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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
v.	:	
	:	ON APPEAL
	:	
	:	NO. 2724
MERCHANT MARINER CREDENTIAL	:	
	:	
	:	
Issued to: THEODORE BRUCE EDENSTROM	:	

APPEARANCES

For the Government:
Andrew J. Norris, Esq.
Eric A. Bauer

Respondent:
Theodore Bruce Edenstrom, *pro se*

Administrative Law Judge:
George J. Jordan

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

On March 20, 2018, an Administrative Law Judge (ALJ) of the United States Coast Guard issued a Decision and Order (D&O) finding proved the Coast Guard's Complaint against the Merchant Mariner Credential of Respondent Theodore Bruce Edenstrom and ordering the revocation of Respondent's credential.

The Coast Guard complaint charged Respondent with two allegations of misconduct. First, the complaint alleged that Respondent failed to disclose a number of medical conditions on

the Form CG-719K he submitted to the Coast Guard, in support of an application for renewal of his credential. Second, the complaint alleged that Respondent committed misconduct by failing to appear for a mandated random drug test on October 8, 2015.

Respondent appeals.

FACTS

On April 21, 2015, Respondent submitted Form CG-719K, Merchant Mariner Medical Evaluation Report, dated March 27, 2015, to the National Maritime Center (NMC), in support of his application for renewal of his merchant mariner credential. [CG Exs. 6 & 7; D&O at 3.] Section I of the Form CG-719K[1] requires the applicant mariner to attest, subject to prosecution under 18 U.S.C. § 1001, that the information provided is truthful and complete, without knowing omission. Respondent signed, and so attested. [CG Ex. 7 at 3.]

Section IV of the Form CG-719K, Certification of Medical Conditions, lists 88 medical conditions. As the form states at the top of Section IV, it "must be completed by applicant, and reviewed by verifying medical practitioner." The instructions to that section provide, "Applicants must report their relevant medical conditions to the best of their knowledge, and the verifying medical practitioner must verify the medical conditions, using the table below." Respondent's March 2015 Form CG-719K indicates that Respondent did not report any diagnosis or treatment of any of the 88 listed medical conditions. [CG Ex. 7 at 5; D&O at 3.]

The NMC issued Respondent's renewed credential, which is the credential at issue in this proceeding, on May 8, 2015. [CG Ex. 1; D&O at 3.]

On September 30, 2015, Respondent was employed by Brusco Tug & Barge (Brusco) as the Master of the M/V HENRY BRUSCO. [D&O at 4.]

[1] Form CG-719K has since been revised, in April 2017.

When new employees are hired by Brusco, they are required to read and initial the company's drug and alcohol policy, which is set out in a section of the company's employee handbook. [D&O at 4.] Pursuant to this policy, Brusco employees are expected to report for drug testing within 24 hours of notification. [*Id.*] Respondent read and initialed the Brusco drug and alcohol policy upon hire. [*Id.*]

To comply with the requirements for random drug testing of mariners, as laid out at 46 CFR § 16.230, Brusco utilizes whole-boat testing (where a vessel's entire crew is selected at random, rather than selection by individual mariner). [D&O at 4.] American Maritime Safety (AMS) administers Brusco's random drug testing program. [*Id.*] AMS uses RandomWare software to select vessels for whole-boat drug testing. [*Id.*]

On September 22, 2015, the AMS vessel operations manager sent a confidential email to Brusco's compliance manager and Designated Employer Representative (DER), notifying him that the M/V HENRY BRUSCO had been selected for random testing. [D&O at 4.] Upon receipt of such a notice, Brusco has 45 days to test the entire crew of the selected vessel and report back to AMS. [*Id.* at 5.] Once a selected vessel is close enough to a collection facility to complete the test, the DER notifies the captain of the drug testing. [*Id.*]

Late in the evening on September 30, 2015, the HENRY BRUSCO was coming into her home port in Cathlamet, Washington. [D&O at 5.] Brusco's DER asked the company's Cathlamet port captain to notify Respondent that his vessel had been selected for drug testing and to request him to keep the crew on board the vessel until the following morning when the testing facility opened. [*Id.*]

On September 30, 2015, the port captain notified Respondent, by text message, that he was to keep the crew onboard overnight, in order to complete a random drug test in the morning. [D&O at 5.] The port captain further directed Respondent not to tell the crew why they were being kept onboard. [*Id.*] Respondent obeyed the order not to decrew the vessel. [*Id.*]

On the morning of October 1, 2015, Respondent and the port captain agreed that Respondent would send the crew to the Brusco office, to receive further instruction regarding the drug screen. [D&O at 5.]

