you’re exerting yourself.” (Tr. at 80).
18. After experiencing a cardiac event in 1995, Respondent James Bruce Hocking had an implantable cardioverter-defibrillator (ICD) surgically placed. (Tr. at 55-63, 254; CG Ex. 1).
19. The ICD is “an electrical generator... designed to detect abnormal rhythms and then provide an electrical shock to correct those rhythms.” (Tr. at 60-61).
20. The ICD is designed to treat abnormal rhythms and then provide an electrical shock to correct those rhythms, and it’s also designed to treat ventricular fibrillation. (Tr. at 61-62).
21. The ICD does not eliminate the underlying condition of ischemic cardiomyopathy and the risk for a potential lethal arrhythmia. (Tr. at 61-63).
22. The ICD also has the potential to cause incapacitation. The ICD is an electrical device . . . that provides a shock to the heart. (Tr. at 61-62). The ICD’s “shock, if it’s in defibrillator mode, can cause an incapacitating event in and of itself. If [the ICD] fails to fire, that heart rate could result in incapacitation or even death.
23. The electric devices of the ICD may be subject to electrical and magnetic interference by shipboard electrical devices. (Tr. at 62).
24. Pursuant to 46 C.F.R. §11.709, “[e]very person holding a license or endorsement as first class pilot shall have a thorough physical examination each year while holding the license or endorsement.” Id.; §10.709 (2008).
25. Physical examination findings and results are recorded on Merchant Mariner Physical Examination Reports (CG-719K).
26. Based on the underlying heart condition documented in Respondent James Bruce Hocking’s medical record, including the 2008 719K there is sufficient information to support the Coast Guard’s Finding that Respondent was not fit for duty. (Tr. at 62-63, 83-84, 97-99).
27. Since 2009, Respondent James Bruce Hocking has continued to serve on his Merchant Mariner’s License as the Master of the M/V NANTUCKET after receiving notice from the Coast Guard that he was determined to be medically unfit. (CG Exhibit 3, 11, Tr. at 17-20, 288)

III. DISCUSSION

A. General

The United States Congress has passed comprehensive legislation expressly charging the Coast Guard with the responsibility to promote the safety of life and property at sea. See generally 46 U.S.C. Subtitle II. “[O]versight of the conduct of mariners is an essential step in fulfilling that congressional mandate.” Appeal Decision 2279 (LEWIS) (1981). Coast Guard Suspension and Revocation proceedings are one of the administrative processes designed to promote safety at sea and maintain standards of competence and conduct. See 46 U.S.C. §7701; 46 C.F.R. §5.5. Pursuant to 46 C.F.R. §5.19, Administrative Law Judges (ALJ) are vested with the authority to conduct hearings and to suspend or revoke a credential for violations arising under 46 U.S.C. §§7703 and 7704.

The APA, as amended and codified at 5 U.S.C. §§551-559, applies to Coast Guard Suspension and Revocation hearings. The APA authorizes imposition of sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative and substantial evidence. 5 U.S.C. § 556(d). The Coast Guard bears the burden of proof to establish that the charges are supported by a preponderance of the evidence. 33 C.F.R. §§ 20.701; 20.702(a).

There is no dispute that the Coast Guard has jurisdiction in this matter. Respondent admitted jurisdiction by Answer and on the record at the hearing. (Tr. at 12-13). With regard to the Complaint’s factual allegations, Respondent admitted receipt of the April 9, 2009, letter from the National Maritime Center (NMC) informing him that

the Coast Guard had determined that he was not medically fit for merchant mariner duties. He also admitted that he continued to serve as Master of the M/V NANTUCKET.

B. Incompetence

“Incompetence,” as Coast Guard regulations define that term, is “the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof.” 46 C.F.R. § 5.31.

“The duties required are those which are inherent in the license or document at issue.”

Appeal Decision 2547 (PICCIOLO) (1992); see also Appeal Decision 328 (SKJAVELAND) (1949) (holding that incompetence should be based on a license or certificate holder’s inability to perform duties required by license or certificate.).

All merchant mariners take an oath to faithfully perform their duties. 46 U.S.C. §§ 7105, 7305. “The ability to perform duties without endangering yourself or others is certainly the most minimal requirement of professional competence. Given this statutory and regulatory background, there can be no doubt that an allegation that an individual is unable to safely perform his required duties states a cause for revoking a merchant mariner [credential].” Appeal Decision 2655 (KILGROE) (2006).

In Appeal Decision 2547 (PICCIOLO) (1992), the Commandant remanded an order of revocation where a charge of incompetence was found proved. The Commandant further directed the presiding ALJ to take additional evidence concerning the mariner’s “most recent medical condition, prognosis, and impact any medical monitoring program will have on his ability to perform the functions of his document decision.” Id. Unlike the ALJ’s initial decision in PICCIOLO, the ALJ’s initial decision issued in SHEA “considered the testimony, evidence, and arguments presented by

Respondent regarding the manageability of his mental condition.” Appeal Decision 2664 (SHEA) (2007) distinguished PICCIOLO, and upheld the ALJ’s Order revoking Respondent’s credentials despite Respondent’s claims that his condition was manageable.

Respondent’s past service as a competent and professional mariner is not in issue. Respondent testified that he has served for approximately 38 years as a Coast Guard-credentialed mariner for the Wood’s Hole Steamship Authority without incident. (Tr. At 247-248, 281). Testimony presented at the hearing demonstrates that Respondent’s peers hold him in high esteem. (Tr. at 198-199, 224). However, Respondent’s professional record alone is not a legal defense to the allegation he is medically unfit. All medical evidence of record and the applicable medical standards for mariners must be considered in the interests of safety at sea to determine whether he is physically competent to continue to hold his license and document.

In order to prove incompetence the Coast Guard must prove that Respondent:

- 1) Is the holder of a license, certificate or registry, or document; who:
- 2) is required to perform duties when acting under the authority of that license, certificate of registry, or document; and
- 3) is unable to or disqualified from performing required duties due to professional deficiencies, physical disability, mental incapacity or any combination thereof.

See 46 U.S.C. 7703(1)(B).

There is no dispute regarding the first two elements. Respondent holds a Coast Guard issued license and document and there is no dispute that Respondent was acting under the authority of his Coast Guard issued license and document during the alleged time period. However, the issue remains whether the Coast

Guard has established the third element, that Respondent is physically incompetent.

C. Medical Standards Established by the Coast Guard

As discussed supra, Congress has passed comprehensive legislation to promote safety of life and property at sea. See 46 U.S.C. Subtitle II. The Coast Guard, as provided by that authority, is the agency responsible for creating and enforcing standards applicable to those who hold, or apply for, Merchant Mariner Credentials, Licenses and Documents. Such responsibility includes, but is not limited to, establishing physical and medical standards by which all licensed mariners must comply. In keeping with its statutory and regulatory authority, the Coast Guard has developed NVIC 04-08 for use in developing and implementing standards for determining whether a mariner is physically and/or medically qualified and competent to hold a Merchant Mariner's Credential. 46 U.S.C. § 7101; 46 C.F.R. § 10.205.

In keeping with Coast Guard regulations⁴, all mariners who hold a license or endorsement as a First-Class Pilot of vessels 1600 gross tons or more are required to submit to annual physical examinations and provide a completed medical evaluation form (CG-719K) to the Coast Guard. 46 C.F.R. § 11.709. The NMC then reviews the submitted medical evaluations using guidance as set forth in U. S. Coast Guard NVIC No. 04-08 "Medical and Physical Evaluation Guidelines for Merchant Mariner Credentials." 73 FR 56600-01.

NVIC No. 04-08 was promulgated, in part, for public safety reasons in response to the findings of a National Transportation and Safety Board (NTSB) investigation into a

⁴ See CG Exhibits 13, 14 and 15.

Staten Island ferry allision.⁵ NVIC No. 04-08 replaced NVIC No. 02-98 and instituted substantial changes to the Coast Guard's evaluation process. (Tr. at 50-54; CG Ex. 14).

D. Respondent Does Not Meet the Medical Standards Established by the Coast Guard

NVIC No. 04-08 provides a medical standard that a mariner with an implantable cardioverter defibrillator is generally not eligible for a medical waiver. (CG Ex. 2 and 13). Upon receipt of a mariner's physical evaluation form, the NMC conducts various levels of review. NMC staff initially review medical evaluations and documents; however, "if there's any concern for significant medical conditions or the potential for disqualification, those cases are then referred to" the division chief for mariner medical evaluations. (Tr. at 47).

