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COMMENTS OF THE AMERICAN PILOTS' ASSOCIATION ON THE DRAFT MERCHANT MARINER MEDICAL MANUAL [COAST GUARD DOCKET NUMBER USCG-2018-0041]

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Introduction

The American Pilots' Association (APA), on behalf of its nation-wide membership, is pleased to submit the following comments in response to the Notice that appeared in the November 13, 2018 *Federal Register*, 83 Fed. Reg. 56272, requesting public comments on the Coast Guard's Draft Merchant Mariner Medical Manual.

The APA is the national association of the piloting profession. Virtually all of the more than 1,200 State-licensed pilots working in the 24 coastal States of the United States, as well as all of the U.S. registered pilots operating in the Great Lakes system under authorization by the Coast Guard, belong to APA member pilot groups. These pilots handle well over 90 percent of all large ocean-going vessels moving in international trade in the waterways of the United States. Their role and official responsibility is to protect the safety of navigation and the marine environment in the waters for which they are licensed. In this regard, the APA and the Coast Guard have the common objectives of the safe, secure, and environmentally responsible movement of maritime commerce.

While APA's membership is comprised predominantly of groups of State-licensed pilots, APA has a strong interest in the Coast Guard's merchant mariner credentialing and medical fitness programs. The reason for this interest rests in the fact that State-licensed pilots also hold Merchant Mariner Credentials, officer endorsements as Federal First Class Pilots, and merchant mariner Medical Certificates.

In the State pilotage system, State training, certification, qualification, and recency standards are far more stringent than any federal requirements, but the federal pilot endorsement does provide some benefit in that it serves as a national *minimum* standard. In the State pilotage system, obtaining a federal first class pilot endorsement can be either an entry level requirement for selection to a State pilot training or apprentice program or it could be one of the many steps in such a training program preparing an individual for an eventual State pilot license.

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Because State-licensed pilots also hold federal Merchant Mariner Credentials, Endorsements and Medical Certificates, the professional career and livelihood of each State-licensed pilot who belongs to an APA member pilot group, and the welfare of the pilot and his or her family, depends upon how the Coast Guard promulgates and interprets federal statutes, regulations and policy documents related to mariner medical fitness, including the proposed Merchant Mariner Medical Manual.

The APA has a longstanding formal Partnership Agreement with the Coast Guard and will continue to support the advancement of shared maritime safety, security, and environmental protection goals. In the spirit of this Partnership Agreement, and in support of the Coast Guard's efforts to continually improve its merchant mariner medical review program, the APA respectfully offers the following comments and suggestions regarding the Draft Merchant Mariner Medical Manual and some of the related and important policy implications that have the potential to impact all professional mariners, including APA-member pilots.

Comments

General. While we have some serious concerns over the proposed "Procedures for Cancellation of a Medical Certificate" that are included in the Draft Medical Manual (see comments below), as a general matter, the APA supports the Coast Guard in its effort to consolidate into a single document the agency's current information and guidance on merchant mariner medical evaluations and certification. The current system of publishing this information in a patchwork of Navigation and Vessel Inspection Circulars (NVICs), the Coast Guard's Marine Safety Manual, various Headquarters and National Maritime Center (NMC) policy letters and Regional Exam Centers (RECs) emails has proven to be inefficient, difficult to use, and confusing for all four "users" of the medical guidance – the mariner, maritime employers, examining/treating medical professionals, and the Coast Guard's medical evaluators. In this regard, it is particularly helpful that the individual chapters covering the major medical conditions include specific guidance to the mariner, the treating physician, and the examining medical practitioner. It is also helpful that the Draft Manual outlines the Coast Guard's general concerns with a particular medical condition and discusses the general factors the Coast Guard will use to evaluate the medical condition and make a medical fitness determination.

Providing this proposed Merchant Mariner Medical Manual is kept up to date and the Manual remains easily accessible to the public, consolidating all of this material into a single source for "one-stop-shopping" by all users should be a significant improvement.

Procedures for Cancellation of a Medical Certificate. The APA understands the Coast Guard's desire to have in place some mechanism to cancel a Medical Certificate if a mariner develops – during the period after a Medical Certificate is issued, but before the review process for the reissuance of the Medical Certificate – a new medical condition or a change in medical condition that would be disqualifying under Coast Guard medical standards. The Coast Guard's interest in such a process would seem to be particularly relevant in the case of a Medical Certificate with a long duration (i.e., 5 years).

Regarding a process for cancelling a Medical Certificate, we would like to make several points.