Respondent himself visited the Brusco office on October 1, 2015, where he met with the DER and discussed health insurance paperwork. [D&O at 5.] During this meeting, the DER did not mention anything to Respondent about the drug test, and Respondent made no inquiries about the same. [*Id.*] Respondent did not report to a drug testing facility on October 1, 2015. [*Id.*]

Respondent's hitch on the HENRY BRUSCO ended on October 1, 2015. [D&O at 4, 6.] As was the company's standard practice, Respondent remained in Brusco's employee pool, with the expectation that he would be assigned to a Brusco vessel within 45 days. [*Id.* at 6.] At some point after October 1, 2015, Respondent applied for and received Washington State unemployment benefits. [*Id.*]

On October 8, 2015, Brusco's DER became aware that Respondent had not completed the October 1 random drug screen, ordered for the entire crew of the HENRY BRUSCO. [D&O at 6.] That day, the DER contacted Respondent to ask why he had not reported for a drug test on October 1, and inform him that he would need to take a drug screen immediately. [*Id.*] The DER told Respondent that, if Respondent failed to complete a drug screen, Brusco would notify the Coast Guard. [*Id.*]

Respondent reported to the drug testing facility in the afternoon of October 8, 2015. [D&O at 6.] Respondent's initial urine sample, provided at about 2:30 pm, was more than 100° Fahrenheit, which is outside the acceptable temperature range for a urine sample. [*Id.*; 49 CFR § 40.65(b)] The collector informed Respondent that he was obliged to provide a second urine sample, this time under direct observation. [D&O at 6.] Accompanied by a male observer, Respondent was unable to provide a second sample. [*Id.*] The collector provided Respondent with ten ounces of water, and informed him that he was obligated to remain at the testing facility

until he could provide a second sample. [*Id.* at 7.] At approximately 2:37 pm, Respondent left the facility, not having provided a second sample. [*Id.*]

Respondent proceeded to the Brusco office, where he informed the DER that he had left the testing facility without submitting a sample. [Tr. at 147-48.] Upon receiving confirmation of this refusal from the testing facility, Brusco terminated Respondent's employment. [*Id.* at 148.]

On November 23, 2015, the Coast Guard filed a Complaint against Respondent's Merchant Mariner Credential making two allegations of misconduct for refusal to submit to mandated drug testing—one for the October 1 drug testing date and one for October 8. This Complaint was assigned docket number 2015-0352.

On March 7, 2016, Respondent failed to appear at a scheduled prehearing conference for 2015-0352, and the Coast Guard moved for default. [CG Ex. 3.] Respondent filed, on March 20, 2016, a Motion for Good Cause Shown, explaining that he had missed the scheduled conference as a result of treatment for an ongoing medical condition. [CG Ex. 4.] The ALJ denied the government motion for default because Respondent had provided good cause for missing the conference. [CG Ex. 2 at 2.]

The hearing in the 2015-0352 matter convened on June 28, 2016. [CG Ex. 2 (January 12, 2017 D&O) at 3.] At hearing, the Coast Guard withdrew its allegation regarding the October 8 test, and the ALJ dismissed that misconduct charge without prejudice. [CG Ex. 2 (January 12, 2017 D&O) at 2.] The ALJ subsequently issued his D&O on January 12, 2017, finding the remaining misconduct charge, for refusal of an ordered drug test on October 1, NOT PROVED, because Brusco did not properly notify Respondent of his obligation to test. [*Id.*] The Coast Guard appealed that ruling, an appeal that was later withdrawn.

During an internal post-hearing review of the first complaint against Respondent, the Coast Guard investigating officer (IO) noted the medical information contained in Respondent's March 20, 2016, Motion for Good Cause. [D&O at 3.] The IO believed that the condition and treatment described by Respondent were possibly disqualifying for sea service. The IO obtained

Respondent's most recent merchant mariner credential application, which included the March 27, 2015, Form CG-719K described above. [*Id.*] The IO then subpoenaed Respondent's medical records, which revealed that Respondent had, prior to March 2015, been diagnosed with and treated for several of the medical conditions marked "No" at Section IV of the March 2015 sworn Form CG-719K. [*Id.* at 4.]

On May 17, 2017, the Coast Guard filed a new complaint against Respondent's credential, making two independent allegations of misconduct, first for violating 18 U.S.C. § 1001 by failing to disclose known medical conditions on the Form CG-719K, and second for refusing a government-mandated drug test on October 8, 2015.