As established by the Coast Guard, review by a board certified occupational medicine physician of Respondent's 2008 Merchant Mariner Physical Evaluation Report (form CG-719K) resulted in a determination that he did not meet the established medical standards needed to hold a MML. In support of its position, the Coast Guard introduced Respondent's 2008 physical evaluation report (CG Ex. 1); the applicable portions of NVIC 04-08 (CG Ex. 2 and 13) and presented the testimony, via telephone, of Captain Matthew Hall, M.D.⁶

Dr. Hall is a medical doctor, who is board certified in occupational medicine. (Tr. at 40-45). From 2008 to 2010, Dr. Hall served as the division chief for merchant mariner evaluations at the NMC. During that time, Dr. Hall personally reviewed Respondent's case. (Tr. at 47-48). Dr. Hall testified regarding the evidence of record on the effects and

⁵ See Tr. at 50-54; CG Exhibit 14.

⁶ Telephonic testimony is expressly authorized by 33 C.F.R. §20.707.

risks associated with Respondent's medical condition of ischemic cardiomyopathy with an ICD. (Tr. at 65-99). Dr. Hall also specifically testified that Respondent's condition presents a risk of sudden death or syncope and that his medical condition places him at substantially greater risk than the general population. (Tr. at 97-99, 123-24).

Additionally, the ICD itself presents risks of going off incorrectly and incapacitating a person even when it does work. (Tr. at 61-62). He also provided testimony that the recent evidence of Respondent's condition showed that his condition had declined in view of a lower ejection fraction and also that the lower ejection fraction (below 40%) is an independent basis to find him medically unfit and disqualified for a merchant mariner officer license. (Tr. at 94-99; CG Ex. 9).

The evidence of record, including Dr. Hall's testimony, distinguishes the instant matter from Appeal Decision 2547 (PICCIOLO) and instead is comparable to the analysis and holding in Appeal Decision 2664 (SHEA); (aff'd by NTSB Order No. EM-204 (2008)). Accordingly, the court finds that the Coast Guard has presented sufficient evidence demonstrating that Respondent's medical condition of ischemic cardiomyopathy with an ICD, along with the recent evidence of a decreased ejection fraction, places him at greater risk than the general public of sudden death or incapacitation. (Tr. at 124, 141, 154-55).

The highest standard of care is placed on vessel officers for the personal safety of passengers and crew. Appeal Decision 2257 (MALANAPHY) (1981) (internal citations omitted). Accord Appeal Decisions 2467 (TOMBARI) (1988); 2464 (FUTCHER) (1987); 2440 (LYONS) (1986); 2439 (FREDERICKS) (1986). Respondent's license allows him to be in control of the vessel. His medical condition including his implanted

ICD places him at greater risk of heart attack or syncope. The Court finds that the Coast Guard has met its burden in regard to presenting sufficient evidence regarding Respondent's medical condition that the risk of incapacitation of Respondent as holder of an MML constitutes medical incompetence and presents a risk to maritime safety.

Although Respondent offered numerous medical records into evidence, he did not present any direct medical testimony by his cardiologist or any other medical doctor. Respondent did extensively cross-examine Dr. Hall regarding the basis for the Coast Guard's determination that he was not medically fit for duty. As part of his case-in-chief, Respondent presented evidence through the testimony of other mariners, as well as his own testimony, regarding his physical capabilities. Additionally, Respondent presented documentary evidence of studies. (Resp. Ex. MM, NN, OO). Respondent's presentation of his excellent work record and his actions in setting up shipboard procedures on M/V NANTUCKET to ensure additional personnel are available to react in the event of his physical incapacitation is commendable. However, Respondent's work record and prophylactic measures do not provide a valid defense to the evidence that he does not meet the physical requirements necessary to hold a merchant marine officer license.

Upon review of all testimony and evidence contained within the record, the court finds Dr. Hall's testimony concerning Respondent's medical condition to be persuasive. Inasmuch as Respondent's medical condition presents a significant risk of sudden death or incapacitation, the evidence is sufficient to support the Coast Guard determination that Respondent is medically incompetent to perform the duties required of his current license a merchant marine officer, Master of Steam or Motor Vessels of any Gross Tons and First Class Pilot of Vessels of Any gross tons. The Coast Guard presented evidence at the

hearing that Respondent continued to operate the M/V NANTUCKET after receiving notice that he was considered to be medically unfit to operate under his MML and Respondent did not dispute that he has continued to serve under his license. (CG Ex. 3, 11, Tr. at 17-20, 288). Respondent stated that he has continued to serve under his license since receiving the April 2, 2009 letter from the Coast Guard. (Tr. at 288). The court finds that the evidence presented constitutes sufficient proof of medical incompetence in violation of 46 U.S.C. § 7703(4) and 46 C.F.R. § 5.31.

E. The Medical standards Established by the Coast Guard and the determination not to grant a waiver are entitled to deference.

As discussed supra, NVIC No. 04-08 provides that a mariner with an ICD is generally not eligible for a medical waiver. In addition to finding Respondent medically unfit to serve under his current license, the NMC determined that he was not eligible for a medical waiver. (CG Ex. 3, Resp. Ex. II). On April 2, 2009, Respondent was notified by the NMC of its determination. (*Id.*). On April 25, 2009, and in accordance with 46 C.F.R. § 1.03-40, Respondent requested reconsideration of the NMC's April 2, 2009, findings. (CG Ex. 4). On June 12, 2009, the NMC advised Respondent that the April 2, 2009, decision to deny his request for a medical waiver was upheld. (CG Ex. 8; Resp. Ex. JJ). On October 6, 2009, in accordance with the provisions of 46 C.F.R. § 1.03-40, Respondent appealed the NMC determination to the Commandant's Director of Prevention Policy. (CG Ex. 9). Acting of the behalf of the Commandant, the Director of Prevention Policy denied Respondent's appeal and upheld the NMC's determination. (CG Ex. 10). The Coast Guard contended that such denial constituted final agency action.

Respondent now seeks relief in this administrative forum to find him fit for duty contrary to what is indicated in the medical guidance promulgated and implemented by the Coast Guard so that he may continue to serve under the authority of his Merchant Mariner's License.

However, the Suspension and Revocation administrative hearing process is not an alternative forum to challenge the medical standards adopted by the Coast Guard or to appeal the determination not to grant a waiver. It is within the authority of the Coast Guard to develop and implement medical standards and other qualifications to determine whether a mariner possesses the requisite qualifications and are medically fit for service. See generally 46 U.S.C. § 7101; 46 C.F.R. Part 10. For denial of waivers when applying for or renewing a license the regulations provide a process for appeal of determinations made by the NMC. The Coast Guard has followed that process in regard to the waiver requested, and has denied Respondent's request for a medical waiver. With regard to Respondent's current MML, there is no evidence that an affirmative action to grant a waiver was taken when it was renewed. Likewise, there is no evidence that Respondent did anything different than his previous license renewals. However, since 1998, subsequent issuances of Respondent's MML were not expressly endorsed with a medical waiver.

According to the testimony of Dr. Hall, who reviewed Respondent's medical evaluation and records, the grant of a waiver was not appropriate in view of the risk of sudden death or incapacitation, including the potential for the ICD to malfunction and generate a shock unnecessarily resulting in incapacitation.

Respondent has also asserted that he would accept a restrictive endorsement on his license and has instituted procedures on his vessel (M/V NANTUCKET) to ensure that another pilot qualified mariner is on the bridge in restricted waters along with an able-bodied seaman. The Coast Guard counters that argument with the fact that the shipboard procedures adopted by Respondent are voluntary procedures that could be changed at any time and Respondent's license provides authority to operate as the only licensed officer on a vessel. Similar to the question of waivers, the determination of whether to allow restrictive endorsement on mariner licenses is a matter generally within the discretion of the agency and not a matter for adjudication in Suspension and Revocation proceedings. In keeping with Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) and its progeny, the Coast Guard's determinations in such matters, including interpretation of its own regulations, are entitled to deference. Federal Express Corp. v. Holowecki, 552 U.S. 389; 128 S.Ct. 1147 (2008). The court finds that the Coast Guard has demonstrated that Respondent does not meet the medical standards for retaining his MML and the determination not to grant a waiver is within Coast Guard authority and in the interests of safety at sea. Coast Guard Ex. 14 documents the bases for the change in the medical and physical evaluation process (NVIC 04-08) including the public safety concerns raised because of the incapacitation of the assistant Captain of the Staten Island ferry ANDREW J. BARBERI that led to a marine casualty resulting the death of 10 passengers and injuries to 70 others. The Coast Guard actions in denying a waiver or a restrictive endorsement are not arbitrary or capricious. Cf. Soderback v. Siler, 610 F.2d 643 (9th Cir. 1979).

F. Respondent's Allegations that the Coast Guard's actions in denying his waiver request violate the rehabilitation act and the U.S. Constitution do not present a defense to incompetence or any basis to circumvent the Medical standards Established by the Coast Guard.

Although Respondent did not present any specific evidence in support of this argument at the hearing, he has raised this issue in his Answer to the Complaint and in subsequent briefs.