First, there is a sound legal argument that the Coast Guard already has authority to take action against a Medical Certificate through the Suspension and Revocation (S&R) process granted in 46 USC §7703. Under the authority granted by §7703, the Coast Guard has several grounds under which the agency may suspend or revoke a Merchant Mariner Credential, including “incompetence.” Under the Coast Guard’s S&R regulations, 46 CFR §5.31, “incompetence” is defined as including “physical disability” and “mental incapacity.” This could certainly address medical fitness.

In addition, while the Coast Guard has chosen to narrowly define “Merchant Mariner Credential” for S&R purposes (*see* 46 CFR §5.40), there is no reason that the Coast Guard could not – for the limited purposes of S&R proceedings – include Medical Certificate under the list of credentials included in the definition of “Merchant Mariner Credential.”

Using the existing S&R statutory and regulatory system – a system that includes formally established due process protections and with which the Coast Guard and mariners are familiar – would appear to be more fair and practical for all parties.

Second, if the Coast Guard concludes that the well-established S&R process should not be applied to Medical Certificates, at a minimum (given the huge negative impact the cancelation of a Medical Certificate will have on a mariner's career and livelihood), a process that would permit the Coast Guard to cancel a Medical Certificate should be established in the Code of Federal Regulations through public and transparent “notice and comment” rulemaking. Trying to put such a mechanism in place through the publication of an informal guidance manual or general policy document is inappropriate.

As discussed above, there is simply too much at stake for the mariner – his or her career and livelihood – for the Coast Guard to use an informally established process that is not “legally binding” to cancel a mariner’s Medical Certificate. Paragraph 5. of the Draft Medical Manual’s promulgation letter clearly states, “This guidance is not a substitute for applicable legal requirements, nor is it itself a rule. It is intended to provide operational guidance for Coast Guard personnel and is not intended to nor does it impose legally binding requirements on any party outside the Coast Guard.” A process as important and as impactful on the lives and careers of the Nation’s professional mariners certainly deserves more serious and deliberate treatment than a few paragraphs in “operational guidance for Coast Guard personnel.”

Without getting into a lengthy legal discussion, when a federal agency promulgates regulations or rules made pursuant to Congressionally delegated authority, the exercise of that authority is governed by the rulemaking procedures outlined in the Administrative Procedures Act (5 U.S.C. § 553). The Coast Guard’s authorities regarding merchant mariner medical certificates are established and delegated under 46 U.S. Code, Subtitle II (Vessels and Seamen), Part E (Merchant Seamen Licenses, Certificates, and Documents). Therefore, if the Coast Guard wishes to establish procedures for the cancellation of a merchant mariner’s valid Medical Certificate, these procedures should be proposed through public rulemaking procedures set out in the Administrative Procedures Act and established through legally binding regulations. Again, there is simply too much at stake for the Coast Guard to take a shortcut and establish Medical Certificate cancelation procedures through anything short of a public and transparent notice and comment rulemaking project.

While there are significant shortcomings, the proposed procedures for canceling valid merchant mariner Medical Certificates outlined in Chapter 3, paragraphs L. through O. of the Draft Merchant Mariner Medical Manual seem to be the result of a good faith effort by the Coast Guard to put in place a fair process. While the APA is not committing to specific language at this time and certainly reserves the right to comment on future Coast Guard rulemakings, the Coast Guard could use the draft procedures contained in paragraph L. through O., with some important changes and additions, as the basis for a rulemaking proposal governing the cancelation of Medical Certificates. See the *Enclosure* to these comments for suggested amendments (additions shown by underline, deletions shown by strike through) to the text of paragraphs L. through O. that the Coast Guard could potentially use for rulemaking purposes. These proposed regulatory procedures could then be improved through further public comment.

Finally, if the Coast Guard chooses not to apply the well-established S&R process to Medical Certificates; and insists upon moving forward with establishing a process to cancel Medical Certificates that is not done through notice and comment rulemaking, that doesn't reflect the seriousness and importance of the matter, and that is arguably inconsistent with the Administrative Procedures Act; the APA strongly urges the Coast Guard to include in the Merchant Marine Medical Manual the suggested edits contained in the *Enclosure*.

Disclosure of Prescription and Over-the-Counter (OTC) Medications. The medication disclosure requirements laid out in Chapter 7, paragraph D. of the Draft Medical Manual have been in place for years and are well known and understood by mariners. The Coast Guard, however, introduced some confusion regarding medication reporting requirements when it published the most recent version of the Application for Medical Certificate (Form CG-719K, Rev 04/17, Exp. Date 03/31/2021).