PROCEDURAL HISTORY

Respondent filed an answer, styled as a "Response and Notice of Special Appearance," denying all of the Complaint's jurisdictional and factual allegations. On July 5, 2017, Respondent filed a motion to dismiss, arguing that the complaint was invalid for lack of jurisdiction and failure to state a cause of action. Respondent's motion also asked the ALJ to quash the Coast Guard subpoena of Respondent's medical records, as an overreach of the Coast Guard's statutory investigatory authority.[2]

The Coast Guard filed a motion for a partial summary decision, arguing that the D&O of January 12, 2017, had conclusively determined that Respondent was properly selected for a random drug test on September 22, 2015. The Coast Guard asked the ALJ to consider this determination *res judicata* and binding in this action against Respondent.

The ALJ denied both of these motions, by separate orders of August 8, 2017. The ALJ denied the Coast Guard motion because the January 2017 D&O was then on appeal to the Commandant, but took official notice of the testimony regarding the random selection made at

[2] *Pro se* Respondent clarified the dual intent of his motion by email of August 8, 2017: "In case the motion to dismiss is construed not to include a determination as to the illegal subpoena and the unlawfully obtained private medical records with the use of that subpoena, Mr. Edenstrom would like this email to be intended as a motion to quash the subpoena, in support of and in addition to the motion to dismiss."

the August 2016 hearing in that case.[3] The ALJ denied Respondent's motion to dismiss, and upheld the legitimacy of the disputed Coast Guard subpoena, noting that only the subjects of Coast Guard investigatory subpoenas may move to quash. *See* 46 CFR § 5.305; 33 CFR § 20.609.

On August 28, 2017, the ALJ issued a Protective Order, directing that sensitive, relevant evidentiary materials, "including medical records, MMC credential applications and documents related to drug testing," must not be publicly disclosed unless appropriately redacted.

The hearing in this matter convened on August 29, 2017. At hearing, the Coast Guard offered the testimony of three witnesses and entered thirteen exhibits into the record. Respondent offered his own testimony and entered five exhibits into the record. Respondent appeared *pro se* and was aided at hearing by his non-attorney son. The parties filed post-hearing briefs and proposed findings of fact and conclusion of law.

The ALJ issued his D&O on March 20, 2018. Concurrently, he issued an Addendum Decision, subject to the August 28, 2017, Protective Order, containing findings and discussion as to Respondent's medical conditions. The findings and analysis of the Addendum Decision were incorporated into the publicly available D&O "to the greatest extent possible without revealing [personally identifying information.]" [Addendum Decision at 3.]

Respondent filed notice of appeal and perfected his appeal by filing a timely Appeal Brief. The Coast Guard submitted a Reply Brief. Accordingly, this appeal is properly before me.

[3] Specifically, the August 8 order took official notice of the sworn testimony of two witnesses at the 2015-0352 hearing—the developer of the RandomWare software used by AMS, and the AMS vessels operation manager. This testimony is at pages 7-18 and 19-23, respectively, of the 2015-0352 hearing transcript, filed as Respondent Exhibit A in the case at hand. The ALJ also took official notice of Coast Guard Exhibits 1 and 2 from the 2015-0352 hearing; Coast Guard Exhibit 1 was the AMS random selection, and Exhibit 2 was the September 22, 2015 email from AMS to Brusco's DER, notifying him of the random selection of thirteen Brusco vessels, including the HENRY BRUSCO, for drug testing.

BASES OF APPEAL

Respondent appeals from the D&O, which found proved both allegations of misconduct, for failure to disclose diagnosed medical conditions on a Form CG-719K, submitted to the Coast Guard in application for renewal of his credential, and for failure to submit to random drug testing. Respondent raises the following questions on appeal:

I. *Was Respondent acting under the authority of his license at the time of the October 8, 2015 drug test?*

II. *Was the October 8, 2015 drug test properly ordered?*

III. *Did the ALJ err in upholding the Coast Guard subpoena of Respondent's medical records?*

IV. *Was the ALJ's determination that Respondent knowingly omitted medical diagnoses from his application supported by substantial evidence?*

OPINION

I.

Was Respondent acting under the authority of his license at the time of the October 8, 2015 drug test?

Respondent has maintained, throughout this proceeding, that he was not acting under the authority of his credential on October 8, 2015, because he was not employed by Brusco on that date.

To establish jurisdiction in a misconduct case, the act of misconduct alleged must be proven to have occurred while the mariner was "acting under the authority" of his merchant mariner credential. 46 U.S.C. § 7703. A person employed in the service of a vessel is acting under the authority of a merchant mariner credential when possession of the credential is either "[r]equired by law or regulation" or "[r]equired by an employer as a condition for employment." 46 CFR § 5.57(a). "[Suspension and revocation] proceedings are directed solely at the documents or licenses, not against person or property. Accordingly, when such action is based upon a charge of 'misconduct while acting under authority . . .,' the particular act must be related

to the particular document or license and to the person's employment thereunder." *Appeal Decision 2620 (COX)* at 4, 2001 WL 34080159 at 2 (quoting *Appeal Decision 2025 (ARMSTRONG)* at 4, 1975 WL 171669 at 3).