Respondent's Answer and post-hearing submissions attempt to assert that the Coast Guard's actions in seeking to revoke Respondent's license and document are unconstitutional and violate both the Rehabilitation Act and the Americans with Disabilities Act (ADA). Neither challenges to the Constitutionality of Coast Guard determinations on medical issues for merchant mariners, nor other statutes that do not address safety at sea concerns, present a relevant basis for challenge of or defense to the charge of incompetence within the context of a Coast Guard suspension and revocation proceeding. Other than mere reference to the Rehabilitation Act or the ADA, Respondent has not presented any basis for considering such matters in regard to the physical requirements for persons to hold merchant marine credentials. Some positions such as police officer, require physical standards that exceed what is required of the general population. Eg., Joyce v. Suffolk County, 911 F.Supp. 92 (E.D. N.Y. 1996). Such matters would appear to preclude the application of the Rehabilitation Act or the ADA, as Respondent would suggest. Additionally, the Coast Guard is not Respondent's employer, instead the Coast Guard has been designated by Congress to set the standards for licensing merchant mariners to promote safety at sea. 46 U.S.C. § 7101(e); see generally 46 U.S.C. Chapter 71; 46 U.S.C. Chapter 73.

The instant matter is a purely administrative proceeding. The purpose of Suspension and Revocation actions is to “promote safety at sea” and “is limited to compliance with statutes and regulations” designed to that end. It is well established that “Constitutional issues are beyond the province of this administrative body.” Appeal Decision 2632 (WHITE) (2002). Judicial review of non-administrative issues, such as Constitutional concerns, is available in the federal court. Appeal Decisions 2632 (WHITE) (2002); 2599 (GUEST) (1998); 2594 (GOLDEN) (1997); 2560 (CLIFTON) (1995), 2546 (SWEENEY) (1992) aff’d Administrator v. Sweeney, NTSB Order No. EM-176 (1994).

However, with respect to determinations of Constitutionality, the Courts have long held that although an administrative “agency may always determine questions about its own jurisdiction . . . [t]he law has long been clear that agencies may not nullify statutes.” Appeal Decision 2632 (WHITE) (2002) citing Weinberger v. Salfi, 422 U.S. 749, 765 (1975); Johnson v. Robinson, 415 U.S. 361, 368 (1974); Oestereich v. Selective Service Board, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); Public Utilities Commission v. U.S., 355 U.S. 534, 539 (1958).

The court would note that the record herein clearly demonstrates that Respondent’s due process rights have been properly safeguarded within the Coast Guard’s administrative process, a process that has been held to be constitutionally sufficient. Respondent has been afforded the right to appear before a neutral Trier of fact, to face all evidence presented against him, to present evidence on his own behalf, to cross-examine the Coast Guard’s witnesses and to call witnesses on his own behalf.

Respondent is also afforded the right to appeal the instant decision to a higher authority. See Attachments B and E of this Order.

Also, Respondent's underlying argument would imply that there is some conflict of statutes or an ambiguity involving the Coast Guard's authority as the agency responsible for setting and enforcing standards for Merchant Mariner Licenses and Documents, including medical standards and guidelines for holders of Merchant Mariner Credentials. As noted supra, the Coast Guard is not Respondent's employer, instead the Coast Guard is the agency responsible for setting and enforcing standards for Merchant Mariner Licenses and Documents, including medical standards and guidelines for holders of Merchant Mariner Credentials. Where the plain language of a statute is clear there is no need to engage in statutory interpretation or analysis. See 2A Sutherland Statutory Construction 46.1 (7th ed.); Jimenez v. Quarterman, 129 S.Ct. 681, 689 (2009); Dodd v. United States, 545 U.S. 353, 359 (2005); Lamie v. United States Trustee, 540 U.S. 526, 534 (2004). The Coast Guard's actions in applying the authority given to it by Congress is entitled to deference under Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984). Gonzales v. Oregon, 546 U.S. 243, 255-56 (2006) citing United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). Respondent has received the process due under 46 U.S.C. Chapter 77 and the Coast Guard regulations in 33 C.F.R. Part 20 and 46 C.F.R. Part 5.

G. The Coast Guard did not present evidence sufficient to demonstrate that Respondent is unfit to perform duties for all positions that require service under an MMD.

As discussed supra, the Coast Guard bears the burden of proof in these proceedings. While the evidence of Respondent's condition that presents a risk of sudden

death or incapacitation is a valid basis to disqualify him from duties as a licensed officer that would be in control of a vessel, the same level of risk to maritime safety has not been demonstrated with regard to duties of an able bodied seaman or other positions under an MMD. There might exist a basis to make such an argument, however, the Coast Guard did not present sufficient evidence to support that argument in this case. Instead, the Coast Guard's witness acknowledged there was more of a concern in the risk to maritime safety for a person with a license as a pilot or a master as compared to someone working on deck that is not in charge of vessel navigation. (Tr. 66-67). The Coast Guard presented only the testimony of Dr. Hall and the various exhibits including the complete NVIC 04-08 which was admitted to the record as CG Exhibit 13. Enclosure (1) to NVIC 04-08 indicates that some entry level ratings do not require a general medical exam or vision and hearing standards. That Enclosure also indicates some positions may require a demonstration of physical ability. However, the Coast Guard did not present any evidence that Respondent could not successfully demonstrate the physical ability required for an MMD. Additionally, the annual physical requirement for pilots does not appear to apply positions requiring only an MMD. Pursuant to 46 C.F.R. § 12.02-27 (2009), a physical exam is only required upon the renewal of an MMD. While the Coast Guard might have had the potential to present evidence in support of physical incompetence for the MMD level, the undersigned cannot find sufficient evidence in the record to support that contention. Respondent testified as to his physical activity level including his activity during relatively recent training. (Tr. at 272). The Coast Guard did not present any specific evidence regarding the standards for positions requiring only an MMD. As noted previously, the Coast Guard bears the burden of proof in these proceedings. In the

limited circumstances of this proceeding, the court finds that the Coast Guard failed to meet the burden of proof in regard to demonstrating evidence that Respondent is medically unfit to retain an MMD.

IV. ULTIMATE FINDINGS OF FACT & CONCLUSIONS OF LAW

1. At all relevant times herein, including the period between May 18, 2009 and May 31, 2009, and continuing after May 2009, Respondent James Bruce Hocking was the holder of a Coast Guard-issued Merchant Mariner's License and Merchant Mariner's Document.
2. Respondent James Bruce Hocking and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. § 7703(4); 46 C.F.R. Part 5; 33 C.F.R. Part 20; and the APA as codified at 5 U.S.C. §§ 551-59.
3. On December 4, 2008, Respondent James Bruce Hocking submitted a completed Merchant Mariner Physical Examination Report (Form CG-719K), dated October 31, 2008, to the National Maritime Center.
4. On April 2, 2009, the National Maritime Center transmitted a letter to Respondent James Bruce Hocking advising that he was not medically fit for merchant mariner duties due to a heart condition and an Implantable Cardioverter Defibrillator (ICD).
5. Respondent James Bruce Hocking's Implantable Cardioverter Defibrillator (ICD) and underlying cardiac condition, as documented in the Physical Examination Report submitted on December 4, 2008, render him physically incompetent and unfit for merchant mariner duties associated with his Coast Guard-issued Merchant Mariner's License.
6. On multiple occasions between May 18, 2009, and May 31, 2009, Respondent James Bruce Hocking served as Master (Captain) of the M/V NANTUCKET (ON 556196), a Coast Guard inspected passenger ferry, operating upon the waters of Nantucket Sound.
7. Respondent continued to serve as Master of the M/V NANTUCKET after May 2009 and intends to continue service as long as he holds his license.
8. Respondent James Bruce Hocking operated a vessel under the authority of his license while medically incompetent to serve in such capacity in violation of 46 U.S.C. §7703(4) by serving on various dates between May 18, 2009 and May 31, 2009, and has continued to operate the M/V NANTUCKET in 2009 and 2010 as

Master (Captain) of the M/V NANTUCKET (ON 556196) while not medically fit for merchant mariner duties.

V. CONCLUSION

For the reasons as set forth and discussed supra, the Coast Guard **PROVED** by a preponderance of reliable, probative, and credible evidence that, Respondent violated 46 U.S.C. § 7703(4) and 46 C.F.R. § 5.31. The Coast Guard presented sufficient evidence to prove Respondent is medically incompetent to serve under the authority of his Coast Guard-issued Merchant Mariner's License. Respondent's service as Master of M/V NANTUCKET while medically unfit in May 2009 and after constitutes physical incompetence.

The Coast Guard **DID NOT PROVE** by a preponderance of reliable, probative, and credible evidence that Respondent is incompetent to serve under the authority of his Coast Guard-issued Merchant Mariner's Document.