The guidance in the Draft Medical Manual, Chapter 7, paragraph D., states:

“1. Applicants who are required to complete a general medical exam should disclose on the Application for Medical Certificate, Form CG-719K, and all prescription medications filled or taken within 30 days prior to the date that the applicant signs the application to the Coast Guard (*See* 46 CFR 10.302(a) and 10.304(a)).

2. In addition, applicants who are required to complete a general medical exam should disclose on the Application for Medical Certificate, Form CG-719K, all prescription medications and OTC medications, including dietary supplements and vitamins, that were used for a period of 30 days or more within the 90 days prior to the date of the applicant signs the application to the Coast Guard (*See* 46 CFR 10.302(a) and 10.304(a)).”

Unfortunately, Section IV. of CG-719K, Rev 04/17 suggests that applicants must disclose not only all prescription medications, but also all OTC medications, “that were filled or refilled, and/or taken within 30 days prior to the date that the applicant signs the CG-719K.”

The guidance in the latest CG-719K is unnecessarily broad and has created considerable confusion and concern among mariners. For example, the language of this CG-719K suggests that a mariner would be expected to disclose to the Coast Guard that he or she took one aspirin, one multivitamin, one energy drink or one fiber tablet within 30 days of submitting his or her CG-

719K. It seems clear that this is not what the Coast Guard intended, and is certainly not what the Coast Guard needs to make mariner fitness determinations. In fact, representatives from Coast Guard Headquarters, the NMC and RECs have assured APA that the medication reporting guidance contained in the latest CG-719K is incorrect and that mariners should continue to following the long-standing Coast Guard medication reporting guidance (i.e., the guidelines contained in Chapter 7, paragraph D. of the Draft Merchant Mariner Medical Manual).

APA urges the Coast Guard to include language in the Merchant Mariner Medical Manual explicitly stating that the medication reporting guidance contained in Chapter 7, paragraph D. takes precedence over the text contained in CG-719K (Rev 04/17). Considering that mariners may be subject to criminal penalties for incomplete or inaccurate submissions on CG-719K forms, out of fundamental fairness the Coast Guard should provide clear and unambiguous guidance to mariners on all sections of the CG-719K, including medication reporting. As an additional recommendation, when the Coast Guard publishes the next version of the CG-719K, the agency should ensure that it corrects Section IV.

No distinction for Great Lakes Pilots' physical exams. Chapter 1, paragraph 4.a. makes reference to 46 CFR § 402.210, which states, "Medical examinations for Great Lakes Pilots must be conducted by a licensed medical doctor...." For all other mariners in the United States, per 46 CFR § 10.302, medical exams for credentialing purposes may be "performed, witnessed, or reviewed by a licensed medical doctor, licensed physician assistant, licensed nurse practitioner, or a designated medical examiner." There is no statutory requirement or policy justification to require Great Lakes Pilots to see a "licensed medical doctor" when all other mariners have the option of seeing other types/classes of medical professionals. This arbitrary requirement places an unnecessary financial and administrative burden on Great Lakes Pilots and the Coast Guard should eliminate it.

Coast Guard Procedures during the Transition Period. In Chapter 3, paragraph B., the Draft Medical Manual outlines procedures the Coast Guard will follow during the "transition period" from January 24, 2014 through January 24, 2019 when all mariners are required to meet the applicable medical standards and hold a valid Medical Certificate. Since this transition is already complete, paragraph B. is moot and should be deleted.

Conclusion

The proposed Draft Merchant Mariner Medical Manual is of great importance to the APA and its more than fifty (50) member pilot associations around the country. APA supports the Coast Guard's efforts to consolidate its medical review and certification guidance and appreciates the opportunity to offer constructive comments and suggestions. We believe the comments and suggestions offered above will help the Coast Guard meet its obligations to ensure mariners are medically fit to work under the authority of merchant mariner documents and endorsements, while also ensuring that U.S. mariners, specifically including independent professional compulsory maritime pilots, are treated fairly and afforded appropriate protections that will allow them to continue to serve in the careers to which they have dedicated their lives.

Enclosure

ENCLOSURE

L. NMC Medical Evaluation Procedures for Cancellation of a Medical Certificate.

1. A medical certificate may be cancelled by the National Maritime Center (NMC) if:
 - a. A mariner develops a new medical condition or a change in a medical condition that would be disqualifying under 46 CFR part 10, subpart C, ~~as implemented by this Manual;~~
 - b. A mariner is non-compliant with the conditions, limitations, and/or restrictions placed on their medical certificate; or
 - c. A mariner has submitted a fraudulent medical application or false information; or has withheld or otherwise failed to disclose medical information in support of a medical certificate application.

