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

UNITED STATES COAST GUARD
Complainant

vs.

CARL DANIEL BRADSHAW
Respondent

Docket Number 2012-0073
Enforcement Activity No. 4213187

DECISION AND ORDER
Issued: March 28, 2013

By Administrative Law Judge: Honorable George J. Jordan

Appearances:

Mr. Eric A. Bauer
Brian Crockett, Esq.
Suspension & Revocation National Center of Expertise
For the Coast Guard

STUART S. HEALY, Esq.
For the Respondent

IT IS ORDERED that service of this Decision and Order upon Respondent will serve as notice to Respondent of appeal rights as set forth in 33 CFR Subpart J, Section 20.1001.

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DECISION AND ORDER

I. PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard or Agency) initiated this administrative action seeking revocation of Carl Daniel Bradshaw's (Respondent) Merchant Mariner's Credential (MMC or Credential). This action is brought pursuant to the authority contained in 46 U.S.C. § 7701 et seq. and its underlying regulations codified at 46 C.F.R. Part 5.

On February 9, 2012, the Coast Guard filed a Complaint seeking revocation of Respondent's MMC for an act of Incompetence. Specifically, the Coast Guard alleges that Respondent is medically incompetent to perform his maritime duties because he is epileptic. The Complaint in this matter set forth the following factual allegations:

> 1. On August 05, 2011, Respondent was examined by David W. Wheeler, MD who diagnosed the Respondent with Localization-related (focal) (partial) epilepsy and epileptic syndromes with complex partial seizures; with intractable epilepsy.
>
> 2. On September 27, 2011, at approximately 1600 (CTZ) Respondent was serving as Mate and had direction and control of the uninspected towing vessel, M/V H.B. 1 (ON 271177), as required by 46 CFR 15.610.
>
> 3. On September 27, 2011, at approximately 1600, Respondent had a syncopal episode.
>
> 4. On October 13, 2011, Respondent was examined by Thomas O. Mayer, MD who diagnosed the Respondent with Convulsions (primary), consider possible focal onset seizure disorder, possibly related to previous stroke.
>
> 5. On November 21, 2011, at approximately 1430 (CTZ), Respondent was serving as Mate and had direction and control of the uninspected towing vessel, M/V ST. GENEVIEVE (ON 541599) as required by 46 CFR 15.610.
>
> 6. On November 21, 2011, at approximately 1430, Respondent had a syncopal episode.

> 7. Mariners with a seizure disorder who are not seizure free for a period of 8 years are unfit and disqualified for service as a credentialed Merchant Mariner with an officer endorsement.
>
> 8. The Respondent's diagnosis of epilepsy coupled with his September 27, 2011 and November 21, 2011, syncopal episodes are acts of incompetence relating to the operation of a vessel, as described in 46 USC 7703(4) and 46 CFR 5.31.

The Coast Guard proposed revocation of Respondent's Credential.

On March, 22, 2012, Respondent, through counsel, filed an Answer admitting paragraphs 2 and 5 and denying paragraphs 3, 6, and 8. Regarding paragraph 1, Respondent admitted he consulted with Dr. Wheeler but denied suffering "Localization-related (focal) (partial) epilepsy and epileptic syndromes with complex partial seizures; with intractable epilepsy." Regarding paragraph 4, Respondent admitted consulting with Dr. Mayer but denied having suffered "Convulsions (primary), consider possible focal onset seizure disorder, possibly related to previous stroke." Respondent stated he had not seen either doctor's medical records and therefore could not respond to any diagnosis or impressions contained in those records. With respect to paragraph 7, Respondent asserted that it is a legal conclusion requiring no response, but to the extent that it implied he had suffered a seizure disorder, he denied the allegation.

The hearing took place in the Federal District Courthouse, Casper, Wyoming on August 28, 2012. 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 located at 33 C.F.R. Part 20. Mr. Eric Bauer and Brian Crockett, Esq. represented the Coast Guard. Stuart Healey, Esq. of the Healey Law Firm represented Respondent.

At the hearing, four witnesses testified on behalf of the Coast Guard. Respondent called one witness and also testified on his own behalf. The Coast Guard submitted seven exhibits, all of which were received into evidence. Respondent submitted ten exhibits, which were also received into evidence. The Witness and Exhibit List is attached to this decision as **Appendix B**.

At the end of the hearing, the Coast Guard moved that Respondent's credential be retained pursuant to 46 C.F.R. § 5.521(b). This regulation states that when a hearing is continued or delayed, "the Administrative Law Judge returns the license, certificate, or document to the respondent: unless a prima facie case has been established that the respondent committed an act or offense which shows that the respondent's service on a vessel would constitute a *definite* danger to public health, interest or safety at sea." (Emphasis added.). I denied the motion because, based on the record and particularly the evidence that Respondent is on medication and seizure-free for almost a year, it was not clear at the time that Respondent's service would constitute a *definite* danger to safety at sea.

On October 10, 2012, the Coast Guard submitted a post-hearing brief including proposed findings of fact and conclusions of law. Respondent's counsel submitted his proposed findings of fact and conclusions of law on October 15, 2012. Rulings on the proposed findings and conclusions are found in **Attachment C**. This matter is now ripe for decision.

After careful review of the entire record taken as a whole, including witness testimony, applicable statutes, regulations, and case law, I find the charged violation of incompetence based on Respondent's medical condition **PROVED**.

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.

Respondent's Credential

1. At all times relevant herein, Respondent, Carl Daniel Bradshaw, was the holder of Coast Guard issued Merchant Mariner Credential Number 000027799. [Ex. CG-07.]
2. Respondent's MMC bears the following endorsements:
    a. Authorizing Respondent to serve as Master of Towing Vessels upon Great Lakes, Inland Waters and Western Rivers and Radar Observer (Unlimited). [Ex. CG-07.]
    b. Authorizing service as Tankerman-PIC (Barge) Limited to Dangerous Liquid (DL) Cargoes. [Ex. CG-07.]
    c. Entry-level endorsements authorizing service as Ordinary Seaman, Wiper, and Stewards Dept (FH). [Ex. CG-07.]
3. This credential expires September 03, 2014.

Respondent's Medical Background

4. On or about August 2010, Respondent suffered a "left side stroke." [Ex. CG-01, R-A; Tr. at 70, 75, 88, 116, 122, 144.]
5. Following that incident, the Respondent's primary treating physician, Dr. Finley, prescribed Respondent the blood-thinning medication Coumadin. [Ex R-D.]
6. Ms. Deb Johnston is a certified physician assistant (P.A.) who worked with Dr. Finley at the time he was treating Respondent. [Tr. at 108.] Ms. Johnston now works for Chris Brown, M.D. in Sheridan, WY. [Ex. CG-04, R-C; Tr. at 104.] Ms. Johnston treated Respondent at both physicians' offices. [Tr. at 116.]

7. On or about March 8, 2011, Dr. Finley prescribed Respondent Pradaxa instead of Coumadin. [Ex. R-C; Tr. at 110-11.]
8. On July 02, 2011, Respondent had a syncopal episode while on an airplane where he passed out for twenty minutes. Following the episode, he went to the emergency room where they found nothing wrong. [Ex. CG-01, CG-03, CG-04, R-A, R-B, R-C; Tr. at 70, 88.]
9. On July 27, 2011, Respondent had another syncopal episode at home where he passed out for 30 minutes. Again, an ER visit did not find anything wrong. [Ex. CG-01, CG-04, CG-06, R-A, R-C; Tr. at 70, 114.]
10. David W. Wheeler, M.D. is a neurologist in Casper, WY. [Ex. CG-01; Ex. R-A, R-A-1; Tr. at 74, 130.]
11. On August 05, 2011, Dr. Wheeler examined Respondent as part of a consultation following the two syncopal episodes. [Answer; Ex. CG-01; Ex. R-A; Tr. at 68, 81, 87.]
12. As part of that examination, Respondent was given an Electroencephalogram (EEG). [Ex. CG-01.]
13. On August 05, 2011, Dr. Wheeler reviewed the results of the Respondent's EEG. [Ex. CG-01.]
14. Dr. Wheeler's medical record of that examination states that he strongly suspects Localization-related epilepsy and intended to obtain a Brain MRI with seizure protocol. [Ex. CG-01.]

15. Dr. Wheeler's assessment continued with "Localization-related (focal) (partial) epilepsy and epileptic syndromes with complex partial seizures; with intractable epilepsy. (345.41)." [Ex. CG-01; Ex. Resp. A; Tr. at 66-67, 72, 77, 101.]
16. Dr. Wheeler prescribed Vimpat. [Ex. CG-01, R-A; Tr. at 71, 101.]
17. Vimpat is a brand name for Lacosamide. [http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000506/.]
18. Lacosamide is an anti-seizure medication designed to prevent seizure episodes. [Ex. CG-01, R-A; Tr. at 71.]

Episode Aboard the M/B H.B. 1 and Subsequent Medical Evaluations

19. The M/V H.B. 1 (ON 271177) is a 74.8 foot uninspected towing vessel. [Ex. CG-02.]
20. Every towing vessel of at least 8 meters (at least 26 feet) in length must be under the direction and control of a Coast Guard-Credentialed mariner. [46 CFR § 15.610.]
21. On September 27, 2011, Captain Leo J. Toups III, was the Captain (Master) of the M/V H.B. 1 and Respondent served as Mate, as required by the regulations. [Answer; Ex. CG-02; Tr. at 20-21; 46 CFR § 15.610.]
22. On September 27, 2011, at approximately 1600 Central Time Zone (CTZ), Respondent had direction and control of the M/V H.B. 1. He was alone in the wheelhouse at that time. [Answer; Ex. CG-02; Tr. at 21-22, 27, 142.]
23. The M/V H.B. 1 was moored up in the Capital Fleet and standing by to take loaded gasoline barges in tow. [Tr. at 23-24.]
24. On September 27, 2011, at approximately 1600 CTZ, Respondent had a syncopal episode with seizure-like symptoms. [Ex. CG-02, CG-03, CG-04, R-B, R-C; Tr. at 22-23, 25, 142-143, 145-149.]

25. Captain Toups observed Respondent was unresponsive, laying on his back in the wheelhouse chair, feet on the dash, shaking, eyes rolled in the back of his head, and arm curled up toward his chest. [Ex. CG-02; Tr. at 22-23, 25.]
26. Respondent was transported by Medevac from the M/V H.B. 1. He was treated and released, and advised to see his regular physcian for tests and evaluation. [Ex. CG-02; Tr. at 27-28.]
27. The operations of the M/V H.B. 1 were delayed until another pilot came on board. [Tr. at 29.]
28. A form CG-2692 Report of Marine Accident, Injury or Death concerning the Respondent's Sepetmeber 27, 2011 syncopal episode was submitted to the Coast Guard. [Ex. CG-01; Tr. at 21.]
29. Thomas O. Mayer, M.D. is a neurologist. [Ex. CG-03, R-B; Tr. at 73-74, 130.]
30. On October 13, 2011, Dr. Mayer examined Respondent for a complaint of "spells." [Answer; Ex. CG-03, R-B; Tr. at 74.]
31. In the History section of his notes, Dr. Mayer wrote that Respondent "was apparently seen in the ER after one of these events and they did a Head CT which was personally reviewed with him today and it was a normal study." [Ex. CG-03.]
32. Dr. Mayer's assessment was "Convulsions NEC (primary), consider possible focal onset seizure disorder, possibly related to previous stroke." [Ex. CG-03, R-B; Tr. at 75.]
33. On October 13, 2011, Respondent reported to Dr. Mayer that he had discontinued the use of Pradaxa. [Ex. CG-03, R-B.]

34. On October 13, 2011, Dr. Mayer determined Respondent's syncopal episodes were not likely related to Pradaxa dosing. [Ex. CG-03, R-B; Tr. at 75.]

35. Dr. Mayer's notes state that Respondent may need to have an EEG or brain MRI performed and that he would not treat Respondent at that time because the etiology of Respondent's condition was unknown. [Ex. CG-03.]

36. Dr. Mayer's notes indicate that Respondent requested a return to work letter, but Dr. Mayer "would wait until further information is obtained." [Ex. CG-03.]

37. Ms. Johnston, P.A., saw Respondent at Dr. Finely's family practice on October 27, 2011. [Ex. CG-04, R-C; Tr. at 126.]

38. Based on Respondent's medical records, Ms. Johnston directed him to cease Pradaxa and use Coumadin instead. [Ex R-C-1.]

39. On October 27, 2011, Ms. Johnston provided Respondent with a letter clearing him to return to work. [Ex R-C-1.]

Episode Aboard the M/V St. Genevieve and Subsequent Medical Evaluations

40. The M/V ST. GENEVIEVE (previously ACCU VIII) (ON 541599) is a 70 foot, uninspected towing vessel. [Ex. CG-05.]

41. On November 21, 2011, Captain Jackie W. Hudson was the Relief Captain (Master) of the M/V ST. GENEVIEVE. Respondent served as Mate, and Mr. Troy C. Swear served as Tankerman. [Ex. CG-05; Tr. at 34, 52-53.]

42. On November 21, 2011, at approximately 1430 CTZ, Captain Hudson was asleep in his cabin with Respondent at the watch while the M/V ST. GENEVIEVE was pushed in, standing by with two empty "red flag" barges. [Ex. CG-05; Tr. at 37; Tr. at 40-41.]

43. A barge certificated to carry liquid hazardous material cargoes in bulk is required to display a red flag by day or a red light by night during transfers of cargo. 46 C.F.R § 151.45-9. The general regulations contained in 46 C.F.R. Part 151 apply to such barges.
44. On November 21, 2011 at approximately 1430 CTZ, Respondent had a syncopal episode with seizure-like symptoms. [Ex. CG-05, R-B, R-C-1; Tr. at 37-39, 55-56.]
45. Mr. Swear observed the episode and sounded the vessel's general alarm. [Tr. at 37, 40, 55.]
46. Captain Hudson reported to the wheelhouse and observed Respondent as unresponsive, on the floor, leaning againt a chair, jerking, shaking, slobbering, wheezing, trying to catch his breath, mumbling, with his eyes rolled back. [Ex. CG-05; Tr. at 37-39, 44.]
47. Mr. Swear observed Respondent as unresponsive, with fluid and snot coming from his mouth, eyes rolled back in his head, shaking, and incoherent. [Ex. CG-05; Tr. at 55.]
48. Respondent was taken by ambulance from the M/V ST. GENEVIEVE to an emergency room. [Ex. 05; Tr. at 38, 44.]
49. The operations of the M/V ST. GENEVIEVE were delayed until the following day, when a replacement for Respondent arrived on board. [Tr. at 44-45.]
50. A form CG-2692 Report of Marine Accident, Injury or Death concerning the Respondent's November 21, 2011 syncopal episode was submitted to the Coast Guard. [Ex. CG-05; Tr. at 35, 53.]

51. Respondent had a follow-up visit with Dr. Wheeler on August 20, 2012. No new EEGs or MRIs were done. [Ex. R-A-1.]

52. Dr. Wheeler's follow-up assessment was that Respondent had Localization-related epilepsy with seizures controlled on Vimpat, "Other late effects of cerebrovasular Disease (438.89)" and "Localization-related (focal) (partial) epilepsy and epileptic syndromes with complex partial seizures; without mention of intractable epilepsy. (345.40)." [Ex. R-A-1.]

Coast Guard Review of Respondent's Fitness for Duty

53. Dr. Laura Girandola Gillis is the chief of the Medical Evaluations Division at the National Maritime Center. She was previously a flight surgeon and a private practice physician, and is board-certified in occupational medicine. [Tr. 63-64.]