VI. SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. 46 C.F.R. § 5.567; Appeal Decision 2362 (ARNOLD) (1984). The selection of an appropriate sanction is the responsibility of the ALJ. 46 C.F.R. § 5.569(a). The nature of this administrative proceeding is to "promote, foster, and maintain the safety of life and property at sea." Appeal Decision 1106 (LABELLE) (1959); 46 U.S.C. § 7701. These proceedings are remedial, not penal in nature, and "are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea." 46 C.F.R. § 5.5. In this matter where the charge of physical incompetence is proved with

regard to Respondent's MML and in consideration of the interests of maritime safety the appropriate sanction is revocation. 46 C.F.R. § 5.569 and Table 46 C.F.R. § 5.569.

VII. ORDER

IT IS HEREBY ORDERED, that all elements of the Complaint filed against Respondent James Bruce Hocking on March 23, 2010, with respect to his Coast Guard-issued Merchant Mariner's License are found **PROVED**.

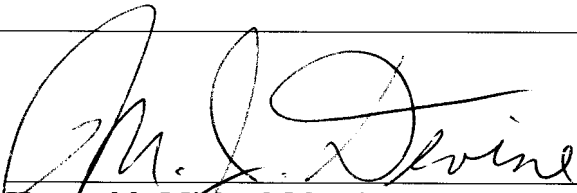
IT IS FURTHER ORDERED, that Respondent James Bruce Hocking's Coast Guard-issued Merchant Mariner's License is **REVOKED**.

IT IS FURTHER ORDERED, that Respondent James Bruce Hocking is to immediately tender his Coast Guard-issued Merchant Mariner's License to the National Maritime Center, 100 Forbes Drive, Martinsburg, West Virginia 25404. If you knowingly continue to use your Merchant Mariner License, you may be subject to criminal prosecution.

IT IS FURTHER ORDERED, that the charge of incompetence with regard to Respondent James Bruce Hocking's Coast Guard-issued Merchant Mariner's Document is **NOT PROVED**. Respondent may retain his MMD.

PLEASE TAKE NOTE, that issuance of this Decision & Order serves as notice of the parties' right to appeal under 33 C.F.R. Part 20, Subpart J. A copy of Subpart J is provided as Attachment E.

IT IS SO ORDERED.


Honorable Michael J Devine
Administrative Law Judge
United States Coast Guard

Date: January 04, 2011

VIII. ATTACHMENT A: WITNESS & EXHIBIT LISTS

COAST GUARD EXHIBITS

1. Respondent's Merchant Mariner Physical Examination Report (Form CG-719K) dated 10/31/2008
2. Excerpt of NVIC 04-08 (7 Pgs)
3. National Maritime Center's letter 16720/499027, dated 04/02/ 2009, to Respondent informing him that he is not medically fit for merchant mariner duties.
4. Respondent's request for reconsideration dated 04/25/2009
5. Respondent's medical evaluation by Falmouth Cardiology Associates dated November 2, 1995
6. Letter from Falmouth Cardiology Associates dated 10/13/1998
7. Respondent's 2007 Merchant Mariner Physical Examination Report (Form CG-719K)
8. National Maritime Center's determination on reconsideration dated 06/12/ 2009
9. Respondent's appeal of National Maritime Center's determination dated 10/06/2009
10. CG-54 letter 16721/499027 dated 02/15/2010
11. Official log of M/V NANTUCKET (ON 556196), for the month of May 2009.
12. Article "Expert Panel Recommendations, Cardiovascular Disease and Commercial Motor Vehicle Driver Safety"
13. Complete NVIC NO. 04-08
14. Federal Register Vol. 71, No. 188 / 56998-57000 (Sept.28, 2006) (Notice of proposed Changes to Medical and Physical Evaluation Guidelines for mariners).
15. Federal Register Vol. 73, No. 189 / 56600-56604 (Sept. 29, 2008) (Notice of Final Version of Changes to Medical and Physical Evaluation Guidelines for mariners).

COAST GUARD WITNESSES

1. Captain Matthew Hall, M.D., United States Coast Guard

RESPONDENT EXHIBITS

- A. Chronology Of Events
- B. MML License History Report dated 5/5/2010
- C. Medical Waiver granted 10/28/98
- D. USCG License issued 5/18/2002
- E. USCG License issued 10/15/2007
- F. Copies of Respondent's credentials expiring 2007 & 2012
- G. Merchant Mariner's Physical Exam Report dated 3/19/1998
- H. Merchant Mariner's Physical Exam Report dated 9/25/2002
- I. Merchant Mariner's Physical Exam Report dated 10/17/2003
- J. Merchant Mariner's Physical Exam Report dated 10/20/2004
- K. Merchant Mariner's Physical Exam Report dated 10/14/2005
- L. Merchant Mariner's Physical Exam Report dated 10/5/2006
- M. Merchant Mariner's Physical Exam Report dated 9/19/2007
- N. Merchant Mariner's Physical Exam Report dated 10/31/2008
- O. Steamship Authority Letter dated 4/16/1980

- P. Steamship Authority Letter dated 4/17/1984
- Q. Steamship Authority Letter dated 5/18/1985
- R. Steamship Authority Letter dated 10/28/1988
- S. Steamship Authority Letter dated 9/21/1993
- T. Steamship Authority Letter dated 12/22/1997
- U. Steamship Authority Letter dated 12/5/2002
- V. Steamship Authority Letter dated 7/23/2007
- W. Certificate Of Inspection date 5/15/2009
- X. Letter by Capt. Everett B. Jackson dated 10/3/2009
- Y. Letter by Margaret Dowd dated 10/02/2009
- Z. Letter by Capt. Louis P. Joska dated 10/5/2009
- AA. Letter by Jeremy McKnight dated 10/7/2009
- BB. Letter by Capt. David E. Reid dated 10/3/2009
- CC. NVIC 04-08 Cover Document & Condition No. 81 only
- DD. Letter from Congressman William Delahunt to RADM Dale G. Gabel dated 6/16/2009
- EE. Memorandum from Capt. James Hocking to Congressman William Delahunt
- FF. Letter from Andy Hammond to NMC dated 10/06/2009
- GG. Email from Capt. Matthew Hall to Andy Hammond dated 10/7/2009
- HH. Medical Waiver Denial Letter dated 4/02/2009
- II. Medical Waiver Denial Letter dated 6/12/2009
- JJ. Medical Waiver Denial Letter dated 9/10/2009
- KK. Medical Waiver Denial Letter dated 2/05/2010
- LL. New England Journal of Medicine article dated 8/8/2001
- MM. Journal Of The American College Of Cardiology, V. 50 No. 23 (2007) Pages 2233-2240
- NN. Steamship Authority Letter dated 8/28/1998
- OO. Article entitled "Risk Stratification For Primary Implantation Of A Cardioverter-Defibrillator In Patients With Ischemic Ventricular Dysfunction"

RESPONDENT WITNESSES

1. Andrew R. Hammond
2. Philip Parent
3. Charles Gifford
4. Edward Jackson
5. Louis Josca
6. James B. Hocking

ALJ EXHIBITS

- I. Respondent Capt. James Bruce Hocking's Motion for Directed Findings at Conclusion of Coast Guard's Case
- II. Respondent's Opposition to CG Motion's for ALJ to Retain License and Credentials

IX. ATTACHMENT B—DISTRICT COURT ORDER

Only the Westlaw citation is currently available.
Slip Copy, 2010 WL 2925903 (D.Mass.)
(Cite as: 2010 WL 2925903 (D.Mass.))

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
D. Massachusetts.
Captain James Bruce HOCKING, Plaintiff,
v.
UNITED STATES of America and United States Coast Guard, Defendants.
Civil Action No. 10-11007-JLT.

July 21, 2010.

Jackie A. Cowin, William Hewig, III, Kopelman & Paige, PC, Boston, MA, for Plaintiff.

Christine J. Wichers, United States Attorney's Office, Boston, MA, for Defendants.

ORDER

TAURO, District Judge.

***1** In this action, Plaintiff seeks judicial review of a decision by the United States Coast Guard declaring him medically unfit to perform his duties as a merchant mariner, due to the defibrillator surgically implanted in his chest, and refusing to grant a medical waiver of his condition to enable him to renew his currently active license when it expires in 2012. Specifically, Plaintiff contends that the Coast Guard's decision violated his rights pursuant to Section 504 of the Rehabilitation Act ^{FN1} because the Coast Guard failed to conduct an individualized inquiry as to whether Plaintiff is otherwise qualified to perform the duties of a merchant marine officer, despite the presence of his defibrillator. Rather, the Coast Guard based its decision entirely upon a recent regulation issued by the Coast Guard Commandant, Navigation and Inspection Circular No. 04-08, which states that the presence of an implantable defibrillator, such as Plaintiff's, is "generally not waivable." ^{FN2}

FN1. 29. U.S.C. § 794.

FN2. Compl., Ex. B., Navigation and Vessel Inspection **NVIC** No. **04-08**.

