IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5135
Summary Calendar

MARK A. JENSEN,

Petitioner,

versus

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, and NATIONAL TRANSPORTATION SAFETY BOARD,

Respondents.

On Petition for Review of an Order of the
National Transportation Safety Board
(SE-10271)

(March 4, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

The Federal Aviation Administration ("FAA") revoked the petitioner's airline transport certificate for flying in an unsafe manner. An administrative law judge ("ALJ") determined that the FAA's order was appropriate. The petitioner brings this pro se appeal of the National Transportation Safety Board's (the "Board")

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

affirming the ALJ's decision. Because our review of the record reveals substantial evidence to support the Board's decision, we deny review.

I

Alan Pitcher and Mark Jensen worked for an Iowa-based airline. On November 9, 1988, Pitcher drove Jensen to a motel and dropped him off at approximately 11:00 p.m. Jensen went to the motel's bar and ate some popcorn. John Scott, a bouncer at the bar, testified that Jensen was wobbly and staggering when he tried to walk out of the bar and that he had to help Jensen out of the bar.

On November 10, 1988, Pitcher picked Jensen up from the motel at approximately 5:30 a.m. the next morning and drove Jensen to the airport. Pitcher testified that he smelled no alcohol on Jensen that morning, but that his sense of smell had been dulled by his work with airplane fuels that morning.

Jensen, a pilot, flew two flights on November 10 for his employer. First, Jensen flew an airplane from Dubuque, Iowa, to Waterloo, Iowa, in order to reposition the plane for another flight. On this flight, Alan Pitcher acted as copilot. Pitcher testified that Jensen did not check the weather or check the airplane's pre-flight condition. Upon landing in Waterloo, Jensen talked with Roger Hoyt, the station manager. Hoyt testified that he smelled alcohol on Jensen's breath.

Second, Jensen flew the same plane from Waterloo back to Dubuque. On this flight, Susan Nelson acted as copilot and Mr.

Pitcher and three other persons sat in the passenger section of the airplane. Nelson testified that she smelled alcohol on Jensen's breath. Jensen made a faster than normal landing in Dubuque and used runway 13, which was directly in line with a significant tail wind, instead of runway 31, which the tower suggested for use. Upon landing in Dubuque, Ms. Nelson reported to airline personnel that Jensen had smelled of alcohol and had flown erratically.

II

On May 12, 1989, the FAA Administrator issued an order revoking Jensen's airline transport pilot certificate. The order listed three reasons for the revocation: First, Jensen flew an airplane within eight hours of consuming an alcoholic beverage in violation of 14 C.F.R. § 91.11(a)(1). Second, Jensen flew an airplane under the influence of alcohol in violation of 14 C.F.R. § 91.11(a)(2). Third, Jensen flew an airplane in a reckless manner in violation of 14 C.F.R. § 91.9. The FAA Administrator amended its order by adding that Jensen did not demonstrate the skill and judgment required to hold an airline transport pilot certificate.

At a hearing on July 24, 1990, Jensen was represented by counsel who presented evidence and arguments on his behalf. After listening to all the evidence offered by the FAA and by Jensen, the ALJ held that the FAA Administrator had proved its allegations by a preponderance of the evidence.

Jensen appealed to the full Board. After filing that appeal, Jensen filed an affidavit stating that he had just remembered

another person at the motel bar who served as a bouncer that night and requested that the Board issue a subpoena of that bouncer's time card. On February 16, 1993, the Board denied Jensen's appeal and his request for a subpoena. The Board noted that Jensen was fully aware of the need for such evidence at the hearing and offered no acceptable justification of why the exercise of due diligence would not have brought this matter forward at the hearing. Pursuant to 49 U.S.C. App. § 1486(a), Jensen files this pro se appeal.

III

A

On appeal, Jensen's main contention is that, contrary to the ALJ's findings, he did not consume any alcohol or demonstrate poor judgment on November 9 or 10, 1988. We will set aside agency findings of fact only when they are "unsupported by substantial evidence." 5 U.S.C. § 706(2)(E) (1988). The findings of fact made by the Board or the Administrator, if supported by substantial evidence, are conclusive. 49 U.S.C. App. § 1486(e) (1988). Thus, we "`will not displace the agency's [factual findings] so long as a reasonable person could reach that conclusion.'" Kansas City S. Indus., Inc. v. I.C.C., 902 F.2d 423, 432 (5th Cir. 1990) (quoting National Grain & Feed Ass'n v. OSHA, 866 F.2d 717, 728 (5th Cir. 1988)). Further, we are not permitted to consider evidence outside the administrative record. Louisiana v. Verity, 853 F.2d 322, 327

n.8 (5th Cir. 1988) (citing Camp v. Pitts, 411 U.S. 138, 142-43, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973)).