54. Dr. Gillis is also referred to as the Federal Maritime Surgeon. [Tr. at 65.]

55. Dr. Gillis' day-to-day responsibilities as the Federal Maritime Surgeon include responsibility for running the Medical Evaluations Division at the National Maritime Center and ensuring that all medical evaluations are carried out in a manner of the highest quality, consistent with current medical standards. [Tr. at 65.]

56. The Coast Guard's current guidance for evaluating a mariner's medical fitness is encompassed in Navigation Vessel and Inspection Circular (NVIC) 0408. [Tr. at 66.].

57. The evaluation of a mariner's medical fitness by the Medical Evaluations Division at the National Maritime Center is an administrative review of medical records and relies on the observations of other physicians. [Tr. at 67.]

58. Dr. Gillis reviewed Respondent's medical records from Dr. Wheeler, dated August 5, 2011, and Dr. Mayer, dated October 13, 2011. [Tr. at 68, 74.] She also reviewed some records from Dr. Finley and Ms. Johnston. [Tr. at 82.]

59. Dr. Gillis interpreted each report as having diagnosed Respondent with epilepsy. Based on the reports, she stated Respondent's history, symptoms, and EEG results were "highly suggestive" of epilepsy. [Tr. at 68-76, 89.] She did not interpret Dr. Wheeler's report of August 2012 as providing any new information regarding Respondent's condition. [Tr. at 77.]

60. Dr. Gillis stated that, in order to be considered for licensure, mariners with a history of epilepsy need to be eight years seizure-free and on a stable dose of medication for two years at the time of application. [Tr. at 72.]

61. Dr. Gillis stated that she would not find Respondent fit for duty because he has a history of epilepsy that has only been diagnosed within the last year and has not been seizure-free long enough to qualify for licensure at this time. [Tr. at 77.]

III. DISCUSSION

A. Principles of Law

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges have the authority to suspend or revoke Coast Guard-issued credentials or endorsements. See 46 C.F.R. § 5.19(b). These proceedings are conducted under the Administrative Procedure Act (APA). 46 U.S.C. § 7702(a).

Section 7(c) of the APA provides in pertinent part:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof . . . . A sanction may not

> be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

5 U.S.C. § 556(d). In 1981, the Supreme Court stated that "[t]he language of [section 7(c) of the APA] itself implies the enactment of a standard of proof, and that standard of proof is the preponderance of the evidence standard." Steadman v. SEC, 450 U.S. 91, 98 (1981). A party proves a fact under the preponderance of the evidence standard by proving "that the fact's existence is more likely than not." Greenwich Collieries v. Director, Office of Workers' Compensation Programs, 990 F.2d 730, 736 (3d Cir. 1993).

Unless superseded by an express statutory provision, the APA requires that the party who bears the ultimate burden of persuasion prove his case by a preponderance of the evidence. Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries 512 U.S. 267, 114 S.Ct. 2251 (1994). In Coast Guard proceedings, the Coast Guard bears the burden of proof when seeking suspension or revocation of a merchant mariner's credentials. 33 C.F.R. § 20.702(a).

In this case, the Coast Guard alleges that Respondent is a holder of Coast Guard-issued credentials and that he suffered syncopal episodes on two occasions while serving as Mate and having direction and control of an uninspected towing vessel. The Coast Guard further alleges that Respondent's diagnosis of epilepsy, coupled with his syncopal episodes, are acts of incompetence relating to the operation of a vessel. The Coast Guard bears the burden of proving these allegations by reliable, credible, and probative evidence showing that it is more likely than not that Respondent is unable to perform the duties required of him as a Credentialed mariner due to his physical condition. If the Coast Guard establishes those

facts, the statute authorizes suspension or revocation of the Respondent's Coast Guard-issued credentials.

Coast Guard regulations state that an investigating officer will seek revocation of a respondent's credential or endorsements when incompetence is proved. 46 C.F.R. § 5.61(a)(7). However, 46 C.F.R. § 5.567 (b) states that "[i]f the Administrative Law Judge determines that the respondent is professionally incompetent in the grade of the license, certificate or document held, but is considered competent in a lower grade, the credential or endorsement may be revoked and the issuance of one of a lower grade ordered." In the Table entitled "Suggested Range of an Appropriate Order," codified at 46 C.F.R. § 5.569, the suggested penalty range for incompetence states that "[t]he only proper order for a charge of incompetence found proved is revocation."

B. Jurisdiction

Although the jurisdictional facts alleged in the Complaint are admitted, the burden of establishing jurisdiction nonetheless remains. See 33 C.F.R. § 20.310(c); see also Appeal Decision 2656 (JORDAN) (2006) (stating that, irrespective of Respondent's admission of charged offense, appeal must be granted where jurisdiction is not established). The controlling statute, 46 U.S.C. § 7703, currently states: "A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder— (4) has committed an act of incompetence relating to the operation of a vessel." Congress enacted 46 U.S.C. § 7703 with the express purpose of revoking the credentials of mariners who represent a threat to safety at sea. 46 U.S.C. § 7701(a) and (b).

Previously, the statute only authorized suspension and revocation procedures when a mariner committed an act of incompetence while acting under the authority of his

credentials. However, this statute has been amended. House Conference Report No. 108–617, which accompanied the Coast Guard and Maritime Transportation Act of 2004 stated that Section 408 of the House bill would allow the Coast Guard to suspend or revoke an MMC if a mariner commits an act of incompetence, regardless of whether the mariner was acting under the authority of the MMC at the time the act occurs. Section 305 of the Senate amendment contained a similar provision, which was adopted.

The Coast Guard asserts jurisdiction over this matter because Respondent had two syncopal episodes while acting under the authority of his MMC, but while the record clearly establishes this, it is not necessary for jurisdiction to be established. Respondent's status as a Credentialed mariner, in and of itself, affords the Coast Guard jurisdiction to institute a suspension and revocation proceeding alleging incompetence. Accordingly, I find jurisdiction is established.

C. Incompetence: Elements of a *Prima Facie* Case

The statute does not define incompetence; however, Coast Guard regulations have consistently defined incompetence as "the inability 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 (50 Fed. Reg. 32184, August. 9, 1985).

The Commandant has held that the "definition of incompetence set forth in 46 C.F.R. § 5.31 does not 'speak[] entirely in the present tense,' and … that a mariner's medical competence must be determined not based solely on a past incident but by reference to competent medical testimony concerning the individual's condition and necessary treatment, and the risks they present." Appeal Decision 2698 (HOCKING) (2012). Incompetence is a basis for suspension or revocation under 46 U.S.C. § 7703(4) "but it is not an 'offense;' it is

a condition." Appeal Decision 1720 (HOWELL) (1968) (aff'd NTSB Order No. EM-5, 1 NTSB 2165).

The Coast Guard argues that over period of four months, Respondent suffered four separate syncopal episodes and was diagnosed with epilepsy by Dr. David Wheeler. The Agency's position is that "[b]y both statute and regulation, mariners suffering from epilepsy are deemed physically unfit to hold a merchant mariner credential. The diagnosis of epilepsy was based on medical history and EEGs suggestive of epilepsy." CG Brief at 17.

Respondent does not dispute he suffered episodes of syncope, but argues that there is insufficient evidence of epilepsy and attributes his symptoms to side effects of Pradaxa. Respondent asserts that he has not suffered a syncopal episode since discontinuing the drug and he is seizure-free on his current medication. Respondent also asserts that the EEG does not confirm a diagnosis of epilepsy and he has not undergone any brain scans.

In reviewing medical evidence, "[t]he Administrative law Judge is not bound by medical findings and opinions. The ultimate finding as to fitness is his alone. . . . On the other hand, the Administrative Law Judge's discretion cannot extend beyond the substantial evidence in the record." Appeal Decision 2547 (PICCIOLO) (1992) (internal citations omitted). The record consists of numerous medical reports with inconclusive findings. There are reports from his regular treating physician, a physician's assistant, emergency room notes, and reports of two neurologists who either examined or treated the Respondent. These records are sometimes conflicting, but none contain conclusive evidence of epilepsy. I particularly note there is no MRI or other brain scan evidence establishing the etiology of Respondent's condition.

Both parties listed the neurologists who treated or examined Respondent as witnesses, but neither party called these witnesses at the hearing. Thus, the record is devoid of any testimony by these specialists regarding the nature of the diseases, the specific testing, symptoms, history, or other factors which they relied upon when diagnosing Respondent. Instead, I must rely on their medical records and the testimony of a reviewing physician who is an occupational medicine specialist, not a neurologist. The parties also chose not to call Respondent's general physician to offer testimony on Respondent's condition.

Based on the evidence and facts of this case, I need not reach a conclusion as to whether Respondent indeed suffers from epilepsy in order to determine Respondent's competence to hold his current Credential and endorsements.

In 2008, the Coast Guard issued Navigation and Vessel Inspection Circular (NVIC) No. 04–08, which provided new "guidance for evaluating the physical and medical conditions of applicants for merchant mariner documents and licenses." NVIC No. 04-08 was a "critical component" of the Agency's response to an NTSB report following the 2003 collision of the Staten Island ferry ANDREW J. BARBERI, in which 10 passengers died and 70 more were injured. Medical and Physical Evaluation Guidelines for Merchant Mariner Credentials, 71 Fed.Reg. 56998–01, 2006 WL 2769993, at 56,998–99 (Sep. 28, 2006). The reasoning was that:

> T]here are public safety risks associated with some medical and physical conditions, particularly when these conditions may result in the sudden incapacitation of mariners on vessels. These conditions can be the root cause of a maritime mishap. The NTSB [determined that the assistant captain's unexplained incapacitation was a causal factor in the [Staten Island ferry] casualty.

Id. In its report on the Staten Island ferry case, the Board found that a lack of medical evidence prevented it from determining whether a medical or behavioral condition, alone or in combination, caused the assistant captain to be unresponsive to cues of the impending allision. Even though the assistant captain had undergone extensive cardiological and neurological examinations, the Board felt "none is especially compelling, and there are insufficient data to determine which, if any, might have occurred." NTSB Marine Accident Report, Allision of Staten Island Ferry *Andrew J. Barberi* St. George, Staten Island, New York, NTSB/MAR-05/01, at http://www.ntsb.gov/doclib/reports/2005/MAR0501.pdf.

The Board followed this by stating,

> Yet, several of the assistant captain's known medical conditions and medications should have called into question his ability to pilot a vessel safely. In particular, the assistant captain had chronic back pain, continuously treated with tramadol, a potentially impairing medication that had the additional risk of increasing the likelihood of seizures. In addition, he was being treated for a variety of other ailments (high blood pressure, high cholesterol, insomnia) by several physicians and dentists and had regularly taken medications prescribed by those health practitioners.

Id. Clearly, the Board considers a mariner's medical fitness relevant to his ability to serve safely.

It is undisputed here that Respondent lost consciousness on four occasions over a period of four months. The question is what these incidents signify regarding Respondent's medical condition and his ability to safely carry out his duties as a Credentialed mariner. The fact that Respondent has suffered syncope and convulsions clearly calls into question his ability to pilot a vessel safely. If a Mariner holds a credential and is unable to perform his required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof, then he is incompetent. It does not matter whether

those acts occur while he is operating a vessel, only that those acts could impact the safe operation of a vessel. It is clear that the vessel operator suddenly losing consciousness is an act relating to the operation of the vessel and is manifestly unsafe.

D. Respondent's Medical Condition

1. Summary of Medical Evidence

The etiology of Respondent's condition has been considered by several physicians. Treatment notes from Dr. John W. Finley, Respondent's primary physician, show his office referred Respondent to a specialist. [Ex. R-D.] Dr. David B. Wheeler, a neurologist, examined Respondent on August 5, 2011 concerning "syncopal episodes and EEG results." [Ex. R-A.] He stated that the EEG showed "occasional focal slowing with sharp components over the right temporal region. Therefore, I strngly [sic] suspect he has symptomatic localization-related epilepsy. . . . We will plan to obtain a brain MRI with seizure protocol in the near future." Id. Respondent was to return for a follow-up appointment on October 18, 2011. There is no evidence in the record to show whether such a follow-up occurred. Dr. Wheeler conducted a second examination of Respondent on August 20, 2012. [Ex. R-A-1.] No new testing was considered, though Respondent did report having been seizure-free since their previous consultation. Dr. Wheeler's assessment at this exam was "localization-related (focal) (partial) epilepsy and epileptic syndromes with complex partial seizures; without mention of intractable epilepsy." Id.

Dr. Thomas O. Mayer, also a neurologist, examined Respondent on October 13, 2011. [Ex. R-B.] Respondent reported having a recent spell and a history of three very similar spells, which Respondent attributed to being on Pradaxa. Dr. Mayer's assessment was "Convulsions NEC . . . consider possible focal onset seizure disorder, possibly related

to previous stroke. Not likely related to Pradaxa dosing. Consider possible but less likely a cardiac etiology." Id. Dr. Mayer felt he could not "treat at present as not clear of the exact etiology of spells" and planned to obtain records from Dr. Wheeler to determine what testing had been done and to make further recommendations at that time. Id.

Although both neurologists felt additional testing, such as brain scans, was a necessary part of the diagnostic package, the record contains no evidence that such scans were ever performed. Dr. Mayer's notes make reference to a Head CT performed in an ER after one of Respondent's syncopal episodes but call it a normal study. Respondent was scheduled for a sleep study on September 4, 2011 but this study, if performed, is not in the record. [Ex. R-D.] The only specialized testing in the record is an EEG conducted during Respondent's August 5, 2011 appointment with Dr. Wheeler that was interpreted as "suggestive" of epilepsy.

Respondent also saw Dr. Kim Fehir, a hematologist, on October 18, 2011. [Ex. R-E.] Dr. Fehir diagnosed, inter alia, "possible seizures related to Pradaxa." However, she wrote in the narrative section of the report that "he apparently developed possible cerebral blood clots while he was on Pradaxa and off of Coumadin. He eventually also apparently had seizures. He was seen in several different emergency rooms in different states. I have no records of these."

Dr. Laura Gillis of the National Maritime Center was the only physician to testify at the hearing. Dr. Gillis relied on medical records provided to her by the parties to formulate her opinion, and testified that this is a common and accepted medical practice. [Tr. at 67-68.] She considered Respondent's recent history of stroke and childhood history of head injury as risk factors for a seizure disorder. [Tr. at 70.] Although Dr. Gillis said Pradaxa can

cause lightheadedness and dizziness, she said it would not cause symptoms as severe as Respondent's and agreed with the neurologists that it was unlikely to be related to his seizures. [Tr. at 72.] She also said it was not likely that, if Respondent discontinued use of Pradaxa on October 18, 2011, enough would be left in his system to cause a syncopal episode on November 21, 2011. [Tr. at 84-85.]

Dr. Gillis agreed with Dr. Wheeler's diagnosis of "localization-related or focal/partial epilepsy and epileptic syndromes with complex partial seizures with intractable epilepsy." Id. After reviewing Dr. Mayer's report, Dr. Gillis stated that the reports gave her concern because "[n]ow I have two specialists who concur that this mariner has a seizure disorder." [Tr. at 75.] She also gave great weight to the EEG which showed an abnormal pattern which she felt was suggestive of a seizure disorder or epilepsy. [Tr. at 76.]. However, she acknowledged that the test was not conclusive. [Tr. at 89.] Dr. Gillis believed that Dr. Mayer's diagnosis was more generalized than Dr. Wheeler's because he did not have the benefit of the EEG and Respondent's history:

> That's what medical providers do when they think that's going to be the diagnosis but they still have to get the records from the last guy or get the results of X, Y, and Z tests. So they give a generalized diagnosis and then "consider possible," meaning "this is what I'm thinking but I've got to get the rest of this before I can confirm that. [Tr. at 91.]