The Coast Guard appellate brief observes that no Appeal Decision has directly addressed a situation like this one, where a respondent mariner, serving periodically on coastwise vessels without contract or articles, is required to complete a random drug test during his "off" period ashore. [CG Appellate Brief at 2.]

It is undisputed that, while serving as Master of the HENRY BRUSCO, Respondent was acting under the authority of his credential. The crew of the HENRY BRUSCO, including Respondent, were to be relieved in a regularly scheduled crew change after arrival in port on September 30, 2015. The vessel arrived on the evening of September 30, and Respondent was directed to keep the crew onboard overnight, so a random drug screen could be completed on the morning of October 1, 2015. Respondent argues on appeal that after October 1, 2015, he was unemployed, and that on the date of his test refusal, October 8, he was in no way acting under the authority of his credential.

The Coast Guard presents two alternative bases for finding that Respondent was acting under the authority of his credential when he refused the October 8 drug test. First, his employment relationship with Brusco, conditioned on his possession of a merchant mariner credential, was continuous and remained ongoing as of October 8, 2015. Second, the obligation to take the government-mandated random drug screen arose on October 1, 2015, when Brusco notified the off-signing crew of the HENRY BRUSCO of the obligation to test. Respondent signed off as Master of the HENRY BRUSCO on October 1, a position that required a Coast Guard license. Because his obligation to complete the random drug screen arose on October 1, this second argument goes, the question of jurisdiction depends on his status as of that date.

The ALJ, in his D&O, held that Respondent was acting under the authority of his credential on October 8, establishing Coast Guard jurisdiction. The ALJ observed that, as of October 8, while Respondent was no longer a crewmember assigned to a Brusco vessel, he

remained a Brusco employee, eligible to fill safety-sensitive positions on Brusco vessels, and also noted that the obligation to test arose earlier, while Respondent was a crewmember assigned to a Brusco vessel.

The jurisdictional question on appeal is whether Respondent was acting under the authority of his credential when he departed the drug testing facility on the afternoon of October 8, 2015, in circumstances amounting to a refusal to test. I find that he was.

When Brusco contacted him on October 8, Respondent consented to complete the drug screen and reported to the testing facility. In Respondent's words, he followed Brusco's instructions to report for a drug test, "under duress": "I was told it would look real bad for everyone if I didn't take it that day and [Brusco's DER] demanded that I did." [CG Ex. 12 at 2.] This statement supports a determination that he complied with the order to test in order to maintain his employment relationship with the company. The DER informed Respondent that, should he fail to report to the testing facility on October 8, 2015, Brusco would report that failure to the Coast Guard. [D&O at 6.] This warning put Respondent on notice that his compliance was being requested in direct connection with his credential.

Respondent believes that he was justified in departing the testing facility, in circumstances that established a refusal to test, because he was "not under a contract nor on any job site or vessel." [CG Ex. 12 at 2; Tr. at 192-94.] Whatever name we assign to his employment status on October 8, 2015, Respondent's disputed actions on that date were quite evidently related to his employment relationship with Brusco, and were therefore taken under the authority of his credential.

The Coast Guard takes the position, as it did seventy years ago, that "the paramount factor in determining whether a person is serving under the authority of a license or certificate is that of the employment status." *Appeal Decision 389 (VENTOLA)*, 1949 WL 38781 at 3. Expanding on the term "employment status," *VENTOLA* states: "The basic employment status required (. . . for Coast Guard jurisdiction), is that the seaman must be 'in the service of the ship.'" 1949 WL 38781 at 6. Where a mariner acts "in the course of his employment," or "on

the shipowner's business," he acts "in the service of the ship," for purposes of jurisdiction. *Id.* at 5. "The Coast Guard may assume jurisdiction when a seaman is 'in the service of the ship' because he is then acting 'under authority of his license' if there is a causal relationship between the two." *Id.*

Consider the "course of employment" test in the context of a routine, government-mandated pre-employment drug test. "No marine employer shall engage or employ any individual to serve as a crewmember unless the individual passes a chemical test for dangerous drugs for that employer." 46 CFR § 16.210(a). A pre-employment drug screen is prerequisite to employment and, therefore, the job applicant submitting to that pre-employment test is, evidently, not yet an employee. The applicant is, however, submitting to the drug test in the course of employment. "[T]he particular act"—the drug test—is "related to the particular document or license and to the person's employment thereunder," in the words of *Appeal Decision 2620 (COX)* at 4, 2001 WL 34080159 at 2 (quoting *Appeal Decision 2025 (ARMSTRONG)* at 4, 1975 WL 171669 at 3).

