

June 4, 2008

Dear CAP Plaintiff,

Time for an update and, for some, a request for a quarterly payment. About half of our Plaintiffs are fully vested so they will receive an update sans this request for money. Updates are forwarded by some to extensive email lists so these "forwards" may, or may not, include the request for a payment. If you've received this version of the update, you're fully vested and need not pay any additional amounts. It is my intent to have everyone fully vested by the end of this year.

Request for Amicus Briefs:

I sent correspondence to Southwest Airlines, SWAPA, and the Civil Aviation Medical Association (CAMA) requesting Amicus submissions on our behalf to the appeals court. Southwest and SWAPA have respectfully declined. They're looking forward on this issue, not back. I haven't heard from CAMA. I've asked CAMA to address the medical irrationality of a blanket age rule versus individual testing, a long-standing position with the majority of AMEs with the CAMA.

Freedom of Information Act Request:

Several weeks ago Tony sent a Freedom of Information Act request to the FAA asking for FAA records in response to a Remand from the 7th Circuit Court of Appeals in *Aman vs FAA*, 1988. The *Aman* court specifically asked:

"The FAA's consideration of the petition for exemption at issue here was incomplete. The FAA adduced substantial evidence supporting its rejection of the contention that the petitioners' protocol, combined with existing methods of operational testing, would screen out all increased risks of incapacitation or undetected skill deterioration among pilots older than sixty. However, the FAA failed to set forth a sufficient factual or legal basis for its rejection of the petitioners' claim that older pilots' edge in experience offsets any undetected physical losses. We therefore vacate the denial of the exemptions and remand to the FAA for further proceedings to provide findings and explanations addressing the deficiencies we have noted and for other appropriate proceedings not inconsistent with this order." VACATED AND REMANDED

The FAA wrote back (to Tony); "A records search was conducted in the Office of the Chief Counsel, Regulations Division. We were not able to locate any records or files pertaining to your specific request, and we are unaware of any other offices likely to possess additional responsive records." Although we've been unable to sight a copy of the FAA response, the subsequent *Baker vs FAA* (1990) court references the FAA response to *Aman* several times in their decision. The

issue boiled down to whether a pilot's increased level of experience overruled physical and cognitive declination with age. The Baker Court finds "flaws" in arguments from both sides and, since the burden of proof lies with the Plaintiffs, the majority again defers to the FAA. A dissenting opinion by Judge Will went beneath the insurmountable burden of proof placed upon Plaintiffs to expose the lack of credibility the FAA evidence displays.

"For the age 60 and out rule makes sense only if it screens for risks that are significantly higher for all 60-year-olds than for 30, 40 or 50-year-olds. Otherwise, the rule is simply an arbitrary, overly broad and outmoded presumption, smelling of age discrimination, about infirmities which do not uniformly afflict all pilots over 60 and should not be assumed to."

"The FAA, however, has not offered any evidence to support this distinction between the special certificates it grants to younger pilots and its refusal even to promulgate meaningful regulations and criteria for age exemptions for older pilots, much less to grant an age exemption to an older pilot."

Unfortunately he was in the minority.

Seven years later in PPF vs FAA we see the same results. A majority opinion that defers to the FAA when balanced against substantial arguments from Plaintiffs, and a scathing minority opinion that strips away the fluff and reveals the idiocy of the FAA's unsupported assertions.

It is most aggravating to know that so many prior decisions were not based on evidence but rather on assertions by the FAA which Petitioners couldn't overcome within the rules spelled out in FARs and the FAA's enabling legislation. It is the intention of the CAP to take this evidence to a different arena where the agency will have to explain why they never issued one exemption, never gathered data that support the 60 and out policy, felt compelled to treat over 60 part 121 pilots differently than over 60 foreign pilots and domestic commercial pilots not operating under part 121. Since no such evidence has ever been presented in court to date, the FAA may finally have to address the Aman remand and explain how pilots over 60 actually reduced the level of safety in a multi-piloted airliner.

The FAA must respond to our appeal by June 13th. We then have until June 27th to respond to the FAA's filing. This is expected to be the final written submission before the Court decides what action it will pursue.

Regards,

Mickey Oksner