Dr. Gillis also opined that there is no significant difference between focal onset seizure disorder and localization-related epilepsy. [Tr. at 93.]

Respondent also called Deb Johnston, a physician's assistant, to testify on his behalf. Ms. Johnston has provided primary care for him and is familiar with his history, but was not aware of the severity of the two syncopal episodes he suffered while piloting tow vessels or the diagnoses recorded by Dr. Wheeler or Dr. Mayer. [Tr. at 129-30.] She was also unaware

of the nature of the cargo being transported by the tow vessels when she issued a "return-to-work" letter for Respondent. [Tr. at 128.] Ms. Johnston acknowledged that the opinions of the neurologists would override her own. [Tr. at 131.] She also said that Respondent had told her "he had seen . . . a couple specialists, and they felt it was the Pradaxa that may have been causing [the syncopal episodes], and they put him back on the Coumadin." [Tr. at 116-17.] Since Respondent thought the Pradaxa was making him sick and seemed to be doing fine on Coumadin, she recommended that he stay on Coumadin. [Tr. at 118].

2. Medical Terminology and Definitions

The record in this case contains a large volume of medical evidence. The parties have offered some definitions of the medical terminology in their proposed findings of fact and conclusions of law, and I have accepted these definitions. However, other terms were left undefined. In the absence of relevant testimony by medical professionals and in order to conduct a meaningful review of the record, I have taken official notice of certain definitions and descriptions publicly available from reliable sources, including the National Institute of Health's Online Medical Dictionary and National Institute for Neurological Disorders and Stroke, and Stedman's Medical Dictionary. This information "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." F.R.E. Rule 201. Further, this information does not rise to the level of "material facts" on which the decision rests. See 33 C.F.R. § 20.806. A material fact is one which might affect the outcome of the case under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Coast Guard rules concerning official notice parallel those in the APA and provide that "[w]hen all or part of a decision rests on the official notice of a material fact not

appearing in the evidence in the record, the decision must state as much; and any party, upon timely request, shall receive an opportunity to rebut the fact." 33 C.F.R. § 20.806. The parties may file a motion under 33 C.F.R. § 20.904(a) to reopen this proceeding to rebut any officially noticed fact.

The medical terminology I have take notice of is as follows:

1. "Syncope." The National Institute of Neurological Disorders and Stroke (NINDS) at the National Institutes of Health (NIH) states that syncope is a medical term used to describe a temporary loss of consciousness due to the sudden decline of blood flow to the brain. Syncope is commonly called fainting or "passing out." [NINDS Syncope Information Page http://www.ninds.nih.gov/disorders/syncope/syncope.htm.] Syncope is otherwise defined as loss of consciousness and postural tone caused by diminished cerebral blood flow. [Stedman's Medical Dictionary 28th Edition, © 2006 Lippincott Williams & Wilkins.]
2. "Convulsion." A convulsion is either "an abnormal violent and involuntary contraction or series of contractions of the muscles" or a synonym for seizure. [Definition from National Institutes of Health (NIH) On-line Medical Dictionary (Merriam-Webster), http://www.merriam-webster.com/ medlineplus/convulsion.]
3. "Seizure." Seizure is defined as "a sudden attack (as of disease); especially: the physical manifestations (as convulsions, sensory disturbances, or loss of consciousness) resulting from abnormal electrical discharges in the brain (as in epilepsy)." [Definition from NIH On-line Medical Dictionary (Merriam-

Webster) http://www.merriam-webster.com/medlineplus/seizure.] NINDS states that "Seizures are divided into two major categories -- focal seizures and generalized seizures. . . . Focal seizures, also called partial seizures, occur in just one part of the brain. . . . Generalized seizures are a result of abnormal neuronal activity on both sides of the brain. Not all seizures can be easily defined as either focal or generalized. Some people have seizures that begin as focal seizures but then spread to the entire brain. Other people may have both types of seizures but with no clear pattern." [NINDS page on Epilepsy, http://www.ninds.nih.gov/disorders/epilepsy/detail_epilepsy.htm#222133109.]

4. "Complex Focal Seizure." According to NINDS, "[i]n a complex focal seizure, the person has a change in or loss of consciousness. His or her consciousness may be altered, producing a dreamlike experience. People having a complex focal seizure may display strange, repetitious behaviors such as blinks, twitches, mouth movements, or even walking in a circle. These repetitious movements are called automatisms. More complicated actions, which may seem purposeful, can also occur involuntarily. Patients may also continue activities they started before the seizure began, such as washing dishes in a repetitive, unproductive fashion. These seizures usually last just a few seconds." [NINDS page on Epilepsy, http://www.ninds.nih.gov/ disorders/epilepsy/detail_epilepsy.htm#222133109.]

5. "Epilepsy." NINDS states that "Epilepsy is a brain disorder in which clusters of nerve cells, or neurons, in the brain sometimes signal abnormally. . . . In epilepsy, the normal pattern of neuronal activity becomes disturbed, causing

strange sensations, emotions, and behavior, or sometimes convulsions , muscle spasms, and loss of consciousness. . . . Having a seizure does not necessarily mean that a person has epilepsy. Only when a person has had two or more seizures is he or she considered to have epilepsy." [NINDS page on Epilepsy, http://www.ninds.nih.gov/disorders/epilepsy/detail_epilepsy.htm#222133109.] Epilepsy is considered intractable when a person "will continue to experience seizures even with the best available treatment." Id.

6. "Electroencephalography (EEG)." This is a medical procedure that monitors brain activity through the skull. EEG is used to help diagnose certain seizure disorders, brain tumors, brain damage from head injuries, inflammation of the brain and/or spinal cord, alcoholism, certain psychiatric disorders, and metabolic and degenerative disorders that affect the brain. EEGs are also used to evaluate sleep disorders, monitor brain activity when a patient has been fully anesthetized or loses consciousness, and confirm brain death." [NINDS page on Neurological Diagnostic Tests and Procedures, http://www.ninds.nih.gov/disorders/misc/diagnostic_tests.htm; Tr. at 75-76, 89-90, 92-93, 97-99.]

3. Analysis of Medical Evidence

The testimony of Respondent and other witnesses to his on-board episodes clearly establish that Respondent has twice suffered a loss of consciousness while having direction and control of a vessel. The question is whether the evidence establishes, as the Coast Guard

alleges, that these episodes were caused by epilepsy. In order to make a determination, I must consider what that condition entails.

Among the physicians whose reports were introduced into evidence, I find Dr. Mayer's assessment that Respondent suffered Convulsions NEC with an unknown etiology to be the most accurate assessment. This is due to the lack of any testing designed to confirm a diagnosis and the reliance instead on Respondent's medical history. Both Dr. Wheeler and Dr. Mayer believed Respondent suffers from some form of neurological disorder causing either convulsions or seizures, but recognized the need for further examination to determine the nature of the disorder.

Initially, Dr. Wheeler strongly suspected that Respondent had "symptomatic localization-related epilepsy." Dr. Wheeler's assessment on August 20, 2012 was "localization-related (focal) (partial) epilepsy and epileptic syndromes with complex partial seizures; without mention of intractable epilepsy," though no additional testing was conducted and he offered no explanation for the more decisive diagnosis.

I find Dr. Wheeler's diagnosis problematic for several reasons. The evidence has established that at the time of Dr. Wheeler's first examination, Respondent had suffered two self-described syncopal episodes when he was not at work and one episode resembling a seizure while on a vessel. It is not clear that these episodes meet the minimum NINDS definition of epilepsy, which requires two seizures. At his August 20, 2012 appointment, Respondent denied having suffered any more seizures since he last saw Dr. Wheeler, whereas the evidence establishes that he suffered another syncopal episode with seizure-like symptoms in November 2011. While this information would seem to support a firmer diagnosis of epilepsy, it is not apparent that Dr. Wheeler knew that the incident aboard the

M/V ST. GENEVIVE occurred, or had the benefit of the witness descriptions of either vessel-related incident. It is unclear from the record what specific medical symptoms his diagnosis is based on, other than Respondent's self-reported history and an EEG "suggestive" of epilepsy. As episodes of syncope and/or convulsions can be caused by conditions other than epilepsy, I cannot conclude from the information in the record that Dr. Wheeler's diagnosis was supported by sufficient evidence to be reliable.

Next, I note that NINDS describes complex focal seizures as causing symptoms such as changes in or loss of consciousness, a dreamlike experience, and/or repetitious movements, usually lasting just a few seconds. The testimony of record, however, does not match this description, as the witnesses to Respondent's episodes aboard vessels described involuntary jerking motions, salivating, and total loss of consciousness lasting several minutes.[1] No medical professional has considered these descriptions of Respondent's behavior in formulating a diagnosis or opined on what they signified from a medical standpoint. I therefore cannot conclude that these episodes were definitely "seizures" even though Respondent displayed seizure-like symptoms. With respect to the two other syncopal episodes, the only evidence is that Respondent lost consciousness for an unspecified period of time, with no mention of any type of seizure-like symptoms.

NINDS states that "[i]t may take many tests and careful monitoring by an experienced physician to tell the difference between epilepsy and other disorders." NINDS

[1] Certain forms of seizure do fit this description: tonic seizures cause stiffening of muscles of the body, generally those in the back, legs, and arms. Clonic seizures cause repeated jerking movements of muscles on both sides of the body. Myoclonic seizures cause jerks or twitches of the upper body, arms, or legs. Atonic seizures cause a loss of normal muscle tone. The affected person will fall down or may drop his or her head involuntarily. Tonic-clonic seizures cause a mixture of symptoms, including stiffening of the body and repeated jerks of the arms and/or legs as well as loss of consciousness. Tonic-clonic seizures are sometimes referred to by an older term: grand mal seizures. NINDS page on Epilepsy, http://www.ninds.nih.gov/disorders/epilepsy/detail_epilepsy.htm#222133109. However, the only descriptions of Respondent's symptoms are by lay persons; no medical evidence in the record considers wehther Respondent could have suffered any of these forms of seizure.

page on Epilepsy, http://www.ninds.nih.gov/disorders/epilepsy/detail_epilepsy.htm#222133109. I do not find Dr. Wheeler's opinion contains sufficient testing and analysis to support a firm diagnosis of epilepsy, particularly as his diagnosis seems to be at odds with the actual symptoms suffered by Respondent. Dr. Mayer's opinion, on the other hand, recognizes that Respondent has displayed symptoms that could be related to epilepsy, but that he would require further testing before making a firm diagnosis. For these reasons, I give greater weight to Dr. Mayer's opinion that I do to Dr. Wheeler's.

Although Respondent relied on Dr. Fehir's records to support his belief that Pradaxa caused his symptoms [Tr. at 135-136, 151], I do not find these records reliable. Dr. Fehir's diagnosis of "possible seizures related to Pradaxa" is unsupported; she wrote in the same report that she did not have any records related to these incidents. Dr. Fehir's diagnosis appears to be based on information given to her by Respondent rather than on medical testing and analysis. Respondent testified that she had told him to "get off of [Pradaxa]," but without a reasoned explanation of why Dr. Fehir felt Respondent should not use Pradaxa or why it could be related to his symptoms, I cannot give her notes any weight.

I do not find the Coast Guard reviewing physician, Dr. Gillis, to be fully reliable either. She did not examine the Respondent and only had the benefit of the records provided to her by the parties. Dr. Gillis testified that physicians routinely withhold a precise diagnosis until they have sufficient documentation, yet she opined that Dr. Wheeler's diagnosis of epilepsy was accurate even though both Dr. Wheeler and Dr. Mayer expressed a need for further testing. [Tr. at 67-68, 89-91.] I do, however, credit her testimony to the extent that she is familiar with the job requirements of mariners and found sufficient

evidence in Respondent's medical file to warrant an investigation into his ability to perform his duties.

I also find the testimony by Deb Johnston to be of very limited credibility. Ms. Johnston is not a physician, and did not have access to the records of more-qualified medical providers. Although she was familiar with some of Respondent's medical history, much of what she based her opinion on was Respondent's own assessment of his condition. It is clear from the record as a whole that Respondent's account of his syncopal episodes varies greatly from that of witnesses to those episodes, and his characterization of the physicians' opinions regarding his use of Pradaxa is at odds with the physicians' records. Thus, Ms. Johnston's opinion was not based on objective medical testing and analysis, but merely what Respondent wanted her to know about his symptoms. Moreover, she admitted that she has very little knowledge of what working as a mariner involves and the regulations governing medical fitness for mariners. [Tr. 128.] I therefore find her testimony regarding the symptoms and etiology of Respondent's condition along with his suitability for work as a mariner is entitled to little weight.

Taking the medical records and the testimony of all witnesses as a whole, Respondent clearly suffers or has suffered from a disorder causing syncopal episodes, some with seizure-like symptoms. The precise etiology of the condition has not been established and I cannot determine from the evidence in the record that it is "more likely than not" that his condition is, in fact, epilepsy, as the Coast Guard alleges. Both neurologists considered Respondent to have some form of neurological disorder and the testimony of the witnesses, Captain Toups, Captain Hudson, and Mr. Swear, has credibly established Respondent's

behavior during these spells. The evidence also shows that the condition is unlikely to be related to his use of the prescription drug Pradaxa.

4. Coast Guard Law and Policy on Incompetence

The current guidance for evaluating the physical and medical conditions of applicants for merchant mariner documents and licenses is found in Navigation and Vessel Inspection Circular No. 04–08. It lists "history of unconsciousness without identifiable cause" and "convulsive disorder" as medical conditions subject to further review. The Commandant has held, however, that "[t]he physical evaluation guidelines … do not establish absolute standards of physical incompetence. There must be evidence on the record that tends to prove that the Appellant is unable to perform the required duties expected of a holder of a document. Appeal Decision 2280 (ARNOLD)." Appeal Decision 2547 (PICCIOLO).

A Master of Towing Vessels endorsement on an MMC entrusts a mariner with the authority to direct and control the operation of a towing vessel. A Tankerman endorsement entrusts a mariner to oversee the transfer of oil and other hazardous materials. A mariner who has suffered four episodes of syncope, at least two which had indicia of convulsions, is unable to safely perform those duties. Loss of consciousness while operating a vessel poses a serious threat to marine safety, as it could reasonably be expected to result in a serious marine incident such as a grounding, collision, or allision. The presence of hazardous materials on the vessel or as part of the cargo being towed by the vessel only exacerbates that risk. Loss of consciousness during the transfer of hazardous materials also poses a serious threat due to the risk of malfunctions or spillage.

Respondent argues that, to the extent he has any sort of convulsive disorder or other condition leading to the syncopal episodes, it is manageable and currently under control. He points to Appeal Decisions 2547 (PICCIOLO), 2664 (SHEA), and 2698 (HOCKING) in support of his argument. Having considered these Appeal Decisions, I find this case distinguishable on its facts.

PICCIOLO, the earliest of these decisions, involved a mariner who was found incompetent by an ALJ due to uncontrolled diabetes. The Commandant held that the evidence in the record was insufficient, in light of the respondent's satisfactory shipboard performance, to show that his diabetes rendered him incompetent and that being on a monthly blood sugar monitoring program was incompatible with performance of his duties. The case was therefore remanded to the ALJ for further consideration.

Here, unlike in PICCIOLO, the precise condition from which Respondent suffers has not been established, though Respondent is being treated with a blood-thinning medication and an anti-convulsion medication. He has not presented credible evidence that this combination of medications is likely to eliminate the risk of future episodes of syncope or seizure, or that a medical regimen and monitoring program known to eliminate such risk even exists. There was also no testimony establishing whether or not the prescription drugs Respondent is currently taking are safe for use while operating a vessel. Moreover, Respondent did suffer from symptoms that prevented him from performing his duties on board the vessel. While alone in the wheelhouse, Respondent lost consciousness and had to be relieved of his duties. This stands in stark contrast to PICCIOLO, where the mariner's shipboard performance was rated "very good."