In *Appeal Decision 2656 (JORDAN)*, 2006 WL 1519585, the respondent mariner applied for a position that required a merchant mariner document. Prior to hire, he was required to submit to a pre-employment drug test. Under those circumstances, there was "no question that Respondent was 'acting under the authority' of his document when he failed to submit to a pre-employment drug test that was required as a condition of his employment." *JORDAN* at 6, 2006 WL 1519585 at 3.

Here, Respondent's *continued* employment with Brusco, in a credentialed position, was conditioned on his completion of the October 8, 2015 random drug test. As in *JORDAN*, it is unquestionable that he was acting under the authority of his license when he failed to submit to that test. Respondent argues that the employment relationship with Brusco was binary; when he was aboard ship and receiving wages he was employed by Brusco, and when he was off the ship and not receiving wages, he was not employed. But comparison to pre-employment drug tests illustrates that the question of jurisdiction is not a binary status question—employee or non-employee—but a fact-specific question as to whether Respondent's particular act—his visit to

the drug testing facility—was undertaken "in the course of his employment." *See Appeal Decision 389 (VENTOLA)*, 1949 WL 38781 at 6.

The findings of the D&O support a determination that Respondent's visit to the drug testing facility on October 8, 2015, was undertaken at Brusco's behest, in the course of Respondent's employment with that company, and thus his departure from the testing facility was also in the course of Respondent's employment with that company. At all relevant times, Respondent was acting under the authority of his credential, establishing jurisdiction for the second allegation before this suspension and revocation proceeding.

II.

Was the October 8, 2015 drug test properly ordered?

Respondent argues that he was entitled to refuse to be tested in the absence of a contract with the person demanding it. In other words, he suggests that the October 8, 2015 drug test was not properly ordered, because, as he was not assigned to a vessel or on active duty with Brusco on October 8, he was not eligible for random drug testing on that date. [Respondent's Appellate Brief at 2].

Part I of this opinion addressed Respondent's related jurisdictional argument that he was not acting under the authority of his license on October 8, 2015. That was a question of jurisdiction, but this is a question as to a necessary element of the charge of misconduct laid against Respondent. The second question, whether or not Respondent was entitled to refuse the October 8 test without consequence to his credential -- that is, whether his employer had a right to order it -- can be separately analyzed, but it will be resolved consistently with the answer to the first, jurisdictional question.

"Misconduct is human behavior which violates some formal, duly established rule. . . . It is an act which is forbidden or a failure to do that which is required." 46 CFR § 5.27. This misconduct proceeding is based upon a mariner's refusal to follow his employer's direction to submit to a government-mandated random drug test. Having concluded that Respondent was acting under the authority of his license, and that jurisdiction is therefore proper, I will now

consider the situation from a different point of view: whether a marine employer may require an off-duty mariner who is not assigned to any vessel to submit to government-mandated random drug testing. That is, was Brusco's direction to Respondent to submit to a drug test a legitimate enforcement of its obligation to test mariners under 46 CFR § 16.230?

Coast Guard policy guidance provides ample support for the proposition that a mariner remains eligible for testing under 46 CFR § 16.230 while in an off-duty, but "on-roster," status. When calculating the number of random drug screens necessary to meet the required annual testing frequency, marine employers are directed to base their calculation on the number of employees who fill covered billets on their vessels: "For example; if a marine employer employs 12 crewmembers throughout a year to fill 6 crewmember billets on board their vessel, the number of random tests required would be based on 12 employees. Thus, using a required rate of 50%, 6 random tests would need to be conducted during that year." Marine Safety Manual, Volume V, COMDTINST M16000.10A dated April 24, 2008, paragraph C.6.C.3.a.1 at C6-14. Marine employers may only avoid the pre-employment drug test process for returning seasonal employees if those employees have been kept in an active random drug testing pool for the full duration of the off-season. *Id.*, paragraph C.6.B.7 at C6-10. "The same would hold true for a seaman returning to the same company after an absence (i.e. vacation or normal time off from being part of a blue/gold crew) during which the seaman was still considered an employee of the company (i.e. still receiving medical and/or other benefits)." *Id.*

In this case, Respondent had recently qualified for Brusco employee health benefits, and was reportedly considering whether to apply for those benefits at the time of his refusal to test. [Tr. at 149-50.] Had Respondent's employment continued as planned, Brusco would not have required him to submit to a pre-employment drug test the next time he rotated back onto a Brusco vessel, after entering an off-duty status on October 1, 2015. [D&O at 8.]