Presently at issue is *Plaintiff's Motion for Preliminary Injunction* [# 3], by which Plaintiff asks this court to enjoin the Coast Guard from commencing an administrative hearing to determine whether to revoke Plaintiff's merchant marine license based on the prior finding that he is

medically unfit for duty and not entitled to a medical waiver. Because there has been no final agency action with regard to the specific issue Plaintiff asks this court to review, namely whether the Coast Guard's decision as to Plaintiff's medical fitness violated his rights under the Rehabilitation Act, *Plaintiff's Motion for Preliminary Injunction* [# 3] is DENIED.^{FN3}

FN3. See *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (holding that an agency action is final only when (a) the action marks the consummation of the agency's decisionmaking process; and (b) the action determines a party's rights or obligations, or legal consequences will flow from it). Because the Coast Guard has not yet had an opportunity to address the Rehabilitation Act challenge presented here, this court cannot conclude that any prior agency action that has occurred marks the consummation of the agency's decisionmaking process on that issue.

Plaintiff's Rehabilitation Act challenge was raised in administrative proceedings for the first time through his answer to the Coast Guard's complaint seeking revocation of Plaintiff's license. The Administrative Law Judge (ALJ) stated by an *Order Denying Motions for Summary Decision* in the revocation action that, in accordance with Plaintiff's due process rights, he will hold an evidentiary hearing to allow the parties to fully develop the facts with regard to Plaintiff's medical condition and how it may affect his fitness for duty.^{FN4} In addition to medical evidence, the ALJ directed the parties to provide any and all evidence or authority pertaining "to the changes to medical requirements for Mariners contained in Navigation and Inspection Circular (NVIC) No. 04-08 ... or to Coast Guard regulations in 46 CFR Parts 10 and 11," if such are relevant to Plaintiff's situation.^{FN5}

FN4. See Pl.'s Reply Supp. Mot. Prelim. Inj., Ex. 8, Order Denying Motions for Summary Decision, 4.

FN5. *Id.*

It is therefore clear from the ALJ's Order that Plaintiff may present and preserve any issues bearing on his medical fitness, as well as the potential license revocation that flows therefrom, in the administrative hearing.^{FN6} And if, on completion of the hearing, the ALJ should either reject or fail to address Plaintiff's Rehabilitation Act challenge, Plaintiff is not without an adequate judicial remedy. To the contrary, he may appeal an adverse decision to the Commandant,^{FN7} then to the National Transportation Safety Board,^{FN8} and finally to the United States Court of Appeals.^{FN9}

FN6. As the ALJ pointed out in his Order, the determination not to grant a medical waiver of Plaintiff's implantable defibrillator is not subject to review in a revocation proceeding. But the ALJ explicitly stated that the evidentiary hearing would address the issue of whether Plaintiff is medically fit to perform his duties, despite the absence of a medical waiver.

FN7. See 33 C.F.R. §§ 20.1003(a), 20.1004.

FN8. See 49 U.S.C. § 1133(3); 49 C.F.R. § 825.5.

FN9. See 49 U.S.C. § 1153(a). Notably, upon judicial review, the Administrative Procedures Act requires the Court of Appeals to set aside agency action if it is “not in accordance with law” or is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” See *Cousins v. Sec’y of U.S.D.O.T.*, 880 F.2d 603, 605 (1st Cir.1989) (quoting 5 U.S.C. § 706(2)).

***2 IT IS SO ORDERED.**

D.Mass.,2010.

Hocking v. U.S.

Slip Copy, 2010 WL 2925903 (D.Mass.)

END OF DOCUMENT

X. ATTACHMENT C—PARTIES’ PROPOSED FINDINGS OF FACT

Coast Guard’s Proposed Findings of Fact

1. On December 4, 2008, Respondent submitted a “Merchant Mariner Physical Examination Report,” form CG-719K, to the United States Coast Guard (USCG). CG Ex. 1. **ACCEPTED & INCORPORATED**
2. Respondent’s 2008 719K noted that Respondent had heart disease and an implantable cardioverter defibrillator (ICD). CG Ex 1. **ACCEPTED & INCORPORATED**
3. A Coast Guard credentialed mariner with Respondent’s medical condition and ICD, is required to have medical waiver. CG Ex. 2 p. 7 of 7; Tr. at 67 lns 3-8. **ACCEPTED IN PART. NVIC 04-08 set medical standards that would require a waiver for an MML.**
4. On April 2, 2009, Respondent was informed by the USCG National Maritime Center (NMC) that he was “not medically fit,” and was not approved for a medical waiver.⁷ CG Ex. 3. **ACCEPTED & INCORPORATED**
5. Respondent operated under the authority of his USCG credential after April 2, 2009, and continued to operate as a licensed pilot up to the time of the oral hearing in this matter. CG Ex. 11; Tr. at 233 lns 8-14; 287 lns 1-4. **ACCEPTED & INCORPORATED**
6. On June 12, 2009, the NMC upheld its previous determination and concluded that Respondent was “medically unfit” and a waiver for his medical condition was not approved. CG Ex. 8. **ACCEPTED IN PART. Evidence of the NMC action was accepted into evidence and considered in issuing the decision in this matter.**
7. On February 15, 2010, the USCG Director of Prevention Policy upheld NMC’s previous determinations and issued “final agency action” denying Respondent’s medical waiver.⁸ CG Ex. 10. **ACCEPTED IN PART. Evidence of the NMC action and subsequent action on the appeal was accepted into evidence and considered in issuing the decision in this matter.**
8. Respondent’s medical condition puts him at greater risk for sudden incapacitation than the general population. TR at 99 lns 15-22. **ACCEPTED & INCORPORATED**
9. Respondent’s medical condition puts him at greater risk for sudden incapacitation than the general population. Tr. at 99 lns 15-22. **ACCEPTED & INCORPORATED**

⁷ Under 46 CFR §1.03-15(f), the original decision of NMC remains in effect while the matter is appealed, unless a stay is granted. A stay was not granted in this case. Despite being appealed, Respondent’s medical waiver denial was in effect upon issuance of NMC’s initial determination.

⁸ Per 46 CFR § 1.03-40, “[t]he decision of the Director of Prevention Policy, Commandant (CG-54), on such an appeal will constitute final agency action.”

10. Respondent's medical condition renders him physically unfit for duty as a credentialed merchant mariner. CG Ex. 3, 8, 10; Tr. at 96-99. **ACCEPTED IN PART AND REJECTED IN PART. Evidence of Respondent's medical condition was accepted into evidence and considered in issuing the decision in this matter. As noted in the Decision the Coast Guard failed to prove Respondent medically unfit to hold an MMD.**

Respondent's Proposed Findings of Fact

1. Capt. Hocking is the current holder of U.S.C.G. License to Merchant Marine Officer 120813, Issue No. 7, dated at Boston, Massachusetts October 15, 2007 (Tr.246; Ex. E). **ACCEPTED, IN PART, as provided in the Decision and Order**
2. Capt. Hocking is the current holder of United States Merchant Mariner's Document [REDACTED], expiring on October 15, 2012 (Tr. 246; Ex. F). **ACCEPTED, as provided in the Decision and Order**
3. Capt. Hocking has been serving under the authority of his Coast Guard License as Master aboard the vessels of the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority since 1985, and for the last 10 years, exclusively as Master and Senior Captain of the Motor Vessel Nantucket (Tr. 148). **ACCEPTED, IN PART, as provided in the Decision and Order.** The period of service from May 2009 and later is the primary focus of this proceeding.
4. Capt. Hocking began his sailing career in 1967 when he joined the United States Navy out of high school. Beginning in January, 1968, he served four (4) years aboard Navy destroyers, including combat duty in Viet Nam, following which he received an honorable discharge (Tr. 247). **NEITHER ACCEPTED NOR REJECTED.** The period of service from May 2009 and later is the primary focus of this proceeding.
5. Following his discharge from the United States Navy, Capt. Hocking went to college, then began working for the Steamship Authority in 1973, and from that time to the present, a total of 37 years, has worked exclusively for them (Tr. 247, 250; Ex. O-W). **NEITHER ACCEPTED NOR REJECTED.** The period of service from May 2009 and later is the primary focus of this proceeding.
6. While working for the Steamship Authority, Captain Hocking worked his way up from able bodied seaman, to Bosun, to licensed inland mate in 1980, pilot in 1983, and Master in 1985 (Tr. 248). **NEITHER ACCEPTED NOR REJECTED.** The period of service from May 2009 and later is the primary focus of this proceeding.
7. In March, 1985, while performing in a church talent show, Capt. Hocking suffered a ventricular tachycardia. He neither became unconscious nor incapacitated, but merely felt lightheaded, and retained full control of his faculties. He concluded his performance, and worked lights, music and a tape machine until the talent show was concluded (Tr. 252); **ACCEPTED, IN PART, as provided in the Decision and Order**