In SHEA, the ALJ found the respondent incompetent due to bipolar disorder. The respondent argued that because his physician had determined his condition was manageable and declared him fit for duty, the ALJ erred in finding him incompetent. The Commandant disagreed, stating that the ALJ has broad discretion to consider the evidence and may disagree with the opinion of a physician. Here, I have found physician's assistant Deb Johnston's opinion that Respondent is fit for duty not credible, as she was unaware of pertinent events in Respondent's medical history and was unfamiliar with the requirements of his position when she issued a return-to-work letter.[2]

The Commandant most recently addressed the issue of incompetence in Appeal Decision 2698 (HOCKING). That case involved a mariner who suffered a heart condition requiring the implantation of a defibrillator. The ALJ determined that the respondent was not medically fit for duty because people with his condition are at a higher risk of sudden incapacitation or death. The Commandant found that the record contained substantial medical evidence to support the ALJ's decision.

HOCKING also addressed the question of whether a mariner needs be presently incapable of performing his professional duties in order to be declared incompetent. The respondent relied on PICCIOLO in arguing that the Coast Guard cannot speculate on how a condition may affect the mariner in the future if he is presently able to perform his duties. The Commandant, however, clarified that "*Picciolo* supports the proposition that a mariner's medical competence must be determined not based solely on a past incident but by reference to competent medical testimony concerning the individual's condition and necessary

[2] In his brief, Respondent's counsel refers to Appeal Decision 2417 (YOUNG), which states, "Ordinarily, any allegation of incompetence must be based on sufficient evidence subsequent to any fit for duty declaration by the USPHS or it should be found not proved." As the return-to-work letter in this case was issued by a physician's assistant with no connection to the U.S. Public Health Service and without sufficient knowledge of the mariner's duties, I do not find YOUNG relevant here.

treatment, and the risks they present." Referring back to SHEA, the Commandant further stated, "*Shea* supports the idea that medical incompetence is not restricted to a determination based on apparent fitness for duty at the present moment. It calls for assessment of the risk of impairment of a mariner's ability to safely carry out duties in the future." Thus, provided the ALJ relies on substantial evidence in the record when making a determination of whether the mariner poses a risk to maritime safety, future risk may be considered.

Moreover, the Commandant held that "[w]hile [Hocking] was not shown to have suffered incapacitation while performing his duties in the past, the risk that he could become so in the future is too great to ignore. Any other holding would inconsistent with the safety and security of the maritime environment." Here, Respondent has actually suffered incapacitation while on duty, not once but twice. Although I cannot conclude that his condition is epilepsy, he clearly has both a "history of unconsciousness without identifiable cause" and some form of "convulsive disorder." In the absence of any clear and credible medical evidence showing that he is unlikely to suffer further episodes of syncope, the risk of recurrence and the threat it would pose to maritime safety are certainly too great to ignore in this case.

5. *The Coast Guard's Asserted Policy that Mariners With a Seizure Disorder Must Be Seizure-Free for a Period of 8 Years is Not Binding on an ALJ*

The Coast Guard asserts that, in cases where a mariner has a history of epilepsy, that mariner must be seizure-free for eight years and on a stable dose of medication for two years in order to be eligible for a Coast Guard Credential. CG Brief at 23 and Tr. at 72-73. The eight-year requirement is an unwritten guideline which, according to the Coast Guard, "conforms with the recommendations of an expert panel of neurologists appointed by the

Federal Motor Carrier Safety Administration to examine the issue." CG Brief at 23. This study is not in the record but was only discussed in testimony.

Respondent argues that because it has not been promulgated pursuant to the APA rulemaking requirements "the eight-year 'seizure-free' moratorium established by the 'unwritten policy' of the Coast Guard is unenforceable against Respondent as a matter of law. (*Chrysler Corp. v. Brown*, 441 U.S. 281, 99 S.Ct. 1705, 1723-1725, 60 L.Ed.2d 208 (1979))." Resp. Brief at 10.

"In Appeal Decision 2035 (KROHN), [(1975)] it was noted that ALJs are bound by the agency regulations to which they are subject and must follow proscribed procedures." Appeal Decision 2678 (SAVOIE) (2008); see also Appeal Decision 2067(WHITLOW) (1976). Likewise, Coast Guard regulations state that the "decisions of the Commandant in cases of appeal or review of decisions of Administrative Law Judges are officially noticed and the principles and policies enunciated therein are binding upon all Administrative Law Judges, unless they are modified or rejected by competent authority." 46 C.F.R. § 5.65.

The Coast Guard failed to clearly articulate how the guidelines contained in Navigation and Inspection Circular 04-08 or the eight-year seizure-free "Coast Guard policy" or "accepted Coast Guard practice" would bind an ALJ, as neither has undergone the administrative rulemaking process. [Tr. at 93-94, 96-97, 101, 156-57.] Dr. Gillis stated that the "only medical conditions or issues that are addressed in Coast Guard regulations are vision, hearing and color vision." [Tr. p. 94.] Nor has any Commandant Decision on Appeal mandated the application of the eight-year policy or practice.

As noted above, the Administrative law Judge is not necessarily bound by medical findings and opinions. Accordingly, an unwritten policy or the accepted practices of the

Medical Evaluations Division at the National Maritime Center do not create a mandated definition of incompetence that an ALJ must accept. Indeed, in light of my finding that the evidence in the record has not established that Respondent's condition is, in fact, epilepsy; but rather shows a history of unconsciousness without identifiable cause, that policy would not necessarily even be applicable. Accordingly, I need not determine whether the Respondent's condition requires him to be seizure-free for a period of 8 years to be considered fit for duty.

6. Conclusion

Having considered Appeal Decisions 2547 (PICCIOLO), 2664 (SHEA), and 2698 HOCKING in conjunction with the medical evidence in the record, I find Respondent's argument that his condition should be considered manageable unconvincing. I recognize that Respondent has discontinued Pradaxa and is now using Coumadin again. He is apparently also on a successful regimen of anti-convulsion medication. However, the medical evidence has not credibly proven that Pradaxa was the cause of Respondent's syncope and seizures. Moreover, two of Respondent's episodes occurred after the anti-convulsion medication Vimpat was prescribed in August 2011. While there is no evidence in the record of any further episodes of syncope after November 2011, this is a relatively short time period. Furthermore, the medical testing has not clearly established a diagnosis and no physician testified that this regimen is appropriate to control his specific condition and can be expected to prevent future episodes.

As previously discussed, there is no set definition of incompetence and an ALJ must make the determination of whether a respondent is incompetent based on the regulations, case law, and the facts of each individual case. Based on this record, I cannot find that

Respondent's condition is being managed such that the risk of another attack is so remote that Respondent can safely perform his duties as Master and/or Tankerman. Accordingly, Respondent is currently incompetent to perform the duties of Master of Towing Vessels and/or Tankerman.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard and the undersigned in accordance with 46 U.S.C. § 7703, 46 C.F.R. Part 5, and 33 C.F.R. Part 20.
2. Respondent is the holder of a United States Coast Guard-issued Merchant Mariner's Credential.
3. Respondent suffered two syncopal episodes while off-duty, the first on July 02, 2011 and the second on July 27, 2011.
4. Respondent suffered a third syncopal episode on September 27, 2011, while having the direction and control of the towing vessel M/V H.B. 1. His condition caused him to be relieved of his duties and transported to an emergency room.
5. Respondent suffered a fourth syncopal episode on November 11, 2011, while having the direction and control of the towing vessel M/V ST. GENEVIEVE. His condition caused him to be relieved of his duties and transported to an emergency room.
6. The medical evidence of record establishes that Respondent suffers from a nonspecifed form of convulsive disorder; however, it does not establish the precise etiology of his condition.
7. The medical evidence of record does not establish a likely connection between Respondent's condition and his use of the drug Pradaxa.

8. Respondent committed acts of incompetence by losing consciousness on the above occasions. His current condition (nonspecifed form of convulsive disorder) poses an inordinate risk of sudden incapacitation or debilitating complication.
9. The allegation that Respondent is incompetent to hold the endorsements to his MMC of Master of Uninspected Towing Vessel and Tankerman is PROVED by a preponderance of the evidence.
10. The allegation that Respondent is incompetent to hold a basic MMC allowing him to perform duties for which a medical examination is not required is NOT PROVED.

V. CONSIDERATION OF AN APPROPRIATE ORDER

In issuing a decision, the ALJ must include the disposition of the case, including any appropriate order. 33 C.F.R. § 20.902(a)(2). The Coast Guard has requested that I revoke Respondent's MMC. While an investigating officer may suggest an order and present argument in support thereof, "[t]he selection of an appropriate order is the responsibility of the Administrative Law Judge, subject to appeal and review." 46 C.F.R. § 5.569(a).

A. Factors Considered in Determining an Appropriate Order

Generally, an Administrative Law Judge has wide discretion to formulate an order adequate to deter the [a mariner's] repetition of the violations he was found to have committed." Appeal Decision 2475 (BOURDO) (1988). However, in proceedings involving Incompetence, there is no violation. Incompetence is not an "offense;" it is a condition. Appeal Decision 1720 (HOWELL). Accordingly there is no sanction but rather an order. The object is not deterrence but protection of safety at sea and to treat the condition as disqualifying until rectified.

In determining an appropriate order, an ALJ may consider the following factors: (1) remedial actions which have been undertaken independently by Respondent; (2) the prior record of Respondent, considering the period of time between prior acts and the act which presently charged is relevant; and (3) evidence of mitigation or aggravation. See 46 C.F.R. § 5.569(b).

B. Coast Guard's Proposed Order

The Coast Guard seeks revocation of the Respondent's MMC, including all endorsements. The Agency asserts that Revocation is the only appropriate order for proven physical incompetence under Appeal Decisions 1951 (GUTZMER) (1973) and 2021 (BURKE) (1975). Complaint at 2 and USCG Proposed Findings of Fact. As to 46 C.F.R. § 5.567(b), the Coast Guard argues that it does not allege negligence, professional incompetence (professional deficiencies), mental incapacity, or any combination thereof. These proceedings relate specifically to the credentialing medical and physical requirements as outlined in 46 CFR § 10.215 and NVIC 04-08. The Coast Guard has not alleged Respondent does not meet the professional requirements for deck officers as outlined in 46 CFR Subpart D. Therefore, the allowance offered by 46 CFR § 5.567(b) for professional incompetence or negligence is inappropriate in this case. The only proper sanction remains revocation of all credentials.

C. Respondent s Proposed Order

Respondent argues that the Coast Guard has not met its burden and does not address the appropriate order. However, he argues that even the Coast Guard had properly established that Respondent suffers from epilepsy, his symptom-free history since the substitution of the drug Coumadin for Pradaxa and the administration of the anti-convulsive

drug Vimpat raises the issue of his continued fitness for employment and certification notwithstanding the illness. Respondent testified that the implementation of this "policy" would cause him to "lose my life. I'd lose everything." [Tr. 139.]

D. Provisions Specifically Related to Incompetence.

The proposed order is premised on the allegation of incompetence. The statutory authority for Incompetence, 46 U.S. C. § 7703, states as follows: "A license, certificate of registry, or merchant mariner's document issued by the Secretary may be *suspended or revoked* if the holder— (4) has committed an act of incompetence relating to the operation of a vessel." This language permitting suspension appears to be at odds with the agency provisions and precedent mandating revocation for incompetence.

Incompetence is listed in 46 C.F.R. § 5.61 as one of the acts or offense for which revocation is sought. In the Table entitled "Suggested Range of an Appropriate Order," codified at 46 C.F.R. § 5.569, the suggested penalty range for incompetence is as follows "The only proper order for a charge of incompetence found proved is revocation." See also Appeal Decisions 1086 (ARMSTRONG) (1959); 1502 (WILLIAMS) (1965); and 2181(BURKE) (1980) (mod. sub nom. Commandant v. Burke 3 N.T.S.B. 4441 (1980)).

Under 46 C.F.R. § 5.567(b), an "order is directed against all credentials or endorsements, except that in cases of negligence or professional incompetence, the order is made applicable to specific credentials or endorsements." This rule also states that if the Administrative Law Judge "determines that the respondent is professionally incompetent in the grade of the credential or endorsement held, but is considered competent in a lower grade, the credential or endorsement may be revoked and the issuance of one of a lower grade ordered."

Coast Guard rules in 46 C.F.R. § 5.61(b) state also that an investigating officer "may seek revocation of a respondent's credential or endorsements when the circumstances of an act or offense found proved or consideration of the respondent's prior record indicates that permitting such person to serve under the credential or endorsements would be clearly a threat to the safety of life or property, or detrimental to good discipline."

E. The Controlling Statute, 46 U.S.C. § 7703(4) Does Not Mandate Revocation in Incompetence Cases.

The statutory language permitting suspension as well as revocation appears to be at odds with the agency's regulatory provisions and precedent mandating revocation for incompetence. Recently, Appeal Decision 2678 (SAVOIE) (2008) interpreted similar language in 46 U.S.C. § 7704(b) that permitted suspension or revocation for convictions of a dangerous drug law. There, the Commandant stated that "Congress has not dictated a desired or preferred sanction for conviction of a dangerous drug law; rather Congress has merely authorized either sanction." Id. Moreover, "in order for this regulation to be in 'harmony' with the authorizing statute and '[bear] a fair relationship to the language of the statute,' it must provide some circumstance in which an ALJ could order the suspension of a merchant mariner credential, even if rare." Id. (Internal citations omitted.)

Incompetence is listed in 46 C.F.R. § 5.61 as one of the acts or offense for which revocation is sought, but is not included as an act or offense for which revocation is mandatory under 46 C.F.R. § 5.59. Therefore, it appears that a suspension could be assessed in an incompetence case if the ALJ deems it appropriate. However, Coast Guard regulations and precedent require that suspensions last for a specified period of time. 46 C.F.R. § 5.567(c)(2). Appeal Decisions 2162 (ASHFORD) (1979) and 2181 (BURKE). Coast Guard precedent holds that there is no authority for indefinite suspensions. Appeal Decision 1086

(ARMSTRONG) (holding that there is no provision in the regulations for the issuance by an examiner of such an order). See also Appeal Decision 1502 (WILLIAMS) (holding that there is no provision in the regulations for an ALJ to enter an order of suspension until the respondent is found to be fit for sea duty).

I further note that the NTSB has modified a revocation order in an incompetence case to provide for a suspension of mariner's license until such time as he was certified to serve in a licensed capacity. Commandant v. Burke, 3 N.T.S.B. 4441. (1980) (NTSB.) The Board also held in a predecessor case, Commandant v. Burke, Order No. EM-51 (1976), that the "sanction of revocation should not be imposed where the medical evidence relied upon as evidence of a … disability also indicates that it may be alleviated by medical treatment, and that the afflicted person may be restored to active duty within a definite period of time." However, in Commandant v. Shea, NTSB Order No. EM-204, 2008 WL 678271 (N.T.S.B.), the Board affirmed a revocation order for a mental condition that appeared to be in remission and controlled by medication due to the risk of relapse in the high-stress environment of shipboard life.[3]

To be consistent with the unambiguous language of the statute and the various regulations and precedent, I will not consider revocation to be a mandated order if incompetence is found but will consider the circumstances and matters in aggravation and mitigation in determining an appropriate order. Thus, for a suspension to be appropriate in an incompetence case there would have to be evidence of a date when the mariner would again become competent to serve in his licensed or endorsed capacity, so a definite period of

[3] In 46 C.F.R. § 5.201(a), the Coast Guard does authorize indefinite voluntary deposits of a credential where there is evidence of mental or physical incompetence, and the voluntary deposit agreement specifies the conditions on which the credential will be returned. In such a case, the period for deposit may be indefinite. However, voluntary deposits are separate from suspension and revocation proceedings. Appeal Decision 2664 (SHEA).

suspension could be ordered. In a case where the condition is open-ended or a risk of relapse exists, suspension would not be appropriate.