The question of whether a marine employer may require an off-duty mariner who is not assigned to any vessel to submit to government-mandated random drug testing is of first impression in these merchant mariner suspension and revocation proceedings. The National Transportation Safety Board (NTSB) has addressed an analogous question, in a 2009 appeal

from the revocation of a civil airman's certificate, and held that a part-time, off-duty pilot remained subject to selection by his employer for government-mandated random drug testing, so long as his name remained on that airline's roster of available flight crew. *Fed. Aviation Admin. v. Pasternack*, NTSB Order No. EA-5443 at 10, 2009 WL 1222151 at 5, *vacated and remanded on other grounds*, 596 F.3d 836 (D.C. Cir. 2010). "[R]espondent, as a part-time or intermittent pilot designated to perform flight crewmember duties . . . fell within the aegis of the DOT random drug testing requirements." *Id.*

Marine employers' random testing of off-duty mariners ashore, who remain eligible to rotate back into safety-sensitive positions without pre-employment testing, is part of the Coast Guard's established drug testing policy for mariners, and supports the aim of deterrence in the Coast Guard's efforts to maintain a drug-free maritime workforce. The October 8, 2015 random drug screen was properly ordered, in accordance with 46 CFR Part 16.

III.

Did the ALJ err in upholding the Coast Guard subpoena of Respondent's medical records?

Throughout these proceedings, Respondent has remained steadfast in his position that the Coast Guard exceeded its investigatory authority in issuing a subpoena for his medical records.

On August 8, 2017, the ALJ in this matter issued an Order Denying Respondent's Motion to Dismiss (August 8 Order). That Order addressed Respondent's objections to the Coast Guard subpoena: "The Coast Guard's subpoena here appears to be sufficiently specific, limited, and relevant to the matter at hand. Its purpose was to determine compliance with Federal Merchant Mariner licensing requirements. I therefore see no merit to Respondent's arguments that the subpoena was illegal." [August 8 Order at 5.] The ALJ also noted that the Exclusionary Rule does not apply in Coast Guard suspension and revocation proceedings, so a challenge to the legitimacy of the subpoena is immaterial to the admissibility of the evidence. [*Id.* at 4.]

The subpoena power of Coast Guard investigating officers with respect to suspension and revocation proceedings is firmly established, and analogous in scope to the subpoena authority of a federal district court:

> (a) An official designated to investigate or preside at a hearing on matters that are grounds for suspension or revocation of licenses, certificates of registry, and merchant mariners' documents may administer oaths and issue subpenas to compel the attendance and testimony of witnesses and the production of records or other evidence during investigations and at hearings.
>
> (b) The jurisdictional limits of a subpena issued under this section are the same as, and are enforceable in the same manner as, subpenas issued under chapter 63 of this title.

46 U.S.C. § 7705. The referenced Chapter 63 governs marine casualty investigations, and provides:

> (a) In an investigation under this chapter . . . the production of any evidence may be compelled by subpena. The subpena authority granted by this section is coextensive with that of a district court of the United States, in civil matters, for the district in which the investigation is conducted.
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> * * *
>
> (d) An official designated to conduct an investigation under this part may issue subpenas as provided in this section . . . .

46 U.S.C. § 6304. *See also Appeal Decision 2063 (CORNELIUS)* at 7, 1976 WL 179598 at 4.

The ALJ did not err in his interpretation of the Coast Guard's investigatory subpoena power. The IO issued a subpoena to Respondent's medical care providers, in pursuit of possible suspension and revocation action against Respondent's credential. The subjects complied with the subpoena, and the records obtained were entered into evidence, in support of one of the two allegations of misconduct now brought against Respondent.

In litigation arising out of the present matter, a federal district judge rejected Respondent's restricted interpretation of the Coast Guard subpoena power under 46 U.S.C. § 7705. *Edenstrom v. U.S. Coast Guard*, No. C17-5658 RBL, 2018 WL 2229273 at 1 (W.D. Wa. May 16, 2018).[4]

[4] After the August 29, 2017 hearing and before the June 21, 2018 issuance of the D&O, Respondent filed suit against the Coast Guard, seeking a declaratory judgment that the Coast Guard subpoena of Respondent's medical records was illegal. The federal district court found that Respondent had not yet exhausted his administrative remedies and dismissed the claim without prejudice.

As noted by the ALJ's August 8 Order, even were the subpoena procedurally deficient, the Exclusionary Rule does not apply in these suspension and revocation proceedings. *Appeal Decision 2625 (ROBERTSON)* at 13-14, 2002 WL 32061801 at 7 (citing *Appeal Decision 2135 (FOSSANI)*, 1978 WL 199018). "Any remedial action, such as those contemplated by [46 U.S.C. chapter 77], will upset the party whose conduct is found actionable, but this does not convert the proceeding to a criminal case in which the rules of criminal procedure and evidence must be followed." *FOSSANI* at 8, 1978 WL 199018 at 6.

