

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of)	Appeal No. 02-0058
)	
JONATHAN SCHUMACHER,)	DECISION
Appellant.)	
)	March 24, 2003
)	

STATEMENT OF THE CASE

Jonathan Schumacher applied for four licenses under the North Pacific Groundfish and Crab License Limitation Program [LLP]:¹ a groundfish license which named the qualifying vessel as the F/V KING & WINGE, ADFG No. 16203; a crab license which named the qualifying vessel as the F/V KING & WINGE; a groundfish license which named the F/V ROSEANNE HESS, ADFG No. 42163, as the qualifying vessel; and a groundfish license which named the F/V LADY ANGELINE as the qualifying vessel.

The Restricted Access Management Program [RAM] identified discrepancies between Mr. Schumacher's applications and the official LLP record and provided Mr. Schumacher with a Notice of Opportunity to Submit Evidence. Mr. Schumacher did not provide any further evidence or argument on any of his applications. RAM issued a combined Initial Administrative Determination [IAD] which denied all of Mr. Schumacher's applications. Mr. Schumacher can appeal the IAD because it directly and adversely affects his interests. [50 C.F.R. § 679.43(b)]

With respect to the groundfish license based on the F/V KING & WINGE, the IAD stated that Mr. Schumacher was not the owner of the F/V KING & WINGE on June 17, 1995, nor the owner of the fishing history of the F/V KING & WINGE. The IAD denied Mr. Schumacher's application for a crab license based on the F/V KING & WINGE for that reason and additionally noted that the F/V KING & WINGE did not have the documented harvests necessary for two of the endorsements for which Mr. Schumacher had applied: a St. Matthew blue king endorsement and a Pribilof red and blue king endorsement.

With respect to the groundfish license based on the F/V ROSEANNE HESS, the IAD denied Mr. Schumacher's application because the F/V ROSEANNE HESS had not made the documented harvests necessary for an LLP groundfish license and because Mr. Schumacher did not own the F/V ROSEANNE HESS on June 17, 1995 and did not own the fishing history of the F/V ROSEANNE HESS.

With respect to the groundfish license based on the F/V LADY ANGELINE, the IAD denied Mr.

¹ The LLP is located in federal regulation 50 C.F.R. § 679, primarily 50 C.F.R. § 679.2 (definitions), 50 C.F.R. § 679.4(k)(requirements for licenses) and 50 C.F.R. § 679.43 (appeals).

Schumacher's application because no vessel by that name made the documented harvests necessary for an LLP groundfish license.² The IAD also noted that Mr. Schumacher had never supplied the ADFG number for that vessel.

With respect to all four licenses, Mr. Schumacher checked the boxes on the application that he was basing his claim on the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv). The IAD rejected Mr. Schumacher's Rehabilitation Act argument, stating that he had provided no evidence or information to support it. The IAD did not mention the unavoidable circumstances regulation.

With respect to the applications based on the F/V KING & WINGE and the F/V ROSEANNE HESS, Mr. Schumacher checked the box that he was applying based, in whole or in part, upon the fishing history of a vessel that has been lost. The IAD did not refer to this argument.

I conclude that the record has sufficient information on which I can reach a decision, as required by 50 C.F.R. § 679.43(g)(2). I therefore close the record and issue this decision on the merits of Mr. Schumacher's appeal.

SUMMARY

The IAD is affirmed. Mr. Schumacher applied for four LLP licenses: a groundfish license which named the qualifying vessel as the F/V KING & WINGE, a crab license which named the qualifying vessel as the F/V KING & WINGE, a groundfish license which named the qualifying vessel as the F/V ROSEANNE HESS, and a groundfish license which named the qualifying vessel as the F/V LADY ANGELINE as the qualifying vessel.

Mr. Schumacher never claimed to be an eligible applicant based on ownership of any of the qualifying vessels on June 17, 1995 or ownership of their LLP-qualifying fishing history, apart from the vessels. Mr. Schumacher claimed to be an eligible applicant based on the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), also known as section 504 of the Rehabilitation Act.

Relying on the reasoning of *Schumacher I* (Decision, Appeal No. 00-0010, September 16, 2002), a prior appeal by Mr. Schumacher which raised the Rehabilitation Act argument, the Decision in this appeal also concluded that Mr. Schumacher did not state a legal claim for relief under the Rehabilitation Act. Mr. Schumacher proposes that a disabled person should receive an LLP license if the disabled person proves that, but for his or her disability, the person *would have owned* an LLP-qualifying vessel on June 17, 1995.