Additionally I note that since the Burke cases, the Coast Guard has modified its rules. While still requiring specific periods for suspension, the Coast Guard has added provisions allowing for the modification of orders of revocation. Pursuant to 33 C.F.R § 20.904(f), three years or less after an S&R proceeding has resulted in revocation of a mariner mariner's credential, a "respondent may file a motion for reopening of the proceeding to modify the order of revocation with the ALJ Docketing Center." The operative part of such a motion is under subparagraph (1), which reads, "Any motion to reopen the record must clearly state why the basis for the order of revocation is no longer valid and how the issuance of a new license, certificate, or document is compatible with the requirement of good discipline and safety at sea." The agency has the right to respond to any petition to reopen the record. 33 C.F.R § 20.904(f)(2).

F. Respondent's Credentials

In 2008, the Coast Guard revised its procedures for identifying and licensing mariners. USCG-2006-24371, 74 FR 11216, Mar. 16, 2009. Under current regulations,

> A merchant mariner credential (MMC) . . . is a credential combining the elements of the merchant mariner's document (MMD), merchant mariner's license (license), and certificate of registry (COR) enumerated in 46 U.S.C. subtitle II part E as well as the STCW endorsement issued pursuant to the STCW Convention and STCW Code incorporated by reference in § 10.103. MMDs, licenses, STCW endorsements and CORs are no longer issued as separate documents and all qualifications formerly entered on those separate documents appear in the form of an endorsement(s) on an MMC.

46 C.F.R. § 10.201(a). However, the controlling statute, 46 U.S.C. subtitle II part E, still speaks of Documents and Licenses, and makes no provision for the combined Credential.

The basic MMC now serves the same purpose as an MMD previously served. Endorsements may be added to an MMC for any of the positions enumerated in 46 C.F.R. § 10.109. Master of towing vessel and Tankerman are two such endorsements. Respondent is a holder of one of these Coast Guard-issued Merchant Mariner Credentials (MMC). This MMC bears officer endorsements authorizing Respondent to serve as Master of Towing Vessels upon Great Lakes, Inland Waters and Western Rivers and Radar Observer (Unlimited). It also includes the qualified rating endorsement authorizing service as Tankerman-PIC (Barge) Limited to Dangerous Liquid (DL) Cargoes. The MMC also includes entry-level endorsements authorizing service as Ordinary Seaman, Wiper, and Stewards Dept (FH).

The general requirements for issuance of an MMC are found at 46 C.F.R. § 10.209, and the medical requirements are found at § 10.215. Pilots and tankermen are subject to the following:

> (d) General medical exam. (1) This exam must be documented and of such scope to ensure that there are no conditions that pose an inordinate risk of sudden incapacitation or debilitating complication. This exam must also document any condition requiring medication that impairs judgment or reaction time. Examples of physical impairment or medical conditions that could lead to disqualification include, but are not limited to, poorly controlled diabetes, myocardial infarctions, psychiatric disorders, and convulsive disorders.

46 C.F.R. § 10.215(d)(1). Table 10.215(a) shows, however, that ratings are not subject to any medical examination; they must only possess basic physical abilities.

G. Coast Guard Seeks Revocation of all Credentials Held by Respondent.

The Coast Guard seeks revocation of Respondent's entire MMC, including all endorsements, asserting that Revocation is the only appropriate order due to Respondent's

physical incompetence. According to the Coast Guard, Respondent could then apply to the National Maritime Center for a new MMC with entry-level endorsements, which would be issued if he met the requirements for it.

In HOCKING, the Coast Guard made a similar argument to the Commandant, asserting that the ALJ erred in not revoking the respondent's Merchant Mariner's Document as well as his Merchant Mariner's License.[4] The Commandant construed the regulations as encompassing medical incompetence within the definition of "professional incompetence," thereby permitting an ALJ to revoke the mariner's License but not his Document. The Commandant reasoned that officers and those performing other professional positions are held to a higher standard of training and physical fitness than deck workers, some of whom are not subject to any requirements for a physical examination.

The Coast Guard's argument with respect to the sanction in this case disregards the clear language of HOCKING. There, the Commandant considered in depth the meaning of "professional incompetence," as follows:

> The Coast Guard's position seems to assume that 46 C.F.R. § 5.31 sets up three separate categories of incompetence: professional, physical, and mental. But the regulation does not use the terms "professional incompetence," "physical incompetence," and "mental incompetence." It refers only to "Incompetence," describing it in terms of "professional deficiencies, physical disability, mental incapacity, or any combination thereof." Accordingly, the term "professional incompetence" in 46 C.F.R. § 5.567(b) is novel and undefined, and I will exercise reasoned judgment in construing it, consistent with 46 C.F.R. § 5.31. I note that physical incompetence might well include both "professional deficiencies" and some kinds of "physical disability" affecting certain professional positions . . . In light of the evidence in this case, where there is a lack of evidence that safety would be impaired by Respondent's retention of his MMD, it is

[4] In HOCKING, the respondent still possessed both an MMD and an MML, as he had not yet been issued a new MMC under the revised regulations. Here, Respondent possesses an MMC with endorsements, which serves the same purpose.

> consistent with the intent of 46 C.F.R. § 5.567(b) to place Respondent's condition in the category of professional incompetence.

The evidence in this case, like that in HOCKING, establishes that Respondent is a threat to maritime safety when in direction and control of a vessel or when handling hazardous materials, but not when acting as a deck worker. Given the changes to the credentialing procedures of mariners in recent years, it is consistent with HOCKING that the officer and Tankerman endorsements be revoked but not the underlying MMC, which is akin to the former MMD. The Coast Guard has not shown how the evidence in this case is meaningfully distinguishable from that in HOCKING such that the Commandant's holding in HOCKING should not apply here.

H. Conclusions as to an Appropriate Order

1. *Endorsements authorizing the Respondent to serve as Master of Towing Vessels upon Great Lakes, Inland Waters and Western Rivers and Radar Observer (Unlimited).and authorizing service as Tankerman-PIC (Barge) Limited to Dangerous Liquid (DL) Cargoes are REVOKED.*

The record has established that Respondent suffers from a physical impairment that has caused him to suffer syncope and convulsions, and which two neurologists are treating as a form of neurological disorder. As discussed above, I found that Respondent's medical condition has prevented him from performing his duties and that the risk of future impairment remains. This renders him incompetent to perform the duties of pilot and tankerman and would prevent him from passing the general medical exam required to obtain those endorsements. In the absence of evidence that his condition is being managed such that the risk of another attack is so remote that Respondent can safely perform his duties as Master and/or Tankerman, the only appropriate order is REVOCATION of those endorsements. I have considered the hardship that loss of his credentials in effect prevents

him from earning a living as a Towing Vessel Operator. "This need, however, is subservient to the remedial purpose of suspension and revocation proceedings to promote safety at sea. See Appeal Decision 2346 (WILLIAMS)." Appeal Decision 2573 (JONES) (1996).

2. Entry-level endorsements authorizing service as Ordinary Seaman, Wiper, and Stewards Dept (FH) are NOT REVOKED.

I do not, however, find that he is incapable of performing the duties of a rating, which requires no general medical exam. The evidence in the record does not establish that, provided Respondent continues his current protocol of medication, he is unable to perform these basic functions. I therefore find that revocation of his entire MMC is not warranted, though the higher level endorsements must be revoked.

I. Potential Modification of this Order

Should Respondent receive a clearer diagnosis supported by testing and a better assessment of the risk of impairment of his ability to safely carry out duties in the future, he may request reconsideration of this order. Pursuant to 33 C.F.R § 20.904(f), three years or less after an S&R proceeding has resulted in revocation of a mariner mariner's credential, a "respondent may file a motion for reopening of the proceeding to modify the order of revocation with the ALJ Docketing Center." The operative part of such a motion is under subparagraph (1), which reads, "Any motion to reopen the record must clearly state why the basis for the order of revocation is no longer valid and how the issuance of a new license, certificate, or document is compatible with the requirement of good discipline and safety at sea." To do this, Respondent must file a motion with exhibits demonstrating that his condition is so controlled by medication that the risk of future episodes of syncope or seizure that could impact the safe operation of a vessel are minimal, and that he has no

professional deficiencies, physical disability, or mental incapacity that would prevent him from performing his required duties.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that the Allegations in the Complaint are found **PROVED**; and

IT IS HEREBY FURTHER ORDERED that Respondent's Mariner's Officer Endorsements and Tankerman Endorsement on his Merchant Mariner Credential are **REVOKED**.

IT IS HEREBY FURTHER ORDERED that Respondent's Merchant Mariner Credential is to be surrendered to the Coast Guard immediately. The Coast Guard will issue a properly endorsed credential authorizing service as Ordinary Seaman, Wiper, and Stewards Dept (FH).

IT IS SO ORDERED.

George J. Jordan
US Coast Guard Administrative Law Judge

Date: March 28, 2013

APPENDIX A: APPEALS

Procedural Rules for Appeals

33 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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

Additional Rules Concerning Appeals from 46 C.F.R. Part 5

46 C.F.R. § 5.701 Appeals in general.

A party may appeal the decision of an ALJ under the procedures in subpart J of 33 CFR part 20. A party may appeal only the following issues:

(a) Whether each finding of fact rests on substantial evidence.

(b) Whether each conclusion of law accords with applicable law, precedent, and public policy.

(c) Whether the ALJ committed any abuses of discretion.

(d) The ALJ's denial of a motion for his or her disqualification.

46 C.F.R. § 5.707 Stay of effect of decision and order of Administrative Law Judge on appeal to the Commandant; temporary credential or endorsement.

(a) A person who has appealed from a decision suspending outright or revoking a credential or endorsement, except for revocation resulting from an offense enumerated in §5.59, may file a written request for a temporary credential or endorsement. This request must be submitted to the Administrative Law Judge

who presided over the case, or to any Officer in Charge, Marine Inspection for forwarding to the Administrative Law Judge.
(b) Action on the request is taken by the ALJ unless the haring transcript has been forwarded to the Commandant, in which case, the Commandant will make the final action.
(c) A determination as to the request will take into consideration whether the service of the individual is compatible with the requirements for safety at sea and consistent with applicable laws. If one of the offenses enumerated in § 5.61(a) has been found proved, the continued service of the appellant will be presumed not compatible with safety at sea, subject to rebuttal by the appellant. A temporary credential or endorsement may be denied for that reason alone.
(d) All temporary credentials or endorsements will provide that they expir4e not more than six months after issuance or upon service of the Commandant's decision on appeal, whichever occurs first. If a temporary credential expires before the Commandant's decision is rendered, it may be renewed, if authorized by the Commandant.
(e) If the request for a temporary credential or endorsement is denied by the Administrative Law Judge, the individual may appeal the denial, in writing, to the Commandant within 30 days after notification of such denial. Any decision by the Commandant to deny is the final agency action.
(f) Copies of the temporary credential issued become a party of the record on appeal.

§ 5.713 Appeals to the National Transportation Safety Board.

(a) The rules of procedure for appeals to the National Transportation Safety Board from decisions of the Commandant, U.S. Coast Guard, affirming orders of suspension or revocation of credentials or endorsements are in 49 CFR part 825. These rules give the party adversely affected by the Commandant's decision 10 days after service upon him or his attorney of the Commandant's decision to file a notice of appeal with the Board.
(b) In all cases under this part which are appealed to the National Transportation Safety Board under 49 CFR part 825, the Chief Counsel of the Coast Guard is designated as the representative of the Commandant for service of notices and appearances. Communications should be addressed to Commandant (CG–094), U.S. Coast Guard, 2100 2nd St. SW., Stop 7121, Washington, DC 20593–7121.
(c) In cases before the National Transportation Safety Board the Chief Counsel of the Coast Guard may be represented by others designated of counsel.

§ 5.715 Stay of effect of Decision of the Commandant on Appeal: Temporary credential and/or endorsement pending appeal to National Transportation Safety Board.

(a) A Decision of the Commandant on Appeal affirming an order of revocation, except a revocation resulting from an offense enumerated under § 5.59 or suspension that is not placed entirely on probation, which is appealed to the National Transportation Safety Board, may be stayed if, in the Commandant's

opinion, the service of the appellant on board a vessel at that time or for the indefinite future would be compatible with the requirements of safety at sea and consistent with applicable laws. If one of the offenses enumerated in § 5.61(a) has been found proved, the continued service of the appellant will be presumed not compatible with safety at sea, subject to rebuttal by the appellant; in cases of offenses under § 5.61(a), a temporary credential and/or endorsement may be denied for that reason alone.

(b) A stay of the effect of the Decision of the Commandant on Appeal may be granted by the Commandant upon application by the respondent filed with the notice served on the Commandant under 49 CFR 825.5(b).

(c) An Officer in Charge, Marine Inspection, on presentation of an original stay order, issues a temporary credential and/or endorsement as specified in the stay order. This credential and/or endorsement is effective for not more than six months, renewable until such time as the National Transportation Safety Board has completed its review.

APPENDIX B: LIST OF WITNESSES AND EXHIBITS

WITNESSES

For the Coast Guard

Leo Joseph Toups, III
Jackie Wayne Hudson
Troy Charles Swear
Dr. Laura Girandola Gillis

For the Respondent

Deborah Johnston, PA-C
Carl Daniel Bradshaw, Respondent

EXHIBITS

For the Coast Guard

CG-01	Clinical Encounter Summaries from Dr. David B. Wheeler of Wyoming Neurologic Associates, LLC; dated August 5, 2011
CG-02	CG-2692 for M/V H.B. 1;dated September 27, 2011
CG-03	Progress Notes of Dr. Thomas O. Mayer of Sheridan Neurology, PC; dated October 13, 2011
CG-04	PA-C Johnston's Letter Re Carl Bradshaw; dated October 27, 2011
CG-05	CG-2692s for M/V St. Genevieve; dated November 21, 2011
CG-06	Southwest Louisiana EDM Complete ED Record for Daniel Bradshaw; dated November 28, 2011
CG-07	Mr. Bradshaw's Credential

For the Respondent

R-A	Progress Notes and Office Chart of Dr. David B. Wheeler, Wyoming Neurologic Associates, LLC
R-A-1	August 20, 2012, Clinical Encounter Summaries for Mr. Bradshaw's Clinic Visit to Dr. David B. Wheeler
R-B	Progress Notes of Dr. Thomas O. Mayer; dated 12/01/2011 from Observations of 10/13/2011
R-C	Letter, Deb Johnston, PA-C, "To Whom It May Concern," dated 10/27/2011
R-C-1	June 11, 2012, Letter from Mr. Healy to Deb Johnston; Christopher C. Brown/Deb Johnston/Dr. Thomas O. Mayer/Dr. Corey J. Jost Medical Records and Sheridan Radiology Report for

	Mr. Bradshaw
R-D	Medical Records, John W. Finley, MD, d/b/a South Sheridan Medical Center, Re Carl Daniel Bradshaw
R-E	Medical Records, Kim Fehir, MD, Re Carl D. Bradshaw
R-F	Medical Records, Corey J. Jost, Re Carl D. Bradshaw
R-G	PDR.net "Concise Monograph" of Pradaxa

APPENDIX C: PROPOSED FINDINGS OF FACT

Coast Guard's Proposed Findings of Fact

A. Pertinent laws, regulations, appeal decisions and policies.

1. The United States Congress has passed comprehensive legislation to promote safety of life and property at sea. [46 USC Subtitle II]

   Accepted and incorporated.