I see no error in the ALJ's August 2017 order, denying Respondent's motion to quash the subpoena, and his final D&O, which relied on evidence obtained by that subpoena. The ALJ's conclusions as to the admissibility of Respondent's medical records were correct in law.

IV.

Was the ALJ's determination that Respondent knowingly omitted medical diagnoses from his application supported by substantial evidence?

Respondent objects to the D&O's conclusion that he submitted a fraudulent application by knowingly omitting relevant and material information from Form CG-719K. Respondent argues that the medical records in evidence are not sufficient to support the ALJ's finding that Respondent knew of his medical diagnoses at the time he completed the Form CG-719K medical exam.

Submission of Form CG-719K, "Merchant Mariner Credential Medical Evaluation Report," is required for merchant marine officers like Respondent, when applying for an original or renewed merchant mariner credential. *See* 46 CFR §§ 10.225(b)(7), 10.227(d)(6), 10.302. The Coast Guard, as the credentialing authority for the United States merchant marine, has an obligation to certify the medical and physical capacity of credentialed mariners. "Service on vessels may be arduous and impose unique physical and medical demands on mariners. The public safety risks associated with the medical and physical conditions of mariners on vessels are important considerations for the safe operation of vessels and the safety and well-being of the crew. In the event of an emergency, immediate response may be limited to the vessel's crew, and outside help may be delayed." Merchant Mariner Medical Manual, COMDTINST

M16721.48 dated August 30, 2019, paragraph 4.a., at 2.

46 CFR § 10.304(a) describes the scope and purpose of the medical exam conducted in completion of the Form CG-719K: "The general medical exam must be documented and of such scope to ensure that there are no conditions that pose significant risk of sudden incapacitation or debilitating complication. This exam must also document any condition requiring medication that impairs cognitive ability, judgment, or reaction time."

Some portions of Form CG-719K are completed by the applicant, and other portions are completed by a verifying medical practitioner. At Section I of the form, the applicant must certify, subject to prosecution under 18 U.S.C. § 1001, that all provided information is true and correct to the best of his or her knowledge, and that he or she has not knowingly omitted to report any relevant, material information.

> The truth of information provided by applicants for documents and licenses is essential to the discharge of the Coast Guard mission of protection of life and property at sea. . . . The contents of 18 U.S.C. § 1001 are printed on all Coast Guard license application forms. In signing one of these forms an applicant acknowledges his awareness of the meaning of this statute.

Appeal Decision 2025 (ARMSTRONG) at 5-6, 1975 WL 171669 at 4. Under 18 U.S.C. § 1001, it is a crime to make a knowingly false statement to the government, or to knowingly conceal a material fact from the government. This is a formal, duly established rule, violation of which may give rise to a charge of misconduct under 46 CFR § 5.27. *Appeal Decision 2610 (BENNETT)* at 10, 1999 WL 33595178 at 6, *aff'd*, NTSB Order No. EM-187, 2000 WL 967428.

Section IV of Form CG-719K, Certification of Medical Conditions, "must be completed by applicant and reviewed by verifying medical practitioner." The applicant must report, "To the best of the applicant's knowledge, does the applicant have, or have ever suffered from, any of the following [88 medical conditions]?" A checkmark in the "yes" column is required "if the applicant has had a previous diagnosis or treatment of the condition by a healthcare provider." For all conditions marked "yes," the medical practitioner must supply additional information, including limitations caused by the condition, whether or not the condition is under control, and prognosis. Marking "yes" for a listed condition does not medically disqualify a mariner—the

practitioner must then conduct an individualized assessment of whether the condition impairs the mariner to an extent incompatible with service at sea, under the standard set at 46 CFR Part 10. The Coast Guard provides additional guidance to aid medical practitioners in these evaluations. *See* NVIC 04-08, in effect in 2015.[5]

The ALJ concluded that, by signing the Form CG-719K stating he had never been diagnosed with or treated for any of the medical conditions listed at Section IV, Respondent knowingly omitted relevant, material information, in violation of 18 U.S.C. § 1001. This conclusion was based on the ALJ's findings that Respondent had been diagnosed with and treated for, or knowingly suffered from, four of the conditions listed at Section IV of Form CG-719K. [Addendum Decision at 3.] Respondent had actual or constructive knowledge of his diagnoses, hence his submission of false sworn statements on Form CG-719K amounts to a fraudulent application for merchant mariner credentials.[6] [D&O at 13, 19.]