The administrative record shows that two witnesses, Hoyt and Nelson, testified that they smelled alcohol on Jensen on November 10, 1988. Hoyt testified that he smelled alcohol on Jensen at the Waterloo airport when Jensen landed after his first flight. Nelson testified she smelled alcohol on Jensen during the second flight. Nelson also admitted having personal animosity toward Jensen. A third witness, Scott, testified that he had to help Jensen from the bar. Although Pitcher testified that he did not smell alcohol on Jensen's breath, he stated that his sense of smell had been dulled by working with solvents and jet fuel. A security guard testified that she did not smell alcohol on Jensen at the Dubuque airport when she interviewed Jensen in a coffee shop while he was drinking coffee. Jensen admitted going into the bar, be stated that he did not drink while he was there. We hold that although not entirely consistent, the evidence in the administrative record is substantial and supports the ALJ's finding the Jensen consumed alcohol within eight hours of flying.

The administrative record also shows that Jensen flew somewhat erratically and exercised some poor judgment in flying on November 10, 1988. Nelson testified that during the second flight, Jensen varied the altitude of the plane significantly more than normal. Further, Nelson testified that Jensen took a sharp banking dive to land the airplane and landed on a runway that exposed the

plane to a significant tail wind, thus, raising the danger that the plane would run out of runway before it came to a complete stop. Jensen admits his landing was not normal, but argues that it was nonetheless safe. Jensen does not contest that the control tower suggested that he use another runway. Pitcher noticed some irregularities in Jensen's failure to ask for a weather report and make sure the plane had received a pre-flight check. Nelson further testified that Jensen began taxing before she closed the door to the airplane, and this almost caused her to fall out of the airplane. Jensen denied this. We hold that the evidence in the record was substantial and supports the findings that Jensen exercised poor judgment. We further hold that combined with the evidence regarding Jensen's alcohol use, the evidence was substantial and supported the ALJ's finding that Jensen flew under the influence of alcohol.

B

Jensen next contends that the Board erred in preferring certain testimonial evidence to certain documentary evidence and in denying his request for a subpoena. We will reverse an administrative agency's action only if the agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A) (1988). We have previously noted:

> Under the "arbitrary and capricious" standard the scope of review is a narrow one. A reviewing court must "consider whether the decision was based on a

> consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Miranda v. National Trans. Safety Bd., 866 F.2d 805, 807 (5th Cir. 1989) (quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285, 95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974) (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971))).

Jensen argues that Scott's time card, which showed that he did not work at the bar on the night of November 9, 1988, should have totally refuted Scott's testimony. Scott testified that the time card computer was malfunctioning and gave inaccurate data, and he positively identified Jensen as the man he helped from the bar. The motel sales manager's testimony confirmed that the time card computer was malfunctioning and gave incorrect information. Accordingly, we hold that the Board did not act in an arbitrary or capricious manner in preferring Scott's testimony to his time card.

Jensen further argues that the Board erred in denying his request for a subpoena for the bar's employee records because those records would prove that another person--and not Scott--served as bouncer at the bar on November 9, 1988. Jensen did not ask for the subpoena until May 24, 1991--approximately nine months after the hearing. The Board denied the subpoena because: (1) Jensen's deposition of Scott before the hearing shows that he knew of the importance of the presence of the bar's employees at the bar on November 9, 1988; (2) Jensen did not explain why he could not have

sought the employee records before the hearing; and (3) Jensen did not offer any explanation for why he failed to recollect the alleged presence of another bouncer until approximately nine months after the hearing and over two years after the night at the bar. Accordingly, we hold that Board acted reasonably, instead of arbitrarily or capriciously, in denying Jensen's belated request for a subpoena.

C

Finally, Jensen argues that counsel for the Administrator was dilatory in providing Scott's time card to Jensen and that Scott and a Mr. Uhlenhopp conspired to prove false allegations about him. A reviewing court will not consider an objection to an order of the Board unless that objection was first urged before the Board, or reasonable grounds exist for failing to do so. 49 U.S.C. App. § 1486(e) (1988). USAIR, Inc. v. Department of Transp., 969 F.2d 1256, 1259 (D.C. Cir. 1992).

Jensen could have objected at the hearing or to the Board that the Administrator was dilatory in providing him a copy of Scott's time card only a few minutes before the hearing. Jensen does not offer any justification for his failure to object. Thus, we will not consider that objection.

Jensen claims to have discovered a conspiracy between Scott, a Mr. Uhlenhopp, an employee of the same airline Jensen worked for, and Mr. Winkenwerder, the FAA inspector, to deprive him of his airline transport certificate. Jensen discovered this alleged

conspiracy by reviewing the record of his case and other documents. Most, if not all, of these documents were available to Jensen prior to his appeal to the Board. Because Jensen offers no explanation of why, through due diligence, he could not have uncovered the alleged plot and objected in his appeal to the Board, we will not consider this contention.

IV

For the foregoing reasons, the petition for review is

D E N I E D.