2. The United States Coast Guard (Coast Guard) is the agency responsible for setting and enforcing standards for Merchant Mariners including medical standards and guidelines for holders of a Coast Guard issued Merchant Mariner Credentials (MMC). [46 USC Chapters 71 and 73]

   Accepted and incorporated.

3. The purpose of suspension and revocation proceedings is to promote safety at sea. [46 USC § 7701(a); 46 CFR § 5.5]

   Accepted and incorporated.

4. The Coast Guard has enacted regulations to determine the competency of a mariner to serve under the authority of their MMC. [46 CFR § 10.101]

   Accepted and incorporated.

5. The Coast Guard has enacted regulations, to provide a means of determining and verifying the qualifications an applicant must possess to be eligible for certification to serve on merchant vessels; means of determining that an applicant is competent to serve under the authority of their merchant mariner credential (MMC); and whether the holder of an MMC is a safe and suitable person. [46 CFR § 10.101]

   Accepted and incorporated.

6. Medical and physical requirements for merchant mariners are contained in 46 CFR § 10.215.

   Accepted and incorporated.

7. The Coast Guard published Navigation and Inspection Circular (NVIC) 04-08 to provide guidance for evaluating the physical and medical conditions and assist medical practitioners, the maritime industry, individual mariners, and Coast Guard personnel in evaluating a mariner's physical and medical status

to meet the requirements of 46 CFR Chapter I, Subchapter B (including § 10.215). [NVIC 04-08; Tr. at 66]

Accepted and incorporated.

8. The Commanding Officer, Coast Guard National Maritime Center (NMC), under technical control of the Assistant Commandant for Marine Safety, Security, and Stewardship (CG–5), administers the mariner credentialing program and evaluates merchant mariners for suitability for service. [46 CFR § 1.01-10(b)(1)(i)(D)]

   Accepted and incorporated.

9. The NMC is empowered to provide direction to Coast Guard activities relating to marine safety functions consisting of the licensing, credentialing, certificating, shipment and discharge of seamen. [46 CFR 1.01-15(c)]

   Accepted and incorporated.

10. Every towing vessel of at least 8 meters (at least 26 feet) in length must be under the direction and control of a Coast Guard Credentialed mariner. [46 CFR § 15.610]

    Accepted and incorporated.

11. The Operator [Master or Mate] of an uninspected towing vessel is responsible for the safe operation of that vessel during the time that he is on watch. [Appeal Decision 2387 (BARRIOS)]

    Accepted and incorporated.

12. The Master and Mate of an uninspected towing vessel are required to perform duties when acting under the authority of that credential. [Appeal Decision 2387 (BARRIOS)]

    Accepted, but not necessary to support the allegations.

B. Jurisdiction

13. At all times relevant herein, the Respondent, Carl Daniel BRADSHAW, was/is the holder of Coast Guard-issued MMC #000027799. [Ex. CG-07]

    Accepted and incorporated.

14. MMC #000027799 bears officer endorsements authorizing the Respondent to serve as Master of Towing Vessels upon Great Lakes, Inland Waters and

Western Rivers and Radar Observer (Unlimited). [Ex. CG-07]

Accepted and incorporated.

15. MMC #000027799 also bears the qualified rating endorsement authorizing service as Tankerman-PIC (Barge) Limited to Dangerous Liquid (DL) Cargoes. [Ex. CG-07]

Accepted and incorporated.

16. Further, MMC #000027799 bears entry-level endorsements authorizing service as Ordinary Seaman, Wiper, and Stewards Dept (FH). [Ex. CG-07]

Accepted and incorporated.

17. MMC #000027799 expires September 03, 2014.

Accepted and incorporated.

C. Respondent's pre-incident medical history

18. In or about August 2010, Respondent suffered a "left side stroke." [Ex. CG-01, R-A; Tr. at 70, 75, 88, 116, 122, 144]

Accepted and incorporated.

19. On July 02, 2011, Respondent had a syncopal episode.[1] [Ex. CG-01, CG-03, CG-04, R-A, R-B, R-C; Tr. at 70, 88]

1. "Syncope" is defined as "loss of consciousness resulting from insufficient blood flow to the brain." *Merriam-Webster's Collegiate Dictionary*, 10th Edition, 1196 (1998).

Accepted and incorporated.

20. On July 27, 2011, Respondent had another syncopal episode. [Ex. CG-01, CG-04, CG-06, R-A, R-C; Tr. at 70, 114]

Accepted and incorporated.

21. David W. Wheeler, MD is a neurologist. [Ex. CG-01; Ex. R-A, R-A-1; Tr. at 74, 130]

Accepted and incorporated.

22. On August 05, 2011, Respondent was examined by Dr. Wheeler. [Answer; Ex. CG-01; Ex. R-A; Tr. at 68, 81, 87]

Accepted and incorporated.

23. Electroencephalograms (EEG) are utilized in diagnosing epilepsy. [Tr. at 75-76, 89-90, 92-93, 97-99]

    Accepted and incorporated.

24. On August 05, 2011, Dr. Wheeler reviewed the results of the Respondent's EEG conducted that day. [Ex. CG-01]

    Accepted and incorporated.

25. On August 05, 2011, Respondent was diagnosed by Dr. Wheeler with "Localization-related (focal) (partial) epilepsy and epileptic syndromes with complex partial seizures; with intractable epilepsy." [Ex. CG-01; Ex. Resp. A; Tr. at 66-67, 72, 77, 101]

    Accepted as to the fact that Dr. Wheeler's report states this diagnosis, but not as to the ultimate etiology of Respondent's condition.

26. Prior to August 05, 2011, Respondent was prescribed Vimpat. [Ex. CG-01, R-A; Tr. at 71, 101]

    Accepted and incorporated.

27. Vimpat is a brand name for Lacosamide. [http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000506/]

    Accepted and incorporated.

28. Lacosamide is an anti-seizure medication designed to prevent seizure episodes. [Ex. CG-01, R-A; Tr. at 71; http://www.ncbi.nlm.nih.gov/pubmedhealth/ PMH0000506/]

    Accepted and incorporated.

D. Incident aboard the M/V H.B. 1

29. The M/V H.B. 1 (ON 271177) is a 74.8 foot uninspected towing vessel. [Ex. CG-02]

    Accepted and incorporated.

30. On September 27, 2011, Captain Leo J. Toups III (Mariner Reference Number (MRN) 1292615), was the Captain [Master] of the M/V H.B. 1.[2] [Ex. CG-02; Tr. at 20]

2. Master means the officer having command of a vessel. [46 CFR 10.107]

Accepted and incorporated.

31. On September 27, 2011, Respondent was acting under the authority of his Coast Guard-issued MMC by serving as Mate of the M/V H.B. 1, as required by regulation.[3] [Answer; Ex. CG-02; Tr. at 20-21; 46 CFR § 15.610]

3. Mate means a qualified officer in the deck department other than the master. [Id.]

Accepted but not necessary to support the allegations.

32. On September 27, 2011, at approximately 1600 Central Time Zone (CTZ), Respondent had direction and control of the M/V H.B. 1. [Answer; Ex. CG-02; Tr. at 21-22, 27, 142]

Accepted and incorporated.

33. The Respondent was/is required to perform duties when acting under the authority of his MMC. [46 CFR 15.610; Appeal Decision 2387 (BARRIOS)]

Accepted but not necessary to support the allegations.

34. The M/V H.B. 1 was moored up in the Capital Fleet. [Ex. CG-02; Tr. at 23, 27-28]

Accepted and incorporated.

35. The M/V H.B. 1 was standing by to take loaded gasoline barges in tow. [Tr. at 23-24]

Accepted and incorporated.

36. On September 27, 2011, at approximately 1600 CTZ, Respondent had a syncopal episode with seizure[4] like symptoms. [Ex. CG-02, CG-03, CG-04, R-B, R-C; Tr. at 22-23, 25, 142-143, 145-149]

4. Seizure" is defined as "a sudden attack (as of disease); especially: the physical manifestations (as convulsions, sensory disturbances, or loss of consciousness) resulting from abnormal electrical discharges in the brain (as in epilepsy)" *Merriam-Webster's online dictionary*. Retrieved from http://www.merriam-webster.com/medical/seizure. September 18, 2012.

Accepted and incorporated.

37. On September 27, 2011, Captain Toups observed the Respondent as unresponsive, laying on his back in the wheelhouse chair, feet on the dash,

shaking, eyes rolled in the back of his head, and arm curled up toward his chest. [Ex. CG-02; Tr. at 22-23, 25]

Accepted and incorporated.

38. On September 27, 2011, as a result of the Respondent's syncopal episode, Captain Toups, the Master of the H.B. 1, determined the Respondent was unable to perform the required duties of Mate and relieved the Respondent of his watch and duties. [Tr. at 23-24]

Accepted and incorporated.

39. On Septemeber 27, 2011, the Respondent was medevaced from the M/V H.B. 1. [Ex. CG-02; Tr. at 27-28]

Accepted and incorporated.

40. As a result of the Respondent's syncopal episode and medevac, the M/V H.B. 1 was unable to immediately continue with her intended voyage, due t [sic] a lack of manning. [Tr. at 29]

Accepted and incorporated.

41. A form CG-2692 *Report of Marine Accident, Injury or Death* was submitted to the Coast Guard, concerning the Respondent's Sepetmeber 27, 2011, syncopal episode. [Ex. CG-01; Tr. at 21]

Accepted and incorporated.

E. Post M/V H.B. 1 incident

42. Thomas O. Mayer, MD is a Neurologist. [Ex. CG-03, R-B; Tr. at 73-74, 130]

Accepted and incorporated.

43. On October 13, 2011, Respondent was examined by Dr. Mayer. [Answer; Ex. CG-03, R-B; Tr. at 74]

Accepted and incorporated.

44. On October 13, 2011, Respondent was diagnosed by Dr. Mayer with Convulsions (primary), consider possible focal onset seizure disorder, possibly related to previous stroke. [Ex. CG-03, R-B; Tr. at 75]

Accepted and incorporated.

45. On October 13, 2011, Respondent reported to Dr. Mayer, he a discondinued [sic] the use of Pradaxa. [Ex. CG-03, R-B]

Accepted and incorporated.

46. On October 13, 2011, Dr. Mayer determined the Respondent's syncopal episodes were not likely related to Pradaxa dosing. [Ex. CG-03, R-B; Tr. at 75]

Accepted and incorporated.

47. Ms. Deb Johnston is a physician assistant with Chris Brown, MD in Sheridan, WY. [Ex. CG-04, R-C; Tr. at 104]

Accepted and incorporated.

48. Ms. Johnston saw the Respondent on October 27, 2011. [Ex. CG-04, R-C; Tr. at 126]

Accepted and incorporated.

49. On October 27, 2011, Ms. Johnston provided the Respondent with a letter clearing the Respondent to return to work. [Ex. CG-07, R-C; Tr. at 119]

Accepted and incorporated.

50. Ms. Johnston was unaware of the duties and responsibilites of a mariner when she wrote the letter. [Tr. at 127]

Accepted and incorporated.

51. Ms. Johnston was unaware of the physical requirements for merchant mariners. [Tr. at 128, 133]

Accepted and incorporated.

52. Ms. Johnston was unaware Dr. Wheeler had diagnosed the Respondent with epilepsy. [Tr. at 130]

Accepted as to Ms. Johnston's lack of knowledge, but not as to the ultimate etiology of Respondent's condition.

53. Ms. Johnston was unaware of the severity of the Respondent's condition or the detail of the syncopal episode due to the Respondent not being forthcoming with information. [Tr. at 126-127]

Accepted and incorporated.

F. Incident aboard the M/V ST. GENEVIEVE

54. The M/V ST. GENEVIEVE (previously ACCU VIII) (ON 541599) is a 70 foot, uninspected towing vessel. [Ex. CG-05]

Accepted and incorporated.

55. On November 21, 2011, Captain Jackie W. Hudson (MRN 1612157) was the Relief Captain [Master] of the M/V ST. GENEVIEVE. [Ex. CG-05; Tr. at 34, 53]

Accepted and incorporated.

56. On November 21, 2011, Mr. Troy C. Swear was the Tankerman aboard the M/V ST. GENEVIEVE. [Ex. CG-05; Tr. at 52-53]

Accepted and incorporated.

57. On November 21, 2011, Respondent was acting under the authority of his Coast Guard-issued MMC by serving as Mate of the M/V ST. GENEVIEVE, as required by regulation. [Answer; Ex. CG-05; Tr. at 35, 53; 46 CFR § 15.610]

Accepted, but not necessary to support the allegations.

58. On November 21, 2011, at approximately 1430 CTZ, Respondent had direction and control of the M/V ST. GENEVIEVE. [Answer; Ex. CG-05; Tr. at 35-36, 40, 53]

Accepted and incorporated.

59. The Respondent is required to perform duties when acting under the authority of his MMC. [46 CFR 15.610; Appeal Decision 2387 (BARRIOS)]

Accepted, but not necessary to support the allegations.

60. On November 21, 2011, at approximately 1430 CTZ, Capt. Hudson was asleep in his cabin. [Tr. at 37]

Accepted and incorporated.

61. On November 21, 2011, at approximately 1430, the M/V ST. GENEVIEVE was pushed in, standing by with two empty "red flag" barges.[5] [Ex. CG-05;

Tr. at 40-41]

5. "Red flag" barges refers to barges carrying bulk liquid hazardous material cargoes which are required by 46 CFR § 151.45-9 to display a red flag by day or a red light by night while fast to a dock, during transfer of bulk cargo. [Tr. at 41]

Accepted and incorporated.

62. On November 21, 2011, at approximately 1430 CTZ, Respondent had a syncopal episode with seizure-like symptoms. [Ex. CG-05, R-B, R-C-1; Tr. at 37-39, 55-56]

Accepted and incorporated.

63. On November 21, 2011, at approximately 1430 CTZ, Mr. Swear sounded the vessels [sic] general alarm. [Tr. at 37, 40, 55]

Accepted and incorporated.

64. On November 21, 2011, at approximtely 1430, Captain Hudson reported to the wheelhouse of the M/V ST. GENEVIEVE and ovserved the Respondent as unresponsive, on the floor, leaning againt a chair, jerking, shaking, slobbering, wheezing, trying to catch his breath, mumbling, and eyes rolled back. [Ex. CG-05; Tr. at 37-39, 44]

Accepted and incorporated.

65. On November 21, 2011, Mr Swear ovserved the Respondent as unresponsive, with fluid and snot coming from his mouth, eyes rolled back in his head, shaking, and incoherent. [Ex. CG-05; Tr. at 55]

Accepted and incorporated.

66. On November 21, 2011, as a result of the Respondent's syncopal episode, the Master of the M/V ST. GENEVIEVE determined the Respondent was unable to perform the required duties of Mate and relieved the Respondent of his duties. [Tr. at 40-41]

Accepted and incorporated.

67. On November 21, 2011, the Respondent was medevaced from the M/V ST. GENEVIEVE. [Ex. 05; Tr. at 38, 44]

Rejected. The testimony shows that Respondent walked onto the barge with the assistance of a tankerman, then was transported by paramedics in an

ambulance. [Tr. at 38, 44.]

68. As a result of the Respondent's syncopal episode and medevac, the M/V ST. GENEVIEVE was unable to immediately continue with her intended voyage, due t a lack of manning. [Tr. at 44-45, 47]

Accepted and incorporated.