Respondent asserts that the ALJ's findings as to Respondent's medical conditions at the time of application were not based upon substantial evidence, arguing that he submitted evidence showing that, at the time he certified the Form CG-719K, he had no "verified conditions," and that he was not aware of the diagnoses contained in his subpoenaed medical records. [Respondent Appellate Brief at 5.]

In these proceedings, it is the responsibility of the ALJ to weigh the evidence presented and to determine the weight given to conflicting evidence. *Appeal Decision 2689 (SHINE)* at 18, 2010 WL 4607369. I will not reweigh conflicting evidence on appeal when the ALJ's determinations are reasonably supported by the record. *Appeal Decision 2597 (TIMMEL)* at 4, 1998 WL 34073109 (citing *Appeal Decision 2504 (GRACE)* at 7, 1990 WL 10011229).

[5] NVIC 04-08 has been incorporated into and superseded by the Merchant Mariner Medical Manual, COMDTINST M16721.48 dated August 30, 2019.

[6] Not all false statements made by a credential applicant rise to the level of fraud. *Appeal Decision 2663 (LAW)* at 7-8, 2007 WL 3033580 at 6. *See also Appeal Decision 2608 (SHEPARD)* at 8, 1999 WL 33595176 (charge of submission of a false application is a lesser included offense of the charge of submission of a fraudulent application). To rise to the level of fraud, a false statement made on a sworn application must be made with actual or constructive knowledge that statement is false. *Appeal Decision 809 (MARQUES)*, 1955 WL 46693 at 3.

Upon review of the record, I find that the ALJ's findings as to Respondent's medical diagnoses and treatment was supported by substantial evidence, contained in Respondent's medical records and the Form CG-719K. Respondent's medical records document diagnosis and treatment, prior to March 2015, of several medical conditions disclaimed by Respondent's March 2015 Form CG-719K. The ALJ found, based upon Respondent's medical records, that "Respondent had recently been treated for three of these conditions, and . . . knew that his statements on the form denying having any listed conditions were not true." [D&O at 13.] The Addendum Decision cites the details of Respondent's medical records which support this finding, including recorded diagnoses and treatments, including prescription medications. [Addendum Decision at 4-5.] These diagnoses and treatments dated to 2013 and 2014. [*Id.*] The ALJ cites Respondent's statement, reported by his medical records, that he discontinued a prescription medication because he disagreed with the "label" or diagnosis underlying the prescription.[7] [*Id.* at 5.] The ALJ also cited Respondent's choice to visit a medical practitioner who was unfamiliar with Respondent's medical history for the medical exam required to complete Form CG-719-K, as circumstantial evidence in support of the misconduct charge. [Addendum Decision at 6-7.] Respondent provided evidence to the contrary at hearing, testifying that, while he had sought medical evaluation and treatment for various symptoms over the years covered by his medical records, he was not privy to the diagnoses listed in those records. [Tr. at 170-92.] However, the ALJ found, based on all the evidence presented, and his own evaluation of the credibility of that evidence, that Respondent "was aware he had been diagnosed with and treated for" the implicated medical conditions. [Addendum Decision at 5.]

Respondent submitted a fraudulent application for a merchant mariner credential, by his submission of a sworn Form CG-719K that contained knowing omissions of his medical diagnoses and treatments.[8] Previous appeal decisions establish revocation as a mandatory sanction for a proven misconduct charge predicated on submission of a fraudulent application. *Appeal Decision 2663 (LAW)* at 10, 2007 WL 3033580 at 6 (citing *Appeal Decision 2205*

[7] As noted elsewhere in this opinion, mariners are obligated to report *all* prior diagnoses of listed conditions in Section IV of the CG-719K.

[8] In determining whether an application is fraudulent, "[a]n attachment to an application is properly considered part of the application." *Appeal Decision 2610 (BENNETT)* at 9, 1999 WL 33595178 at 5 (citing *Appeal Decision 2569 (TAYLOR)*, 1995 WL 17010119), *aff'd*, NTSB Order No. EM-187, 2000 WL 967428.

(ROBLES), 1980 WL 338494). "[P]roof in a suspension and revocation proceeding of a single specification and charge of fraud in the procurement of a license is enough to require that license to be revoked." *Appeal Decision 2613 (SLACK)* at 10, 1999 WL 33595181 at 5. Having determined that Respondent's application was fraudulent, the ALJ correctly cited this precedent, and imposed a sanction of revocation.

The ALJ's determinations are supported by reliable, probative, and substantial evidence. I will not reweigh the conflicting evidence on appeal.

CONCLUSION

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

ORDER

The ALJ's Decision and Order dated March 20, 2018, is AFFIRMED.

, ADM, USCG

Signed at Washington, D.C., this 18 day of FEBRUARY, 2020.