8. After being diagnosed with ventricular tachycardia at a hospital after the show, Capt. Hocking consulted with a cardiologist and an electrophysiologist (Tr. 252); **NEITHER ACCEPTED NOR REJECTED**. Respondent's condition during the period of service from May 2009 and later is the primary focus of this proceeding.
9. After considering a number of options, including blind studies, and toxic medicines, Capt. Hocking elected to have an implantable cardioverter defibrillator ("ICD") surgically implanted. This course of treatment was purely elective, and included less, or not-so-toxic medications as well. The ICD was surgically implanted in April, 1995 (Tr. 253-4). **ACCEPTED, IN PART, as provided in the Decision and Order**
10. An ICD is a medical device that is implanted into a patient, measures each heartbeat, and if it detects arrhythmia or tachycardia, it can emit a pacing signal to control the rhythm of the heartbeat, by speeding it up, or a shock signal to break the heart rhythm (Tr. 255). **ACCEPTED, as provided in the Decision and Order**
11. The shock signal is stronger than the pacing signal, but even the higher impact signal is not incapacitating in Capt. Hocking's case (Tr. 255). **NEITHER ACCEPTED NOR REJECTED**. Respondent's condition during the period of service from May 2009 and later is the primary focus of this proceeding.
12. Since Capt. Hocking's 1995 ICD surgical implant, he has never been incapacitated by his condition, on the job or off, and has never had any incident while serving under authority of his License (Tr. 256, 271). **NEITHER ACCEPTED NOR REJECTED**. Respondent's condition during the period of service from May 2009 and later is the primary focus of this proceeding.
13. Since Capt. Hocking's 1995 ICD surgical implant, he has been serving successfully and safely under the authority of his License and medical waiver since 1995 (Tr. 271). **NEITHER ACCEPTED NOR REJECTED**. Respondent's condition during the period of service from May 2009 and later is the primary focus of this proceeding.
14. As of the day of the hearing (September 23, 2010), Capt. Hocking was able to perform all of the functions and tasks of a licensed ship's captain, including standing on a bridge for seven (7) hours; walk up and down steep ladders in the event of an emergency; operate radar; plot on a chart; supervise a watch; pilot the vessel in and out of port using the throttle or wheel; and navigate the ship in the waters for which he has pilotage. There is, in short, no function of a ship's master that Capt. Hocking's ICD or his current medical condition prevented him from doing as of the date of the hearing (Tr. 256-7). **ACCEPTED IN PART AND REJECTED IN PART**. The Record did not present evidence of any specific incident or failure to perform duties by Respondent. However, there is evidence that Respondent's medical condition places him at greater risk of sudden death or incapacitation. This additional risk does impact his ability to safely perform duties as Master of the NANTUCKET and serve under the authority of his MML. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.

15. Following his 1995 ICD surgical implant, Capt. Hocking underwent the Coast Guard-required annual medical examination each year from 1995 through to 2009, with his physician Dr. Baxley, each year, he submitted to the Coast Guard his required CG 719K medical exam report, and each year, up to the present, he has been found by his examining physician to have been “fit for duty” (Tr. 257-260, 271, 282). **ACCEPTED, IN PART, as provided in the Decision and Order**
16. Dr. Baxley has been Capt. Hocking’s examining physician for many years. He knows what Capt. Hocking does, knows all about him, and is the doctor who knows the most about Capt. Hocking (Tr. 282). **NEITHER ACCEPTED NOR REJECTED.** Dr. Baxley did not appear as a witness and did not provide any testimony at the hearing. The undisputed existence of Respondent’s heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.
17. In 1998, Capt. Hocking began the process of renewing his Coast Guard Master’s License. Along with his application for renewal, he submitted the required most recent CG 719K medical report, disclosing fully the medical information about his ICD, to the Coast Guard’s Regional Examination Center (“REC”) in Boston (Tr. 259). **ACCEPTED, IN PART, as provided in the Decision and Order.** Respondent’s condition during the period of service from May 2009 and later is the primary focus of this proceeding.
18. Upon submission of his application for renewal of his Coast Guard Master’s License in 1998, REC Boston asked Capt. Hocking for additional medical information about his heart condition. Upon submission of the requested additional medical information, the Coast Guard granted Capt. Hocking a medical waiver, and renewed his license in 1998 for another five (5) year term (T. 259-60; Ex. C). **ACCEPTED, IN PART, as provided in the Decision and Order.** Respondent’s condition during the period of service from May 2009 and later is the primary focus of this proceeding.
19. Similarly, the Coast Guard renewed Capt. Hocking’s Master’s License when it came up for renewal in the years 2002 and 2007 (Tr. 261; Exhs. B, D, E). **REJECTED.** Since 1998, subsequent issuances of Respondent’s MML were not expressly endorsed with a medical waiver. Prior service of Respondent is not in issue in this matter. Respondent’s condition during the period of service from May 2009 and later is the primary focus of this proceeding.
20. In April, 2009, Capt. Hocking received in the mail a letter dated April 2, 2009 from a Capt. D.C. Stalfort, of the Coast Guard’s National Maritime Center (“NMC”), stating the he reviewed Capt. Hocking’s most recent 719K and concluded that Capt. Hocking was not medically fit due to a heart condition and an ICD, and that a waiver was therefore not approved (Tr. 262; Ex. II). **ACCEPTED, as provided in the Decision and Order.**
21. Following his receipt of the Coast Guard’s April 2, 2009 letter, Capt. Hocking placed a call to NMC in Martinsburg, West Virginia for the purpose of asking for an extension to

get more medical information, to pass along to NMC. He spoke to one Eric A. Bauer (mis-spelled in the transcript as "Bower"). Mr. Bauer told Capt. Hocking that "he wasn't concerned about the medical side, the medical people would take care of that, but it was his job to get me off the water." (Tr. 262-3). **NEITHER ACCEPTED NOR REJECTED.** Respondent's condition during the period of service from May 2009 and later is the primary focus of this proceeding.

22. Capt. Hocking realized that the April 2, 2008 letter implied that the medical waiver denial implied that it had been based on one single medical document Capt. Hocking's 2008 719K. He confirmed that by checking with REC Boston, and determining that they still had his complete file in their possession (Tr. 264). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.
23. Following that, Capt. Hocking then sent an e-mail to the same Capt. Hall who testified at the hearing, asking if the additional medical records, which he had by that time sent, had arrived. Capt. Hall never even gave Capt. Hocking the courtesy of a reply (Tr. 264-5). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.
24. Capt. Hocking then enlisted the assistance of Andy Hammond, a former REC employee, for the specific reason that the Coast Guard was not giving him information about how to get the waiver (Tr. 265). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.
25. Even with Mr. Hammond's assistance, a request for further time to permit Capt. Hocking to make an appointment with his cardiologist for a further stress test, which would have given the Coast Guard additional, current cardiological information, was denied by Capt. Hall (Tr. 265-6, 268). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.
26. Capt. Hocking took the stress test anyway. The test rated him at a 95% for persons of his age, and determined that his ejection fraction had risen from 32 to 38% (Tr. 267). **ACCEPTED, IN PART, as provided in the Decision and Order.** The Coast Guard was

required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.

27. The Coast Guard applies an ejection fraction for securing a medical waiver of 40% (Tr. 87). **ACCEPTED, IN PART, as provided in the Decision and Order.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.
28. The Coast Guard's Expert Panel Recommendations, CG Ex. 12, are found in a report which, on its face, states that it is "comprised of research conducted to analyze the impact of cardiovascular Disease on commercial motor vehicle driver safety. (Ex. 12). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. CG Ex. 12 was accepted into evidence and considered in issuing the decision in this matter. Respondent's cross examination of the Coast Guard's witness and presentation of evidence was fully considered in reaching a decision in this matter.
29. The Coast Guard introduced no evidence at the hearing that Capt. Hocking has cardiovascular disease. **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
30. Accordingly, the medical standards in the Expert Panel Recommendations, Ex. 12, do not even apply to Capt. Hocking. **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
31. The Steamship Authority operates the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, operates 9 vessels in the summer, and 7 vessels in the winter. These vessels run on the Hyannis-Nantucket and Woods Hole-Martha's Vineyard runs. The vessels complete approximately 22,000 trips a year, and carry approximately 2.6 million passengers and approximately 600,000 cars and trucks to the islands of Martha's Vineyard and Nantucket safely each year (Tr. 212-3). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD

during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.