69. A form CG-2692 *Report of Marine Accident, Injury or Death* was submitted to the Coast Guard, concerning the Respondent's November 21, 2011, syncopal episode. [Ex. CG-05; Tr. at 35, 53]

Accepted and incorporated.

G. Post M/V ST. GENEVIEVE incident

70. Laura G. Gillis, MD, is Chief, Medical Evaluations Division at the U.S Coast Guard National Maritime Center. [Tr. at 63]

Accepted and incorporated.

71. Dr. Gillis is responsible for ensuring all medical evaluations are carried out in a manner consistant with current medical standards. [Tr. at 65]

Accepted and incorporated.

72. Dr. Gillis is a board certified in Occupational Medicine. [Tr. 64-65]

Accepted and incorporated.

73. Dr. Gillis reviewed Exhibits CG-01, CG-03, CG-04, and CG-06, as well as R-A, R-B, R-C, R-C-1, R-D, R-E and R-F. [Tr. at 68, 73, 82, 99]

Accepted and incorporated.

74. Dr. Gillis concurs with Dr. Wheeler's and Dr. Mayer's diagnosis that the Respondent has a seizure disorder (i.e. epilepsy). [Tr. at 66-67, 75, 93, 97, 99, 122]

Accepted as to Dr. Gillis's concurrence, but not as to the ultimate etiology of Respondent's condition.

75. Dr. Gillis concurs with Dr. Mayer's determination that is unlikely the dosing of the drug Pradaxa caused the Respondnent's syncopal episodes with seizure like symptoms. [Tr. 71, 84-85]

Accepted and incorporated.

76. Mariners with a history of a seizure disorder, excluding Febrile Seizures prior to age 5, have a medical condition subject to further review. [NVIC 04-08 Encl. (2)]

Accepted and incorporated.

77. The Respondent is disqualified from performing the duties of his MMC due to physical disability. [Tr. at 72-73, 77, 99]

Accepted and incorporated as to the endorsements of Master of Uninspected Towing Vessel and Tankerman; rejected as to MMC as a whole.

78. Mariners with seizure disorders are as risk of sudden incapacitation.

Accepted and incorporated.

79. Coast Guard policy requires mariners with a history of seizure disorder to be eight years seizure-free and on a stable dose of medication for two years to be eligible for a waiver. [Tr. at 72, 94, 96-97, 100]

Accepted as a statement of general Coast Guard medical guidelines for marine licensing but rejected as a requirement in the absence of any regulation mandating this practice.

80. The Respondent's last known episode was November 21, 2011. [Ex. CG-05, R-B, R-C-1; Tr. at 37-39]

Accepted and incorporated.

81. The Respondent is unfit for duty as a Merchant Marine Officer until at least November 21, 2019. [Tr. at 77, 99, 100]

Respondent's Proposed Findings of Fact

A. Pertinent laws, regulations, appeal decisions and policies.

1. Respondent, Carl D. Bradshaw, is a 36-year-old married man with two young children and presently resides in Sheridan County, Wyoming. (HT, pp. 136-137).

Accepted and incorporated.

2. Capt. Bradshaw's entire working life dating to 1995 has been in service as a Merchant Marine. He is currently licensed and certified by the United States Coast

Guard as a U.S. Merchant Marine Officer (Credential No. 000027799) qualified as an operator and master of towing vessels upon the Great Lakes and inland waters of the United States dating to 1998. In conjunction with this position, he also trains and assigns other captains in the Merchant Marines. (HT, pp. 137-138).

Accepted and incorporated

3. Other than two (2) warning letters resulting from steering incidents occurring over his 14-year history as a vessel operator, as described by Respondent (HT, p. 138), no evidence was presented concerning any character deficiency or performance inadequacy attributable to the Respondent prior to September 27, 2011.

Accepted and incorporated

4. Prior to June of 2011, Respondent's medical history is likewise unremarkable for any debilitating physical or mental condition. Respondent was previously treated by his family physician for circulatory problems (deep-vein thrombosis), high blood pressure associated with his weight, and a vitamin C deficiency, all of which were presumably reported by his physicians in the annual medical evaluations required of him for his license renewals. (HT, pp. 139-140, Ex. R-D, Office Note of 03/02/09).

Rejected. The issue of whether Respondent's prior medical history showed any debilitating conditions was not before me, and the record was not developed on this point. There is insufficient evidence in the record of whether the conditions were reported and/or should have given rise to increased medical scrutiny.

5. On September 27, 2011, Respondent experienced what Complainant alleged to have been a "syncopal episode"[1] while serving as Mate with direction and control of an uninspected towing vessel known as M/V H.B. 1. (Complaint, supra, ¶¶ 2 and 3; Ex. CG-02).

1. The word "syncopal," by definition, means loss of consciousness, as by fainting, and differs from loss of functional capacity associated with "seizures." (Testimony of Dr. Laura Gillis, HT, pp. 68-69).

Accepted and incorporated.

6. The first witness called by Complainant, Capt. Leo J. Toups III, testified concerning his observations of Respondent after having been summoned to the wheelhouse of the vessel by a crewman. From his recollection of the incident, he testified that upon arriving at the wheelhouse Respondent was laying back in the wheelhouse chair, with his feet on the dash, shaking, eyes rolled back in his head, and breathing very heavily. (HT, pp. 22-23).

Accepted and incorporated.

7. On cross-examination, Capt. Toups admitted to having no medical training or experience (HT, pp. 25), that the vessel was at a "stopped" position at the time of the incident (p. 26), that there were no other indications of disability (p. 27), and that he was unaware of any competent diagnosis of a "seizure" by any medical specialist

involved in Capt. Brawshaw's subsequent evaluation and treatment (p. 28).

Accepted as to the witness's statements, but rejected as a factual finding as irrelevant.

8. Concerning the incident of September 27, 2011, Respondent Bradshaw testified that he had become momentarily ill ("I was throwing up"), was suffering from common symptoms which he attributed to a particular medication he was taking, Pradaxa,[2] ("I get sick and feel light-headed), and that he was not diagnosed with epilepsy or seizure disorder by any medical specialist involved in his treatment. (HT, pp. 142-143).

2. See following review of medical evidence.

Accepted as to the Respondent's statements regarding how he felt prior to the incident. Rejected as to the illness being "momentary." Rejected as to the cause of Respondent's illness. Rejected as to the Respondent's characterization of the diagnoses he received. The rejected statements are discredited by other, more credible evidence in the record.

9. On November 21, 2011, Respondent suffered what is alleged to have been a second "syncopal episode" while serving as Mate on the M/V St. Genevieve (Complaint ¶¶ 5-6).

Accepted and incorporated.

10. Testimony favorable to Complainant's position on this matter was provided by Jackie Wayne Hudson, then serving as captain of the vessel, and Tony C. Swear, then serving as tankerman, both of whom testified from the separate Form 2692 Reports they filed following the incident. (Ex. CG-05)[3]

3. On examination by the Court, it was unclear as to whether Mr. Swear's report had been completed by him or some other person. (HT, p. 59).

Rejected as to the characterization of the witnesses' testimony as "favorable" to any particular position. Rejected as to the witnesses testifying from the reports they filed; both testified from memory of the incident and also referred to those forms. Accepted as to the fact that Mr. Hudson and Mr. Swear testified, however, Mr. Swear's first name is Troy, not Tony.

11. Both witnesses stated in their reports and testified at the hearing that Respondent was experiencing "seizure-like" symptoms during the brief episode. (Hudson, HT, pp. 37, 39; Swear, p. 55).

Accepted as to nature of the witnesses' testimony. Rejected as to the characterization of the episode as "brief," as testimony established that it lasted at least 20 minutes.

12. Upon cross-examination, both witnesses admitted to having no medical training or experience, and neither of them had any awareness of diagnostic or treatment procedures provided by the medical professionals following the incident. (Hudson,

HT, pp. 43-44; Swear, pp. 57-58).

Accepted as to the witnesses' statements, but rejected as a factual finding as irrelevant.

13. Concerning this incident, Respondent testified upon direct examination that his symptoms were the same or similar to those experienced by him on September 21 following the ingestion of Pradaxa in terms of general nausea, dizziness, and a momentary loss of consciousness. (Bradshaw Testimony, HT, pp. 149-150).

    Accepted as to the nature of Respondent's statements, but rejected as to the ultimate cause of his symptoms.

14. Capt. Bradshaw further testified that he recovered immediately and was not tested or treated for any seizure-related disorder by the medical staff that examined him, one of whom indicated his concern for the use of the prescribed medication Pradaxa, which Respondent disclosed in the medical history he provided. (*Id.*)

    Accepted as to the fact that Respondent so testified, but rejected as irrelevant and not fully credible.

15. While it is not exactly clear from the evidence which incident or event, or combination thereof, caused the review of Respondent's physical fitness to serve to be initiated by the United States Coast Guard, the matter was ultimately referred to Dr. Laura Gillis for medical review as a "problematic case" according to her testimony. (HT, p. 66).

    Accepted as to the record regarding the procedural history of this case at the medical review stage. Accepted as to the nature of the witness's statements.

16. This Complaint was brought against the Respondent by the United States Coast Guard as a result of its review of the Gillis Report. As drafted and presented, the Complaint is supported entirely by the Coast Guard interpretation of the "syncopal episodes" of September 27, 2011, and November 21, 2011, and the medical records of Dr. David B. Wheeler of August 5, 2011, and Dr. Thomas O. Mayer of October 13, 2011. (Complaint, ¶¶ 1-6).

    Rejected as argument rather than a factual finding.

B. The Medical Evidence

17. The only medical expert providing medical testimony to establish the claims contained in the Complaint was Laura G. Gillis, M.D., serving as the Chief of the Medical Evaluation Division of the National Maritime Center since 2010. (HT, p. 62).[4]

4. In accordance with the following Findings and Conclusions, I note the relative lack of any direct medical evidence supporting Complainant's ultimate contention that Respondent is or was suffering

from a "seizure disorder," specifically "epilepsy," which renders him disqualified for service. This hearing was scheduled for a minimum of three (3) days according to the prehearing submissions of the parties indicating the presence and testimony, by telephone, of Drs. Wheeler, Mayer, and Gillis by the Coast Guard, all of whom were subpoenaed by the Complainant. Although Dr. Wheeler is located in the city where the hearing was conducted, and Dr. Mayer was apparently standing by telephonically, they were not called by Complainant. Notwithstanding that the records generated by these medical providers were admitted by stipulation, sworn testimony by each of them might have clarified the issues presented by those records.

Rejected as argument rather than a factual finding.

18. Dr. Gillis is board certified in occupational medicine with a background as a family medical practitioner and flight surgeon. (Id., pp.64-65). She has no specialized training in neurology, pharmacology, or toxicology. (Id., p. 79). Dr. Gillis testified that her recommendations to the USCG upon which its Complaint is framed, were based entirely upon an administrative review of Respondent's records, specifically those of Drs. Wheeler and Mayer, without any independent diagnosis of the Respondent or resort to him or other medical professionals and medical records in his treatment history. (Id., pp. 67, 81). She did not contact nor [sic] consult with either Dr. Wheeler or Dr. Mayer (Id., p. 81); nor with any other treatment provider for Respondent, including those involved with his care following the on-duty incidents of September 27 and November 21, 2011. (Id., pp. 81, 85). Upon cross-examination, she stated:

    Q. (By Mr. Healy) You have no medical records which would allow you to confirm that Capt. Bradshaw had any kind of seizure or syncopic episode on November 21 of 2011, correct?

    A. (Dr. Gillis) That – That's true. The document—We don't' have any medical documentation.

    Q. (Healy) Right. And the same is true for the incident which occurred on September 27, 2011, correct, Doctor?

    A. (Gillis) Yes, I suppose that's true, too.

    (Id., p. 86, 1.4-11).

    Accepted as to the text of the testimony at hearing. Rejected to the extent that Respondent sets forth argument, not a finding of fact.

19. The first of two medical opinions upon which Dr. Gillis's recommendations and the ensuing Complaint against Respondent are based are those contained in the office records of Dr. David B. Wheeler, a neurologist, from August 5, 2011, admitted into evidence as Ex. CG-01 and Respondent Ex. R-A, (with attached EEG Report interpretations from Dr. Wheeler). These note Respondent's continued use of the drug, Pradaxa, and contain the following Assessment from the review of his medical history and EEG: "Therefore, I strongly *suspect* he has symptomatic localization-related epilepsy." from which he offered his diagnosis. (Ex. R-A, p. 3 of 3 pages).[5] (Emphasis added by Respondent).

5. Dr. Wheeler also saw Respondent on August 20 of this year according to a report admitted as Respondent Ex. R-A-1. This record was not reviewed by Dr. Gillis or relied upon by Complainant. No new laboratory testing was conducted, and the report confirms Dr. Wheeler's initial opinion of "suspected" epilepsy and symptoms also associated with "other late effects of cerebrovascular disease." It is also notable that Respondent's "suspected" epilepsy-related seizures "are controlled." (Ex. R-A-1, p. 3 of 3).

Accepted as to the fact that Dr. Wheeler's reports were entered as exhibits and contain the quoted statements. Rejected as to the assertion that Dr. Gillis did not review this report, see Tr. p. 99. Rejected to the extent that Respondent sets forth argument, not a finding of fact.

20. The second medical opinion forming the basis of the Complaint was provided by Dr. Thomas O. Mayer, also a neurologist, from the examination of Respondent in Sheridan, Wyoming on October 13, 2011. (Coast Guard Ex. CG-03; Respondent Ex. R-B). This report appears to be the product of a relatively brief office consultation based upon the medical history provided by Respondent and an otherwise unremarkable physical examination with no abnormal neurological findings. Dr. Mayer's primary assessment was for "Convulsions" with an indication of "*possible* onset seizure disorder . . ." (Ex. R-B, p. 2 of 2). However, the "Treatment" section of the Mayer report concludes: "Will possibly need EEG and MRI Brain to be done. Will not treat at present as *not clear on the exact etiology of spells.*" (Id., emphasis added).

Accepted as to the fact that Dr. Mayer's report was entered as an exhibit and contains the quoted statements. Rejected to the extent that Respondent sets forth argument, not a finding of fact.

21. The EEG taken of Respondent by Dr. Wheeler on August 5, 2011, is the only laboratory testing supporting the hypotheses of Drs. Wheeler and Mayer. Complainant's expert, Dr. Laura Gillis, could only state that this test was "suggestive" or, upon prompting by her counsel, "highly suggestive" of seizure disorders, specifically epilepsy. (HT, p. 76).

Accepted as to the assertion that the EEG is the only relevant laboratory testing in the record. Accepted as to Dr. Gillis's statements. Rejected to the extent that Respondent sets forth argument, not a finding of fact.

22. As indicated in the background section of this Decision and Order, Respondent contends that the syncopal-like episodes he experienced on September 27 and November 21 of 2011, and otherwise, were caused by, or causally related to, the *Pradaxa* prescribed for him by Dr. Finley on or about March 8, 2011. This contention is supported by the hearing testimony and medical records of Respondent's treating specialist, Deb Johnston, PA-C, the records of the only hematologist to give evidence in this case, Dr. Kim Fehir, in context with Respondent's Ex. R-G, ad Respondent's own testimony as to his medical history and symptoms related to the incident.[6]

6. The recommendations of Dr. Gillis and resulting Complaint against Respondent were apparently made without benefit of the office notes of Ms. Johnston for 10/27/11 through 12/05/11 (Ex. R-C-1),

or those of Drs. Fehir (Ex. R-E) and Jost (Ex. R-F). (HT, p. 81).