The Rehabilitation Act requires the government to make reasonable accommodations in a

² No vessel by that name is in the official LLP record or database. Memorandum to File from Mary Alice McKeen, March 20, 2003.

program that take into account a person's disability. Mr. Schumacher's proposed change is not a reasonable modification of the LLP because the criteria of vessel ownership does not discriminate against disabled persons, it waives an essential requirement of the LLP and it can result in the same catch history being used to issue two LLP licenses.

Mr. Schumacher does not meet the requirements of the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), because he did not own a vessel on June 17, 1995.

Mr. Schumacher does not meet the requirements of the lost vessel provision, 50 C.F.R. § 679.4(k)(8)(iii), with respect to the F/V KING & WINGE because he made no argument on appeal in support of this claim and because the record strongly suggests that the F/V KING & WINGE has not been lost. He does not meet the requirements of the lost vessel regulation with respect to the F/V ROSEANNE HESS because this regulation only applies to a vessel that sank *after* it made all the harvests required for an LLP license.

ISSUES

1. Has Mr. Schumacher shown that he is an eligible applicant for an LLP license, based on the Rehabilitation Act of 1973, 29 U.S.C. § 794(a)?
2. Does Mr. Schumacher meet the requirements for an LLP license, based on the unavoidable circumstances provision in federal regulation 50 C.F.R. § 679.4(k)(8)(iv)?
3. Does Mr. Schumacher meet the requirements for an LLP groundfish license, based on the lost vessel provision in federal regulation 50 C.F.R. § 679.4(k)(8)(iii)?
4. Is Mr. Schumacher an eligible applicant for an LLP crab or groundfish license?

ANALYSIS

To receive an LLP license, an applicant must be an "eligible applicant."³ To be an eligible applicant, Mr. Schumacher must have owned a vessel on June 17, 1995 which made the documented harvests necessary for an LLP license *or* must own the LLP-qualifying fishing history apart from the vessel *or* must show he is an eligible applicant pursuant to the Rehabilitation Act of 1973 at 29 U.S.C. § 794(a), which is known as Section 504 of the

³ 50 C.F.R. § 679.4(k)(4); 50 C.F.R. § 679.4(k)(5).

Rehabilitation Act.⁴

On each application, Mr. Schumacher acknowledged that, on June 17, 1995, he did not own the vessel he identified as the qualifying vessel. He has also never claimed that he owned the fishing history of any of these vessels, apart from the vessel itself. Mr. Schumacher bases his applications on the Rehabilitation Act, the unavoidable circumstances regulation and the lost vessel provision.

Before I examine those arguments, I want to address several points Mr. Schumacher made in his Appeal.⁵ He correctly notes that the IAD on the F/V KING & WINGE states that the vessel had insufficient harvests for a crab license with a St. Matthew blue king endorsement and a Pribilof red and blue king endorsement. Mr. Schumacher states that this implies that the vessel had harvests sufficient for the other endorsements for which Mr. Schumacher applied, namely Bristol Bay red king and BSAI *opilio/bairdi*, and that he should at least receive an LLP crab licenses with those other endorsements. Whatever harvests the F/V KING & WINGE made, Mr. Schumacher has no right to receive any endorsements based on the fishing history of the F/V KING & WINGE, unless he is an eligible applicant for the LLP license with endorsements.

Second, Mr. Schumacher asserts that the F/V LADY ANGELINE has sufficient fishing history for an LLP license and states that “I myself made deliveries of several hundred thousand pounds while I was delivering to Chignik at Anchorage Bay.”⁶ Similarly, Mr. Schumacher asserts that he made deliveries from the F/V ROSEANNE HESS to the Westward Fisheries plan in Dutch Harbor and several plants in Kodiak and “[s]o it should qualify.”⁷

Unless Mr. Schumacher shows he has the requisite connection to the F/V LADY ANGELINE or the F/V ROSEANNE HESS – either as an owner of the vessel on June 17, 1995, or an owner of the fishing history or as an eligible applicant based on the Rehabilitation Act – it does not matter what deliveries Mr. Schumacher made from these vessels because he cannot receive an LLP license based on the their fishing history. The connection he asserts is based on the Rehabilitation Act, the unavoidable circumstances regulation and the lost vessel regulation.