32. With its high volume of passenger and automobile traffic, the Steamship Authority's confidence in Capt. Hocking is in large part based on the fact that its strict requirements for multiple manning of bridge watch standers, as well as Capt. Hocking's higher manning and performance standards for his watch standers make it assured that if anyone on the bridge has an incapacitating event, qualified back-up personnel are present and able to stand in immediately. **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
33. Capt. Hocking has made those on his watch aware of his medical condition, including his ICD (Tr. 239-41). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
34. The testimony of the Steamship Authority's officials, Philip Parent, Capt. Charles Gifford, the Port Captain, and Capt. Edward Jackson, Capt. Hocking's long time mentor, show how far the Steamship Authority has gone to minimize the risk of danger to the public from any incapacitating event to any Steamship Authority bridge watch stander. **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
35. If either licensed pilot aboard the bridge of a Steamship Authority vessel has an incapacitating event, the other licensed pilot is there to take over immediately. **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
36. Capt. Hocking proceeded with the help of Andrew Hammond to request reconsideration of the Coast Guard's April 2, 2008 decision, and then to appeal directly to the

Commandant. Both requests were denied (Tr. 265, 268-7; Ex. JJ (denial letter dated June 12, 2009); LL (denial letter dated Feb. 15, 2010). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.

37. As further evidence of his currently sound physical condition, Capt. Hocking successfully completed a 16-hour Coast Guard-approved basic firefighting course on March 11-12, 2009. This course includes 8 hours of donning heavy gear and carrying heavy equipment such as helmets, boots and air packs up and down several floors to fight actual fires (Tr. 272). **ACCEPTED IN PART AND REJECTED IN PART.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. As provided in the Decision in this matter Respondent's activity level does not present evidence that he is not subject to a higher risk of sudden death or incapacitation which impacts duties associated with an MML. Respondent's evidence of his physical activity was considered in determining that the Coast Guard failed to prove he was not fit to retain an MMD. The decision in this matter is based on the record as a whole and the applicable law and regulations.
38. Capt. Hocking does not smoke, and has consciously gone into a program of not drinking coffee; and he has cut down on meals and has lost 15 pounds (Tr. 273). **NEITHER ACCEPTED NOR REJECTED.** The decision in this matter is based on the record as a whole and the applicable law and regulations.
39. Capt. Hocking has never experienced syncope, loss of consciousness or fainting (Tr. 273). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
40. Capt. Hocking has never had renal failure (failure of the kidneys) (Tr. 273). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
41. Capt. Hocking has never been told he has cardiovascular disease (Tr. 273). At no time since the implantation of his ICD has Capt. Hocking ever experienced shortness of breath

(Tr. 284). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.

42. There is no history of sudden death in Capt. Hocking's family (Tr. 273-4). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
43. In his present condition, neither his ICD nor his present medical condition have caused Capt. Hocking to be in any way unable to perform any of the functions required of a ship's captain (Tr. 274). **REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
44. Required on the bridge of all Steamship Authority ships are a Master and Pilot Mate. Capt. Hocking has, however, always been more strict with his crews, requiring in addition an AB to come to the bridge as well as a lookout (Tr. 275). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
45. On Capt. Hocking's vessel, the pilot is at the wheel when leaving port. The pilot steers the vessel out between the buoys, making the necessary turns to conform to the channel. At the sea buoy, the pilot then turns the vessel over to the AB, and he then directs the vessel's navigation to the next sea buoy, piloting, plotting, being a lookout, where he again takes over the wheel (Tr. 275-7). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.

46. Even when the ship's wheel is turned over to the AB and the ship is out in the sound, out of pilotage waters, Capt. Hocking still retains three people on the bridge – Captain, Mate and AB (Tr. 276). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
47. On Capt. Hocking's vessel, if conditions require it, such as fog or heavy traffic, a fourth person is brought to the bridge (Tr. 276). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
48. At all times during a transit, Capt. Hocking stays on the bridge. At all times, he has a supervising role, but he may be also attending to other duties such as log keeping or record keeping (Tr. 277). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
49. The transit time from Hyannis to Nantucket is two hours and 15 minutes (T. 277). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
50. The transit time from Woods Hole to Martha's Vineyard is 45 minutes (Tr. 277). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. The decision in this matter is based on the record as a whole and the applicable law and regulations.
51. The term "Pilot" as used aboard Steamship Authority vessels is different than deepwater usage. A Steamship Authority Pilot is required to be at the wheel and navigating inside pilotage waters, and must remain on the bridge and continue to navigate outside pilotage waters (Tr. 278); the pilot navigates and steers the vessel by memorizing the route,

including buoys and courses (Tr. 235). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. Requirements for holding a license or document are set by the Coast Guard in keeping with its statutory authority. The decision in this matter is based on the record as a whole and the applicable law and regulations.

52. Capt. Hocking has disclosed his medical condition to other bridge watch-standers aboard his vessel. If Capt. Hocking were on the bridge of his ship and were to have an incapacitating event, his watch standers would be able to safely handle the vessel. The Pilot/Mate is trained to navigate the vessel in and out of the channel, and to dock and undock it, and that person would take over immediately (Tr. 278-281). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. Requirements for holding a license or document are set by the Coast Guard in keeping with its statutory authority. The decision in this matter is based on the record as a whole and the applicable law and regulations.
53. Capt. Hocking has never had any actions taken against his Coast Guard License, and apart from the three Coast Guard letters dated April 2, 2009, June 15, 2009 and February 15, 2010, no one has ever before told Capt. Hocking that he was "incompetent", including his examining physician Dr. Baxley, and his cardiologist (Tr. 257-60, 271, 281-2). **ACCEPTED, IN PART, as provided in the Decision and Order.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. Requirements for holding a license or document are set by the Coast Guard in keeping with its statutory authority. The decision in this matter is based on the record as a whole and the applicable law and regulations.
54. When Capt. Hocking first got his defibrillator implanted in 1995, he immediately informed his employer, the Steamship Authority management (Tr. 283). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.
55. Also, immediately after he got his defibrillator, Capt. Hocking noted that the instructions stated that the device could be disabled by electromagnets. Accordingly, he consulted with the radar technicians who service his vessel, Bardwell Electronics, and with his

- doctors. They determined that although the radar had a powerful magnet in it, the makeup and the output of the radar would be of no consequence to the operation of his ICD (Tr. 283-4). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.
56. The Certificate of Inspection for M/V NANTUCKET is a Certificate Issued by the Coast Guard setting forth manning requirements for the ship. Capt. Hocking's own rules for watch-standers aboard his vessel exceed those manning requirements (Tr. 285; Ex. X). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. Requirements for holding a license or document are set by the Coast Guard in keeping with its statutory authority. The decision in this matter is based on the record as a whole and the applicable law and regulations.
57. Capt. Hocking has no plans to work for anyone other than the Steamship Authority until the time of his retirement (Tr. 284). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding.
58. Capt. Hocking would accept an endorsement on his license restricting its use to Steamship Authority service (Tr. 287). **NEITHER ACCEPTED NOR REJECTED.** The Coast Guard was required to present evidence at the hearing to support the charges. The Record shows there is no dispute that Respondent has a heart condition and ICD. The undisputed existence of Respondent's heart condition and ICD during the period of service from May 2009 and later is the primary focus of this proceeding. Requirements for holding a license or document are set by the Coast Guard in keeping with its statutory authority. The decision in this matter is based on the record as a whole and the applicable law and regulations.

XI. ATTACHMENT D—PARTIES’ PROPOSED CONCLUSIONS OF LAW

Coast Guard’s Proposed Conclusions of Law

1. By operating under the authority of his USCG-issued credential without a medical waiver, despite having a condition requiring a medical waiver, Respondent committed incompetence as defined in 46 CFR § 5.31, in violation of 46 United States Code (U.S.C.) § 7703(4). **ACCEPTED IN PART, as provided in the Decision and Order.** The court determined there was insufficient evidence to support the charge in regard to Respondent’s MMD.
2. By operating under the authority of his USCG-issued credential while not medically fit to perform merchant-mariner duties, Respondent committed incompetence as defined in 46 CFR § 5.31, in violation of 46 U.S.C. § 7703(4). **ACCEPTED IN PART, as provided in the Decision and Order.** The court determined there was insufficient evidence to support the charge in regard to Respondent’s MMD.

Respondent’s Proposed Conclusions of Law

1. Coast Guard regulations define incompetence as: “the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof.” (33 CFR § 5.31). **NEITHER ACCEPTED NOR REJECTED.** The regulations speak for themselves.
2. Except for affirmative defenses, or as otherwise provided by statute or rule, the Coast Guard bears the burden of proof in this action. (33 CFR § 20.702). **ACCEPTED, as provided in the Decision and Order**
3. The party that bears the burden of proof shall prove his or her case or affirmative defense by a preponderance of the evidence (33 CFR § 20.701). **ACCEPTED, as provided in the Decision and Order**
4. In order to meet the “preponderance of evidence” standard, the ALJ must be convinced that the existence of a fact is more probable than not (Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California, 508 US 602, 622 (1993) (citing In Re: Winship 397 US 358, 371-2 (1970) (Harlan, J., concurring); App. Dec. 2670 (WAIN) (2007) at 10). **ACCEPTED IN PART, as provided in the Decision and Order.** There are many authorities that repeat the standard to be applied in administrative proceedings under the APA.
5. It is the function of the Administrative Law Judge (“ALJ”) to resolve conflicts in testimony and issues of credibility. The question of what weight to accord the evidence is committed to the discretion of the ALJ. (App. Dec. 2675 (MILLS) (2008));

NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ.