Accepted as to the nature of Respondent's arguments. Rejected as to the ultimate cause of Respondent's condition. Rejected as to the characterization of Ms. Johnston as a "specialist." Rejected as to the weight due to the evidence described. Rejected to the extent that Respondent sets forth argument, not a finding of fact.

23. Certified Physician Assistant Deb Johnston testified telephonically that she had treated Respondent on a family practice basis for a number of minor issues including blood clotting problems, for which he was originally prescribed *Coumadin (Warfarin)* (HT, pp. 107-109). She further testified that her supervising physician, Dr. John Finley changed this course of treatment from *Coumadin* to *Pradaxa* on or about March 8, 2011. (Id., pp. 109-110).

Accepted as to the nature of the witness's testimony. Rejected as to the characterization of Respondent's prior medical issues as "minor."

24. Pradaxa is a relatively new blood-thinning substitute for *Coumadin*, which does not require frequent blood testing. (Testimony of PA-C Johnston, HT, p. 110). Among its known side effects are "breathing problems, chest pain or chest tightness, feeling faint or lightheaded, and falls." (Ex. R-G).

Accepted and incorporated.

25. Ms. Johnston's medical records of October 27, 2011, and November 28, 2011, reflect her awareness and understanding that Respondent was a wheel captain of a river boat vessel who suffered a syncopal episode "passed out" while on duty in Louisiana attributable to (1) abdominal pain of unknown origin; (2) gastroesophogeal reflux disease; (and (3) tobacco abuse. (Ex R-C-1). As a result of the medical history provided to her by Respondent during his examination of October 27. 2011, Ms. Johnston ordered him off of *Pradaxa* and recommended a second EEG. (Id.). Following her examination of Respondent on November 28, 2011, PA-C Johnston referred Respondent to Dr. Corey T. Jost, a general and vascular surgeon (Ex. R-C-1, p. 3 of 10), and, following receipt of his reported findings, cleared Respondent to return to his work as a tugboat wheel man, "without restrictions." (Id., p. 2 of 10).

Accepted as to the assertions that Ms. Johnston took Respondent off Pradaxa, referred him to Dr. Jost, and cleared Respondent to return to work. Rejected as to the remaining assertions. Generally rejected to the extent that Respondent sets forth argument rather than factual findings.

26. Despite her admitted lack of neurological expertise, PA Johnston opined that *Pradaxa*, if not the sole producing cause of Respondent's "syncopal episodes," was at least a contributing factor to the associated symptomology according to her objective analysis of the medical facts and her review of the report of Dr. Kim Fehir. (HT, pp. 123-124; 134-135).

Accepted as to the fact that the witness stated this opinion; rejected as to the medical

validity of such opinion.

27. Respondent was examined by Dr. Kim Fehir, hematologist, on October 18, 2011. Dr. Fehir's records, admitted as Respondent's Exhibit R-E, reflect a differential diagnosis of: "4. Possible seizure related to *Pradaxa*," which finding was furthered by Respondent's uncontroverted testimony pertaining to Dr. Fehir's concern for the side effects of this drug. (Testimony of Respondent, HT, pp. 148-151).

    Accepted as to the fact that Dr. Fehir's record was admitted as an exhibit and contains the quoted statement. Rejected as to the medical validity of the assertions contained herein.

28. Consistent with all medical evidence, Respondent testified on direct examination that he had experienced no "syncopal episodes" or "seizure"-like disorders prior to the introduction of Pradaxa into his medical treatment by Dr. Finley in March of 2011. (HT, p. 141). He stated that those particular symptoms associated with the side effects of *Pradaxa* attended his on-board episodes of September 27, 2011, and November 21, 2011, while he was still ingesting that substance. (Id., pp. 142, 144, 148).

    Accepted as to the nature of Respondent's testimony. Rejected to the extent that Respondent sets forth argument, not findings of fact.

C. Resulting Findings of Fact

29. In accordance with the preceding review of testimony and related documentary evidence, I find that Respondent, Carl D. Bradshaw, had a "syncopal episode" – fainting – on September 27. 2011, while having direction and control of M/V H.B. 1 (ON 271177) as alleged in paragraphs 2 and 3 of the Complaint.

    Accepted and incorporated.

30. Also in accordance with the preceding review of testimony and documentary evidence, I find that Respondent, Carl D. Bradshaw, had a "syncopal episode" – fainting – on November 21. 2011, while having direction and control of M/V St. Genevieve (ON 541599) as alleged in paragraphs 5 and 6 of the Complaint.

    Accepted and incorporated.

31. The medical evidence presented by way of testimony and exhibits is too incomplete and inconclusive to support the allegations contained in paragraphs 1, 4, and 8 of the Complaint.

    Accepted with respect to the allegation that Respondent's precise condition is epilepsy. Rejected otherwise.

32. I further find that the organic or chemical combination, or combined organic and chemical condition that caused Respondent's episodes of September 27, 2011, and November 21, 2011, has abated or been controlled by either his discontinued use of the drug known as *Pradaxa*, the use of anticonvulsant medications, or both.

Rejected as inconsistent with the evidence of record.

33. I further find that further laboratory testing of the Respondent is necessary in order to determine the cause of the symptoms experienced by him on September 27, 2011, and November 21, 2011, and his fitness for continued duty in his current occupation.

Accepted regarding the need for further testing to determine the precise etiology of Respondent's condition. Rejected regarding the need for further testing to determine Respondent's current fitness for duty, the record is sufficient to determine that Respondent suffers from a condition that creates an inability on the part of Respondent to perform his required duties

APPENDIX D: PROPOSED CONCLUSIONS OF LAW

Coast Guard's Proposed Conclusions of Law

1. Respondent Carl Daniel Bradshaw and the subject matter of this hearing are properly within the jurisdiction of the U.S. Coast Guard and the Administrative Law Judge in accordance with 46 U.S.C. §7703; 46 C.F.R. Part 5; and, 33 C.F.R. Part 20.

   Accepted and incorporated.

2. At all relevant times, Respondent was the holder of validly issued credentials.

   Accepted and incorporated.

3. On September 27, 2011, while serving as Mate of the uninspected towing vessel M/V H.B. 1, the Respondent was acting under the authority of his Coast Guard issued credential while on watch and having direction and control.

   Accepted and incorporated.

4. On September 27, 2011, the Respondent committed an act of incompetence when he suffered a syncopal episode, while on watch.

   Accepted and incorporated.

5. On November 21, 2011, while serving as Mate of the uninspected towing vessel M/V ST. GENEVIEVE, the Respondent was acting under the authority of his Coast Guard issued credential while on watch and having direction and control.
6. On November 21, 2011, the Respondent committed an act of incompetence when he suffered a syncopal episode, while on watch.

   Accepted and incorporated.

7. On both occasions, the Respondent's incapacitation, as a result of his syncopal episode, demonstrated an inability to perform his required duties due to physical disability.

   Accepted and incorporated.

8. The Respondent was diagnosed by a neurologist with, "Localization-related (focal) (partial) epilepsy and epileptic syndromes with complex partial seizures; with intractable epilepsy."

   Accepted insofar as a neurologist recorded this diagnosis in his medical records; rejected to the extent that the diagnosis is supported by substantial evidence in the record here.

9. Respondent's medical conditions place him at greater risk for sudden incapacitation or sudden death than that of the general population.

   Accepted and incorporated.

10. Coast Guard policy requires mariners with a history of seizure disorder to be eight years seizure-free and on a stable dose of medication for two years to be eligible for a waiver.

    Accepted as a statement of general Coast Guard medical guidelines for marine licensing but rejected as a requirement in the absence of any regulation mandating this practice.

11. The Respondent's last known episode was November 21, 2011.

    Accepted and incorporated

12. The Respondent is unfit for duty as a Merchant Marine Officer until at least November 21, 2019
Accepted that Respondent is currently unfit for duty as a Merchant Marine Officer or Tankerman. Rejected as to that unfitness contnues until at least November 21, 2019.

Respondent's Proposed Conclusions of Law

A. Standard of Review

1. Respondent's expectations of the continuation of his longstanding employment as a merchant marine and maintaining his Master License against the disability claims of the United States Coast Guard implicate the due process of the Fifth Amendment to the United States Constitution. Although not directly employed by an agency or instrumentality of the United States government, Capt. Bradshaw was, and is, entitled to procedural, if not substantive, due process considerations. (*Kelly v. District of Columbia*, ___ F.2d ___, 2012 WL 4465849; 5 U.S.C.A. 558(a).

   Considered as argument. Coast Guard Suspension and Revocation proceedings are conducted under the APA, 46 U.S.C.A. 7702. APA adjudications provide substantive and procedural due process.

2. The primary and controlling legal authorities governing this matter are 46 U.S.C.A. 7703 and 46 C.F.R. 5.31, providing:

   > A license, certificate of registry, or merchant marine's document issued by the Secretary may be suspended or revoked if the holder—. . .
   >
   > > (4) Has committed an act of incompetence relating to the operation of the vessel; . . .

   46 U.S.C.A. 773 [sic]; and

Incompetence 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.

Accepted and incorporated

3. Also relevant to the determination of this matter are the appeals decisions of the Office of the Commandant for the United States Coast Guard, including *Appeal Decision 2698 (Hocking)*, *Appeal Decision 2664 (Shea)*, *Appeal Decision 2547 (Picciolo)*, and *Appeal Decision 2417 (Young)*, from which the following rules derive:

· The U.S.C.G. has a burden of proof to establish that the Respondent is, and continues to be, unable to perform in his current or related duties on account of the asserted defined disability according to "substantial evidence of a reliable and probative character." (*Shea*, p. 11; *Young*, p. 6).

· Medical competence (or incompetence) "must be determined not based solely on a past incident but with reference to competent medical testimony concerning the individual's condition and necessary treatment, and the risks they present," which testimony should be established "to a reasonable degree of (medical) certainty." (*Hocking*, p. 14).

· An ALJ in my position is not bound by medical findings and opinions. (*Shea*, pp. 10-11; *Picciolo*, p. 5; *Appeal Decision 2191 (Boykin)*, p. 3).

Accepted and incorporated

B. Primary Opinion – Incompetence

Having reviewed all competent evidence presented at the Hearing, and accordance with the preceding findings and legal authorities, the Complainant has failed to establish the existence of epilepsy or other neurological "seizure" in the Respondent, as alleged in the Complaint, by substantial evidence of a reliable and probative nature.

Rejected for the reasons given in the opinion. Evidence established that Respondent has had seizures and has a form of conclusive disorder.

C. The Eight-Year Seizure-Free Rule

Paragraph 7 of the Complaint Alleges that:

7. Mariners with a seizure disorder who are not seizure free for a period of 8 years are unfit and disqualified for service as a credentialed Merchant Mariner with an officer endorsement.

Even if the allegations of epilepsy contained in the Complaint had been established by Complainant by a preponderance of the evidence, no legal authority has been presented to the Court supporting this allegation.

The occupational expert testifying for Complainant stated that the authority for this requirement is not contained in any federal statute, regulation, or written policy:

THE WITNESS: At this time the eight-year seizure-free is accepted practice. . . .

THE COURT: And where is that practice adopted?

THE WITNESS: It is not written policy. It is accepted Coast Guard practice at this point through the medical evaluation process and the medical appeal process.

THE COURT: And again the guidelines that you use are guidelines. Is that correct?

THE WITNESS: The NVIC 04-08 is a guideline.

;

Q. (Healy) . . . [t]his eight-year requirement under which a mariner cannot return to his employment is something that's established at the headquarters of the U.S. Coast Guard, correct?

A. (Dr. Gillis) Yes.

Q. (Healy) Okay. There is no federal law, rule or regulation that implements that. Is that correct?

A. (Dr. Gillis) That is correct.

(HT, pp. 94, 100).

Respondent testified that the implementation of this "policy" would cause him to "lose my life. I'd lose everything." (HT, p. 139, lines 5-6). This does appear to be the case according to the testimony of Dr. Gillis and the closing statements of Complainant's counsel. (HT, pp. 72, 162).

The Commandant of the United States Coast Guard clearly has the authority to promulgate written rules and regulations of this nature as a representative of the U.S. Secretary of Treasury. (15 U.S.C.A. 92, 631-633). However, that authority, when affecting the substantial rights of those to whom the rule applies, is subject to the due process requirements of the Administrative Procedures Act, 5 U.S.C.A. 553. (*IPSCO, Inc., v. U.S.*, CIT 1988, 687 F. Supp. 614). No evidence of such compliance has been presented to the Court; all evidence is to the contrary. Therefore, even if the condition of epilepsy postulated by Drs. Wheeler and Mayer were sufficiently established by the facts, the eight-year "seizure-free" moratorium established by the "unwritten policy" of the Coast Guard is unenforceable against Respondent as a matter of law. (*Chrysler Corp. v. Brown*, 441 U.S. 281, 99 S.Ct. 1705, 1723-1725, 60 L.Ed.2d 208 (1979)).

This section is primarily considered argument. The eight-year rule has not been issued pursuant to rulemaking. However, internal guidelines to licensing personnel are not necessarily required to be issued under the notice and comment process of the APA. As discussed in the decision, the eight-year seizure-free requirement is not considered relevant to my decision. Substantive and procedural due process is required in the suspension and revocation process. These proceedings

are adjudicated pursuant to the APA. 46 U.S.C. § 7702. The APA provides effective substantive and procedural due process. The Commandant's authority is delegated currently from the Secretary of Homeland Security. 46 U.S.C. § 2103 and delegated pursuant to46 U.S.C. § 2104. See also 46 U.S.C. 7101 and 33 C.F.R. § 1.05-1.

D. Controlled Disability

Accordingly, even had Respondent's epileptic condition been properly established, his symptom-free history since the substitution of the drum [sic] *Coumadin* for *Pradaxa,* and the corresponding administration of the drug *Vimpat*, raises the issue of his continued fitness for employment and certification notwithstanding the illness according to such cases as *Hocking*, *Shea*, and *Picciolo*.

While reaching different results according to the findings of each of the presiding ALJs and the condition treated, each of these cases underscore the need for competent and extensive medical evidence concerning such factors as the administrative protocol of the controlling medication, the certainty of its effects, the likelihood of self-compliance in its administration, and the level of risk to people and property according to the assigned duties of the seaman. (Hocking, p. 15; Shea, pp. 7-8; Picciolo, p. 5).

These cases also differ in the physical and mental condition being treated, none of which involved epilepsy. In this regard, Complainant's expert testified that current and applicable "guidelines" for fitness determinations are established in the "Navigation and Vessel Inspection NVIC No. 04-08" circular. (HT, Testimony of Dr. Gillis, pp. 66, 94). That circular contains the following passage:

> Disclaimer. This guidance is not a substitute for applicable legal requirements, nor is it itself a regulation. It is not intended to nor does it impose legally-binding requirements on any party. It represents the Coast Guard's current thinking on this topic and is issued for guidance purposes to outline methods of best practice for compliance with the applicable law.

Nevertheless, it is not clear from the record that the Coast Guard complied with the medical procedures and due process requirements of Enclosure 6 of the Circular. Further, the relevant neurological sections of the "Medical Conditions Subject to Further Review" sections of the Circular Enclosure 3, (Nos. 168 and 169), recommend comprehensive medical record retrieval, including appropriate "laboratory and MRI and EEG studies"[7]

Rejected as argument. See decision, ALJ considered this NVIC in the decision. Commandant Instruction M1850.2D applies solely to military members and was not considered.

7. See also U.S. Department of Homeland Security/United States Coast Guard, "Physical Disability Evaluation System," Commandant Instruction M1850.2d (May 19, 2006), Enclosure (1), Sections 8910-8914.