

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
NATIONAL APPEALS OFFICE

In re Application of

[REDACTED]

Appellant

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Appeal No. 10-0115

SUPPLEMENTAL DECISION
ON REMAND

The National Appeals Office (NAO) is a division within the National Marine Fisheries Service (NMFS), Office of Management and Budget. NAO operates out of NOAA's headquarters in Silver Spring, MD and maintains an office in NMFS's Alaska Regional office. NAO is the successor to the Office of Administrative Appeals (OAA), Alaska Region, and is charged with processing appeals that are on file with OAA. This decision is being issued by the administrative judge to whom this appeal was assigned for adjudication.¹

This appeal involves [REDACTED], doing business as (dba) [REDACTED] (collectively referred to herein as Appellant). On October 19, 2011, I issued the initial Decision in this appeal. On November 17, 2011, The Regional Administrator (RA) for the Alaska Region of NMFS, remanded the appeal. In his remand order, the RA ordered NAO to make findings on the following:

- (1) Whether [Appellant] had the specific intent to operate a halibut charter fishing business in 2005;
- (2) The nature of [Appellant's] medical condition(s) and whether such medical condition(s) thwarted his specific intent because they were (a) unavoidable, (b) unique to [Appellant], and (c) unforeseen and reasonably unforeseeable; and
- (3) What steps [Appellant] took to overcome his unavoidable circumstance.

To develop the record so that I could answer the questions posed above, I ordered an oral hearing. In the Notice Scheduling Hearing, I advised Appellant the hearing would include questioning about the medical condition that he thought kept him from chartering and the medical records or expert testimony that could corroborate

¹ See 50 C.F.R. § 679.43.

Appellant's unavoidable circumstances claim. In the Notice I also advised Appellant "if medical records or other forms of evidence would support Appellant's unavoidable circumstances claim, then the current appeal process is Appellant's opportunity to present that evidence. **Any documentary evidence Appellant wishes to submit in support of his appeal should be received in NAO's Maryland office by Friday, December 23, 2011.**" NAO did not receive a response from Appellant.

On January 9, 2012, I held a hearing. At the hearing I instructed Appellant to present all medical records or other documents that supported his claim by February 6, 2012. I subsequently granted Appellant's request for an extension of time to produce evidence to March 5, 2012. On March 5, 2012, NAO received some medical records from Appellant. After receiving records from Appellant, on March 28, 2012 I ordered Appellant to produce medical evacuation records by April 13, 2012. To date, NAO has not received Appellant's medical evacuation records.

(1) Whether Harvey had the specific intent to operate a halibut charter fishing business in 2005.

Appellant has not proved by a preponderance of the evidence that he held the specific intent to operate a charter halibut business in 2005.

As I found in the Decision,² in 2005, Appellant provided charter fishing trips, albeit not in exchange for monetary payment. At best, this shows Appellant intended to operate a charity operation, but does not show he operated a business.

Appellant has not presented evidence of advertising for the 2005 season. Appellant has not presented evidence that he booked halibut charter fishing clients for 2005.

Under the totality of the circumstances, and absent proof by a preponderance of the evidence of specific intent to operate a business in 2005, I find Appellant has not shown the requisite specific intent.

Although not part of the RA's order, I also find insufficient evidence of Appellant's intent to operate a charter fishing business in 2004. His personal logbook does not show entries from 2004, the official record does not show any charter logbook trips for 2004, and generally, other than a statement in his appeal letter, there is very little, if any evidence, that he was interested in or participated in charter fishing in 2004.

Accordingly, I affirm the Decision dated October 19, 2011 as supplemented by this decision.

In reaching my finding that Appellant lacked specific intent, I am aware of Appellant's "but for" claim. That is, but for his medical conditions he would have proof of specific

² Decision dated October 19, 2011, Findings of Fact 3 and 4, page 3.

intent. While appealing on equitable terms, an authority NAO does not have, the but for argument in this appeal is not consistent with the plain language of the regulations. The CHP regulation, in pertinent part, requires: “The applicant *had* a specific intent to operate a charter halibut fishing business in at least one year of the qualifying period.”³ The language is not ambiguous and therefore I am required to apply its plain meaning. The applicant must have had the specific intent. The language does not permit an interpretation that an appellant was unable *to form* the specific intent because a tragedy interfered with his ability to do so. In the appeal before me, Appellant has not shown the requisite specific intent existing prior to the qualifying period.

(2) The nature of Appellant’s medical conditions and whether such medical conditions thwarted his specific intent because they were (a) unavoidable, (b) unique to Appellant, and (c) unforeseen and reasonably unforeseeable.

Appellant claims [REDACTED] and the interaction of the medications designed to stabilize those two medical conditions, constitute an unavoidable circumstance.⁴ Appellant proved the following concerning his [REDACTED]

[REDACTED]⁵

DATE	[REDACTED]	[REDACTED]
01/06/2004	[REDACTED]	[REDACTED]
04/06/2004	[REDACTED]	[REDACTED]
06/24/2004	[REDACTED]	[REDACTED]
07/29/2004	[REDACTED]	[REDACTED]
07/29/2004	[REDACTED]	[REDACTED]
08/23/2004	[REDACTED]	[REDACTED]
08/24/2004	[REDACTED]	[REDACTED]
09/08/2004	[REDACTED]	[REDACTED]
09/14/2004	[REDACTED]	[REDACTED]
08/09/2005	[REDACTED]	[REDACTED]
12/15/2005	[REDACTED]	[REDACTED]
12/15/2005	[REDACTED]	[REDACTED]

As indicated above, Appellant’s physician wanted Appellant’s [REDACTED] at or below [REDACTED]

³ 50 C.F.R. § 300.67(g)(2)(i)(emphasis added).

⁴ Appellant’s hearing testimony. In Appellant’s original appeal letter, he mentioned [REDACTED] as possible unavoidable circumstances. At the hearing, Appellant said the unavoidable circumstances were caused by [REDACTED] and the interaction of the medications he used.

⁵ Based on medical records sent under cover letter received March 5, 2012.

2. Appellant proved by a preponderance of the evidence that in 2004 he suffered an unavoidable circumstance.
3. Appellant proved by a preponderance of the evidence that he took all reasonable steps to overcome his medical condition in 2004.
4. The IAD is consistent with CHLAP regulations.
5. Appellant is not eligible for a CHP because he lacked the requisite specific intent in 2004 or 2005.

ORDER

The IAD dated October 22, 2010 is upheld. The Decision dated October 19, 2011 is affirmed as modified by this Supplemental Decision on Remand. This supplemental decision takes effect thirty (30) days from the date issued, June 13, 2012, and will become the final agency action for purposes of judicial review, unless a motion for reconsideration is made pursuant to <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>, or the Regional Administrator reverses, modifies, or remands this decision pursuant to 50 C.F.R. § 679.43(k), (o).

Appellant or RAM may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Standard Time, on the tenth day after the date of this Supplemental Decision on Remand, May 24, 2012. A Motion for Reconsideration must be in writing, must allege one or more specific material matters of fact or law that were overlooked or misunderstood by the administrative judge, and must be accompanied by a written statement of points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Supplemental Decision on Remand pending a ruling on the motion or the issuance of a Decision on Reconsideration.

Eileen G. Jones
Chief Administrative Judge

Date Issued: May 14, 2012