2. If the NMC receives credible information indicating that one or more of the circumstances described in Paragraph L. 1. a. through c. above is present or has occurred:

a. The NMC will inform the mariner of the situation and provide the mariner an opportunity to respond to the information provided. The NMC will provide guidance on the type of information, reports, examinations or tests that would be required to demonstrate continued medical competence or compliance.

(i) The NMC will establish a reasonable deadline, but not less than thirty (30) days from the time the mariner is informed of the situation, by which time the mariner must comply with the request for more information.

(ii) If circumstances require additional investigation, the NMC may refer the case to the local Officer in Charge, Marine Inspection, in accordance with 46 CFR 1.01-15(b).

b. The NMC will review all information provided and make a determination in accordance with 46 CFR 10.301(a).¹

32. If, after following the procedures outlined in paragraph 2. above, the NMC determines that evidence indicates that one or more of the circumstances described in Paragraph L.1 of this Chapter warrants the cancellation of a medical certificate is warranted, the NMC will:

- a. Provide the mariner with written notification of the cancellation by mail. In addition to written notification, the NMC ~~shall~~ may also inform the mariner of the cancellation by telephone, by e-mail, and/or both, if relevant contact information has been provided to the NMC;
- b. Provide the mariner with information concerning the grounds for the cancellation; and
- c. Advise the mariner in writing that he or she may request reconsideration of appeal any decision that cancels a medical certificate, as allowed for in 46 CFR 1.03-15 and, if necessary and after requesting reconsideration, appeal any decision that cancels a medical

¹ The text of the suggested new paragraph L.2. comes almost entirely from Chapter 3, paragraph K.2.c. of the Draft Merchant Mariner Medical Manual. It is unclear why the Coast Guard decided not to include this important language in the procedures for cancellation of Medical Certificates contained in paragraphs L. through O., but we think this language and this extra step is critical.

certificate, as allowed for in 46 CFR 1.03-15 and 1.03-40, and discussed in Paragraph N of this Chapter.

M. Automatic Stay of Decision to Cancel a Medical Certificate.

1. The procedures in 46 CFR 1.03-15 are applicable except that, notwithstanding 46 CFR 1.03-15(f), the decision to cancel a medical certificate is automatically stayed pending final agency action on the matter, unless the Commanding Officer, NMC, after consulting with the Chief of the NMC Medical Evaluation Division and assigned legal counsel, finds that:
 - a. There is evidence of a compelling and substantial risk of imminent harm if the mariner is allowed to continue to operate under the authority of his or her credential; and,
 - b. The continuation of the automatic stay presents a substantial risk to maritime safety.
2. In cases where the Commanding Officer, NMC, lifts the automatic stay, the processing of the request for reconsideration and, if necessary, appeal shall take priority, subject to the mariner's right to respond. These appeals will normally process within 21 business days, once the mariner has submitted a complete appeal package, in accordance with 46 CFR 1.03-15(c).
3. Until final agency action cancels the medical certificate, or the automatic stay is lifted under Paragraph M.1 above of this Chapter, the medical certificate is valid until expiration, and may be used to operate under the authority of the MMC.

N. Mariner Reconsiderations and Appeals.

1. Reconsiderations (See 46 CFR 1.03-1540).
 - a. Should be received within 30 days of the action or decision by the NMC.
 - b. Have no requirement to be in writing.
 - c. Have no requirement that new information or specific errors be alleged.
 - d. Have no specific format requirements.
 - e. Although it is not required, it is recommended that applicants submit their reconsideration requests in writing, and consult Chapters 8 through 25 of this Manual to determine suggested testing and reports for the condition at issue.
 - f. The NMC's determination becomes final agency action if no request for reconsideration is received within 30 days of action or decision by the NMC.
2. Appeals (See 46 CFR 1.03-15 and 1.03-40).
 - a. Appeals on reconsideration must be received within 30 days of action or decision by the NMC.
 - b. An extension may be requested in writing, and will be granted for good cause.
 - c. Appeals must be submitted in writing to the Commandant (CG-5PS) (See 46 CFR 1.03-15(c)).

O. Authority to Work Pending Final Agency Action.

1. Cancellation of a Medical Certificate.

- a. Until final agency action cancels the medical certificate, or the automatic stay is lifted under Paragraph M.1 above ~~of this Chapter~~, the medical certificate is valid until expiration and may be used to operate under the authority of an MMC.
- b. The NMC's initial determination becomes final agency action if no request for reconsideration is received with 30 days of action or decision by the NMC (See 46 CFR 1.03-15 and 1.03-40).
- c. The NMC's decision on reconsideration becomes final agency action if no appeal is submitted, in accordance with 46 CFR 1.03-15, within 30 days of the NMC decision (See 46 CFR 1.03-15(i)).