1. Has Mr. Schumacher shown he is an eligible applicant for an LLP license pursuant to

⁴ 50 C.F.R. § 679.2 (definition of eligible applicant)50 C.F.R. § 679.2, definition of eligible applicant, subsections (1), (2) & (5). The other definitions of eligible applicant are not relevant to this Appeal. Subsection (3) applies only to a person seeking a crab license with a Norton Sound red and blue king endorsement. Subsection (4) applies to a person seeking an LLP scallop license.

⁵ Appeal, November 5, 2002.

⁶ Appeal at 3, November 5, 2002. I presume he is asserting that he made deliveries of groundfish, since Mr. Schumacher applied for a groundfish license based on the F/V LADY ANGELINE.

⁷ *Id.*

the Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a)?

Section 504 provides that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . . under any program or activity conducted by any Executive agency.” Mr. Schumacher contends that, even though he did not own a LLP-qualifying vessel on June 17, 1995 or the LLP-qualifying fishing history apart from the vessel, he is otherwise qualified for an LLP license because he *would have owned* a qualifying vessel on June 17, 1995 but for his disability.⁸ Mr. Schumacher’s disability is a debilitating back injury he suffered in 1993 while commercial fishing.⁹

Mr. Schumacher made this argument in support of a prior application, which identified the F/V HALCYON as the qualifying vessel. RAM denied Mr. Schumacher’s F/V HALYCON application. This Office affirmed RAM in *In Re Application of Jonathan Schumacher (Schumacher I)*.¹⁰ *Schumacher I* concluded that Mr. Schumacher did not state legal grounds for relief under the Rehabilitation Act. *Schumacher I* concluded that, even if an applicant proved that he or she would have owned a vessel on June 17, 1995, but for a disability, NMFS could not grant an LLP license based on the Rehabilitation Act for that reason. I rely on the reasoning of *Schumacher I* and reach the same conclusion.

Schumacher I explained that the Rehabilitation Act of 1973, as interpreted by the United States Supreme Court, requires the government to make reasonable accommodations for a person’s disability:

The government violates the Rehabilitation Act when a person can show that he or she would receive a government benefit if the government made **reasonable accommodations** for the person’s disability. If an applicant could participate in a government program only if the government made substantial modifications or fundamental alterations in the program, the applicant is *not* “otherwise qualified” for the program and is *not* being denied solely based on a disability. The fundamental nature of

⁸ Appeal, November 5, 2002.

⁹ For purposes of this appeal, I accept that Mr. Schumacher is an individual with a disability within the meaning of the Rehabilitation Act.

¹⁰ Decision, Appeal No. 00-0010 (September 16, 2002).

the program, not the individual's disability, is causing the individual to be denied.¹¹

Schumacher I concluded that the Rehabilitation Act did not require, as a reasonable accommodation, that NMFS grant a disabled person an LLP license, even if the disabled person proves that he or she would have owned an LLP-qualifying vessel but for his or her disability.¹² *Schumacher I* based this conclusion on three reasons:

First, the criteria of vessel ownership for award of an LLP license does not discriminate against disabled persons. It does not result from outdated or archaic assumptions about what disabled persons can and cannot do. It does not require that an applicant prove that he or she can perform any of the physical activities in operating a boat. A disabled person can own a vessel. Even a corporation – a legal entity only – can own a vessel. The criteria of vessel ownership has no intrinsic relationship to an applicant's disability or lack of disability.

Many reasons exist why an applicant might not have owned a vessel on June 17, 1995: a financial setback, poor fishing season, personal problems such as divorce or death in the family, boat breakdown, a natural disaster, a withdrawal of promised financial support from a partner or bank or, as Mr. Schumacher as argued, onset of a disability. NMFS does not examine why any applicant did not own a vessel on June 17, 1995 and does not award an LLP license based on *any* reason why an applicant did *not* own a vessel on June 17, 1995.

In essence, Mr. Schumacher asks NMFS to conduct such an inquiry for disabled persons only. This does not redress discrimination or the effects of discrimination. This would result in disabled persons receiving special treatment because of their disabilities, rather than equal or even-handed treatment which takes into account their disabilities. The change is therefore not a reasonable modification under section 504 of the Rehabilitation Act.