6. The findings of the ALJ need not be completely consistent with all evidence in the record as long as sufficient evidence exists to reasonably justify the findings (App. Dec. 2652 (MOORE) (2005)). **NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ.**
7. The ALJ is not necessarily bound by medical findings or opinions (App. Dec. 2547 (PICCIOLO) (1992) at 4). **NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ.**
8. The ALJ has broad discretion in making determinations regarding the credibility of evidence and resolving inconsistencies of evidence, but that discretion cannot extend beyond the substantive evidence on the record (App. Dec. 2664 (SHEA) (2007) at 9-10; App. Dec. 2547 (PICCIOLO) (1992) at 4); **NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ.**
9. All conclusions of law reached by the ALJ must accord with law, precedent and public policy (33 CFR §20.101(b)(2)); **NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ.**
10. Simply identifying a medical condition and its potential debilitating medical effects upon a mariner does not prove physical incompetence (App. Dec. 2547 (PICCIOLO) (1992) at 3); **NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ.**
11. There must be evidence on the record that tends to prove that the appellant is unable to perform the required duties expected of a merchant mariner's License (App. Dec. 2547 (PICCIOLO) (1992) at 3); **NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ. The burden of proof and various matters are addressed in the Decision and Order.**
12. It is not sufficient to sustain a finding of incompetence for an Investigating Officer to speculate that a mariner would not under certain circumstances be fit for duty. The ultimate issue is whether the appellant can perform the functions expected of him as a holder of his License (App. Dec. 2547 (PICCIOLO) (1992) at 3-4); **NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ. The burden of proof and various matters are addressed in the Decision and Order.**

13. If the Coast Guard seeks to revoke a mariner's seaman's papers for incompetence, the Coast Guard must meet its burden of proving that the mariner was not presently capable of performing the duties of an able bodied seaman (App. Dec. 2664 (SHEA) (2007)); **NEITHER ACCEPTED NOR REJECTED. Weighing the evidence and applying the law and regulations to the proceedings in issue is the function of the ALJ. The burden of proof and various matters are addressed in the Decision and Order.**
14. No otherwise qualified individual with a disability in the United States as defined by Section 705(20) of 29 USC shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by an executive agency (29 USC §794(a); 42 USC §11211 et seq.); **NEITHER ACCEPTED NOR REJECTED. As addressed in Section III F of the Decision and Order the Coast Guard is not an employer of Respondent and the statutes cited do not appear relevant to these proceedings conducted pursuant to 46 U.S.C. Chapter 77 and intended by Congress to promote safety at sea.**
15. A mariner is a "person with a disability" within the meaning of 29 USC §794(a), and 49 USC §12102, by sole virtue of the fact that his medical waiver has been denied, he is currently "regarded as having an impairment" by the Coast Guard (29 USC §794; 49 USC §12102). **NEITHER ACCEPTED NOR REJECTED. As addressed in Section III F of the Decision and Order the Coast Guard is not an employer of Respondent and the statutes cited do not appear relevant to these proceedings conducted under 46 U.S.C. Chapter 77 and intended by Congress to promote safety at sea.**
16. Capt. Hocking is an otherwise qualified individual with a disability within the meaning of the Rehabilitation Act of 1974. **NEITHER ACCEPTED NOR REJECTED. As addressed in Section III F of the Decision and Order the Coast Guard is not an employer of Respondent and the Rehabilitation Act does not appear relevant to these proceedings conducted under 46 U.S.C. Chapter 77 and intended by Congress to promote safety at sea.**
17. Coast Guard license granting is a program or activity within the meaning of 29 USC §794 (Cousins v. Secretary of the US DOT, 880 F. 2d 603 (1st Cir., 1989). The term "program or activity" is to be construed broadly by courts interpreting this section of the ADA (49 USC §12102). Consolidated Rail Corp. v. Darrone, 465 US 264, 632 (1984). The Department of Homeland Security, of which the United States Coast Guard is a part, is an executive branch of the United States government. (6 USC §111; 468(b)); **NEITHER ACCEPTED NOR REJECTED. As addressed in Section III F of the Decision and Order the Coast Guard is not an employer of Respondent and the statutes cited do not appear relevant to these proceedings conducted pursuant to 46 U.S.C. Chapter 77 and intended by Congress to promote safety at sea.**
18. A qualifying person with a disability within the meaning of 29 USC §794 is entitled to an individualized review. School Board of Nassau County Florida v.

Arline, 480 US 273, 287 (1987) (case by case analysis must gather and analyze all relevant information regarding an individual's work history and medical history and thoroughly assess ability to perform duties of the job involved); Stillwell v. Kansas City Board of Police Commissioners, 872 F. Supp. 682 (W.D. MO. 1995); Cleveland Board of Education v. LaFleur, 414 US 632 (1974); Bombrys v. City of Toledo, 849 F. Supp. 1210, 1219 (N.D. Ohio, 1993) (blanket exclusions violate Rehabilitation Act).

NEITHER ACCEPTED NOR REJECTED. As addressed in Section III F of the Decision and Order the Coast Guard is not an employer of Respondent and the statutes cited do not appear relevant to these proceedings conducted pursuant to 46 U.S.C. Chapter 77 and intended by Congress to promote safety at sea.

19. NVIC 04-08, Condition 81 authorizes blanket exclusions or across the board exclusions for medical waivers requested by persons with an ICD. NVIC 04-08, Condition 81 (anti-tachycardia devices or implantable defibrillators "generally not waivable").
NEITHER ACCEPTED NOR REJECTED. As addressed in Section III F of the Decision and Order the Coast Guard is not an employer of Respondent and the statutes cited do not appear relevant to these proceedings conducted pursuant to 46 U.S.C. Chapter 77 and intended by Congress to promote safety at sea.
20. By applying blanket or across-the board exclusions against Capt. Hocking, the Coast Guard violated the Rehabilitation Act of 1974, and Capt. Hocking's due process rights under the Fifth Amendment of the United States Constitution. **NEITHER ACCEPTED NOR REJECTED, as provided in the Decision and Order.**
21. Failure on the part of the Coast Guard to follow the legally mandated procedural requirements of a federal statute, such as the Rehabilitation Act of 1974, also comprises a violation of the due process provision of the Fifth Amendment of the United States Constitution. International Union, United Government Security Officers of America v. Clark, 704 F. Supp. 2d 54 (D.D.C., 2010) (Rehabilitation Act does not preempt Fifth Amendment claim). **NEITHER ACCEPTED NOR REJECTED, as provided in the Decision and Order). As addressed in Section III F of the Decision and Order the Coast Guard is not an employer of Respondent and the statutes cited do not appear relevant to these proceedings conducted pursuant to 46 U.S.C. Chapter 77 and intended by Congress to promote safety at sea.**
22. The Coast Guard failed to meet its burden of proving that Capt. Hocking is not medically competent because it failed to produce any evidence that he is presently incapable of performing the functions of a licensed ship's master. **REJECTED, as provided in the Decision and Order**
23. The Coast Guard failed to meet its burden of proving that Capt. Hocking is medically incompetent to perform the functions of a licensed master because it failed to offer probative, substantial or reliable evidence that Capt. Hocking presently or ever has had cardiovascular disease, and accordingly the standards contained in its Expert Panel Recommendations (CG Ex. 12) do not apply to Capt. Hocking. **REJECTED, as provided in the Decision and Order**

24. The Coast Guard has failed to meet its burden of proving that Capt. Hocking is medically incompetent because the medical science upon which the Coast Guard relied as set forth in the "Expert Panel Recommendations" (CG Ex. 12), are not yet sufficient reliable to be applied in an inflexible fashion against mariners, and the medical recommendations of the report do not, therefore, constitute probative, substantial and reliable evidence sufficient to meet the Coast Guard's burden of proof. **REJECTED, as provided in the Decision and Order**

XII. ATTACHMENT E—NOTICE OF ADMINISTRATIVE APPEAL RIGHTS

33 CFR 20.1001 General.

(a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.

(b) No party may appeal except on the following issues:

- (1) Whether each finding of fact is supported by substantial evidence.
- (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
- (3) Whether the ALJ abused his or her discretion.
- (4) The ALJ's denial of a motion for disqualification.

(c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.

(d) The appeal must follow the procedural requirements of this subpart.

33 CFR 20.1002 Records on appeal.

(a) The record of the proceeding constitutes the record for decision on appeal.

(b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --

- (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
- (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 CFR 20.1003 Procedures for appeal.

(a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.

(1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --

- (i) Basis for the appeal;
- (ii) Reasons supporting the appeal; and
- (iii) Relief requested in the appeal.

(2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.

- (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
 - (1) The party has petitioned the Commandant in writing; and
 - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

33 CFR 20.1004 Decisions on appeal.

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.