....

Second, the proposed change seeks a waiver of an essential feature of the LLP program. Mr. Schumacher seeks a waiver of the requirement for *ownership* of a qualifying vessel on June 17, 1995. The award of LLP licenses to *vessel owners* was a fundamental policy

¹¹ *Schumacher I*, Appeal No. 00-0010 at 6 (emphasis in original). This decision, and all published decisions by the Office of Administrative Appeals, are on the NMFS Alaska region website at <http://www.fakr.noaa.gov/appeals/default.htm>. The three major Supreme Court cases interpreting the Rehabilitation Act of 1973 are *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), *Alexander v. Choate*, 469 U.S. 287 (1985), and *School Board of Nassau County v. Arline*, 408 U.S. 273 (1987).

¹² *Id.* at 8 - 12.

choice in the LLP.

The definition of “eligible applicant” for the LLP in federal regulation 50 C.F.R. § 679.2 requires *ownership* – of a qualifying vessel or the qualifying fishing history – except in the narrowly circumscribed exception applicable to the Norton Sound red and blue king fishery in 1993 or 1994. Apart from the Norton Sound exception, the LLP regulations award licenses to vessel owners, not lessees, not skippers, not permit holders.

The regulatory history shows that award of LLP licenses to vessel owners was a deliberate policy choice. The Council, when it approved the LLP, unanimously adopted motions for both crab and groundfish licenses that licenses would be issued to “current owners (as of 6/17/95) of qualified vessels.” In making the motion to adopt the crab provision, Council member Dave Benton noted: “Through the discussion [of LLP], both groundfish and crab, the Council has heard again extensive testimony regarding the need to award licenses to current owners and I think this is consistent with public testimony and with the Council’s discussions on this matter at numerous Council meetings.”

Since Mr. Schumacher seeks a waiver of an essential eligibility requirement, he has not proposed a reasonable accommodation under the Rehabilitation Act.

Third, Mr. Schumacher’s proposal violates another essential feature of the LLP: that one catch history should not be used to generate more than one license. Mr. Schumacher seeks a permit based on harvests he made from the F/V HALCYON that were recorded on his State of Alaska permit. But the owner of the F/V HALCYON has already received the permit based on the fishing history of the F/V HALYCON. If Mr. Schumacher received a permit based on that same fish history, one fish history would yield two licenses.

NMFS has allowed the same fishing history to yield two licenses, or duplicate quota shares, only in very unusual situations where, due to an agency mistake, an innocent third-party purchaser for value would be harmed unless double licenses or quota shares were left to stand. A proposal which allows two LLP licenses based on the same fish history as a matter of course – any time a person showed he or she would have owned a boat but for a disability – would be a drastic departure from agency regulations, practice and precedent.¹³

¹³ *Schumacher I* at 9 - 11.

The same reasons compel me to deny Mr. Schumacher's Rehabilitation Act argument in this appeal.¹⁴ Mr. Schumacher is not proposing a reasonable accommodation in the LLP but a change in essential features of the program. Mr. Schumacher has therefore not shown that he is an eligible applicant for an LLP license based on the Rehabilitation Act of 1973.

2. Does Mr. Schumacher meet the requirements for an LLP license, based on the unavoidable circumstances provision in federal regulation 50 C.F.R. § 679.4(k)(8)(iv)?

Mr. Schumacher checked this box on his applications but has not made any arguments based on the unavoidable circumstances regulation on appeal. I conclude that Mr. Schumacher has not shown he is entitled to an LLP license based on the unavoidable circumstances regulation. I also note that *Schumacher I* rejected Mr. Schumacher's unavoidable circumstances argument in that appeal because he did not own a vessel on June 17, 1995: "This regulation does not help Mr. Schumacher. It can substitute for missing *harvests* by a vessel, not missing *ownership* of a vessel by the applicant."¹⁵

3. Does Mr. Schumacher meet the requirements for an LLP license, based on the lost vessel provision in federal regulation 50 C.F.R. § 679.4(k)(8)(iii)?

Federal regulation 50 C.F.R. § 679.4(k)(8)(iii) provides:

An eligible applicant, who qualifies for a groundfish license or crab species license but whose vessel on which the eligible applicant's qualification was based was lost or destroyed, will be issued a license.

Mr. Schumacher checked the box on his F/V KING & WINGE application that he was applying based "in whole or in part, upon the fishing history of a vessel that has been lost." Mr. Schumacher has not referred to this argument in his appeal and has never asserted that the F/V KING & WINGE has been lost.¹⁶ Further, unless he shows he is an eligible applicant for an LLP license based on the F/V KING & WINGE fishing history, he could not make use of its fishing history even if it had been lost. I conclude Mr. Schumacher has not shown grounds for an LLP license based on the lost vessel provision as applied to the F/V KING & WINGE.

¹⁴ In *Schumacher I*, I also denied Mr. Schumacher's appeal on factual grounds. I held a hearing and concluded that Mr. Schumacher had not shown, as a matter of fact, that he would have owned a vessel on June 17, 1995, but for his disability. *Schumacher I* at 12 - 15. I base my decision in this Appeal on the legal grounds only.

¹⁵ *Schumacher I* at 16.

¹⁶ In fact, Mr. Schumacher argued that he would have owned the F/V KING & WINGE, but for his disability, which implies that the vessel was not lost.

Mr. Schumacher indicated in his F/V ROSEANNE HESS application that he was applying based on the lost vessel provision. On appeal, Mr. Schumacher argues:

When you talk about the Rosanne Hess, you state insufficient [sic] documented harvests. If it hadn't sank when it did it, and if I had not been injured when I was, there is every possibility that it would have met the requirements. Nobody can say positively what would have happened because there were lots of unforeseen actions.¹⁷

The lost vessel provision is 50 C.F.R. § 679.4(k)(8)(iii) only grants an LLP license to an applicant who “qualifies for a groundfish license or crab license but those vessel on which the eligible applicant’s qualification was based was lost or destroyed.” A vessel qualifies for a license because the vessel made all the harvests required for a license. Therefore, as this Office stated in *In re Application of Mark Donovick*, “This provision only helps a person who owned a vessel that met *all* the harvest requirements – both in the general qualification period and the endorsement qualification period – and *then* sank.”¹⁸ Since Mr. Schumacher does not argue that the F/V ROSEANNE HESS made the harvests required for an LLP license *before* it sank, the lost vessel regulation does not authorize NMFS to grant Mr. Schumacher an LLP license.

Further, Mr. Schumacher faces the same problem with this argument applied to this vessel as applied to the F/V KING & WINGE. Even if the F/V ROSEANNE HESS had made all the harvests required for an LLP license and then sank, Mr. Schumacher could not make use of that fishing history unless he were an eligible applicant for an LLP license based on the F/V ROSEANNE HESS’s fishing history.

I conclude that Mr. Schumacher is not an eligible applicant for an LLP license based on his applications, which identified the F/V KING & WINGE, the F/V ROSEANNE HESS or the F/V LADY ANGELINE as qualifying vessels.

CONCLUSIONS OF LAW

1. Mr. Schumacher is not an eligible applicant for an LLP license pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a).
2. The Rehabilitation Act requires the government to make reasonable accommodations in the LLP for a person’s disability.
3. If a proposed change modifies an essential feature of a program, it is not a reasonable modification.

¹⁷ Appeal at 3.

¹⁸ Decision I, Appeal No. 02-0008 (September 27, 2002) at 5 (footnote omitted). *See* Final LLP Rule, 63 Fed. Reg. 52,642, 52,646 (1998).

4. The Rehabilitation Act does not require, as a reasonable accommodation, that NMFS grant a disabled person an LLP license if the disabled person proves that he or she would have owned a qualifying vessel but for his or her disability.
4. Mr. Schumacher has not shown that he meets the requirements of the unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv).
5. The unavoidable circumstances regulation, 50 C.F.R. § 679.4(k)(8)(iv), is only available to an applicant that owned a vessel on June 17, 1995.
6. The lost vessel regulation, 50 C.F.R. § 679.4(k)(8)(iv), only grants a license to an applicant whose vessel was lost after it made all the harvests required for an LLP license.
7. Mr. Schumacher is not an eligible applicant for an LLP license.

DISPOSITION

The IAD that is the subject of this appeal is AFFIRMED. This Decision takes effect April 23, 2003, unless by that date the Regional Administrator orders review of the Decision.

The appellant or RAM may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, April 3, 2003. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement in support of the motion.

Mary Alice McKeen
Appeals Officer