

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of)	Appeal No. 03-0029
)	
WILLIAM F. PARNELL,)	DECISION
Appellant)	
)	July 3, 2006
_____)	

STATEMENT OF THE CASE

William F. Parnell filed an appeal on December 19, 2003 of Initial Administrative Determination (IAD) No. 03-067, issued on August 20, 2003, by the Restricted Access Management (RAM) Program under the North Pacific Groundfish and Crab License Limitation Program (LLP).¹

The IAD denied Mr. Parnell's application for an LLP groundfish license and stated that Mr. Parnell had until October 20, 2003, to file an appeal.² The IAD specified that date in accord with federal regulation 50 C.F.R. § 679.43(d), which states that an applicant must file an appeal no later than sixty days after the date the IAD is issued.³

On October 28, 2003, RAM sent both the IAD and a Notice of Final Agency Action to Mr. Parnell at a Dutch Harbor address. The Notice of Final Agency Action informed Mr. Parnell that his time for appeal had expired. A family member signed for Mr. Parnell as receiving these documents on December 5, 2003. This office accepted Mr. Parnell's appeal as timely because Mr. Parnell did not receive the IAD when it was issued due to a change in address and because Mr. Parnell filed an appeal within sixty days of when he actually received the IAD. Mr. Parnell can appeal the IAD because it directly and adversely affects his interests, as required by 50 C.F.R. § 679.43(b).

Mr. Parnell applied for an LLP groundfish license for a catcher vessel with an area endorsement for the Central Gulf based on the fishing history of the F/V MOCCASIN and based on the Rehabilitation Act of 1973, 29 U.S.C § 794(a), which is known as section 504 of the Rehabilitation Act. RAM denied Mr. Parnell's application. RAM concluded that Mr. Parnell was not the owner of the F/V MOCCASIN on June 17, 1995, that the F/V MOCCASIN did not have a fishing history which met the requirements for an LLP license and that Mr. Parnell did not prove

¹ The LLP is located in 50 C.F.R. § 679. Specifically: 50 C.F.R. § 679.1(j) (purpose and scope); 50 C.F.R. § 679.2 (definitions); 50 C.F.R. § 679.4(a)(6) (definition of harvesting privilege); 50 C.F.R. § 679.4(k)(license requirements); 50 C.F.R. § 679.7 (prohibitions); 50 C.F.R. § 679.43 (appeals). The LLP regulations are on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/regs/summary.htm>

² IAD at 7.

³ 50 C.F.R. § 679.43(d)(appeal must be filed no later than 60 days after the date of the IAD).

that he was eligible for an LLP license under the Rehabilitation Act.

On appeal, Mr. Parnell filed a brief statement explaining the circumstances of his late appeal. He did not file any additional arguments concerning his right to receive an LLP license. I have treated Mr. Parnell as making the same arguments on appeal that he made to RAM. The record provides sufficient information to determine Mr. Parnell's appeal.⁴ I therefore close the record and decide Mr. Parnell's appeal.

SUMMARY

The IAD is affirmed. Federal regulation 50 C.F.R. § 679.2 defines the three ways that Mr. Parnell could be eligible for an LLP license. Mr. Parnell is not eligible for an LLP license under any of those provisions.

First, Mr. Parnell did not own the F/V MOCCASIN on June 17, 1995. Second, even if Mr. Parnell owned the entire fishing history of the F/V MOCCASIN, the F/V MOCCASIN did not harvest license limitation groundfish in the endorsement qualification period, as required for a Central Gulf endorsement by 50 C.F.R. § 679.4(k)(4)(ii)(H). Third, Mr. Parnell is not eligible for an LLP license based on the Rehabilitation Act. Mr. Parnell was denied an LLP license, not because of any physical disability, but because he did not meet the essential eligibility requirement for an LLP license: ownership of a vessel on June 17, 1995 that made the harvests necessary for an LLP license, *or* ownership of the qualifying fishing history apart from the vessel.

ISSUES

1. Is Mr. Parnell eligible for an LLP groundfish license based on ownership of the F/V MOCCASIN on June 17, 1995?
2. Is Mr. Parnell eligible for an LLP groundfish license based on ownership of the fishing history of the F/V MOCCASIN.
3. Is Mr. Parnell eligible for an LLP groundfish license based on section 504 of the Rehabilitation Act of 1973?

ANALYSIS

To receive an LLP license, an applicant must be an "eligible applicant."⁵ Federal regulation 50 C.F.R. § 679.2 defines "eligible applicant" as follows:

⁴ 50 C.F.R. 679.43(g)(2).

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

Eligible applicant means (for purposes of the LLP program) a qualified person ^[6] who submitted an application during the application period announced by NMFS and:

(1) **For a groundfish license or crab species license, who owned a vessel on June 17, 1995, from which the minimum number of harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5), unless the fishing history of that vessel was transferred in conformance with the provisions in paragraph (2) of this definition; or**

(2) **For a groundfish license or crab species license, to whom the fishing history of a vessel from which the minimum number of documented harvests of license limitation groundfish or crab species were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5) has been transferred or retained by the express terms of a written contract that clearly and unambiguously provides that the qualifications for a license under the LLP have been transferred or retained; or . . .**

(5) **Who is an individual that can demonstrate eligibility pursuant to the provisions of the Rehabilitation Act of 1973 at 29 U.S.C. 794(a).** [emphasis added]

I will examine whether Mr. Parnell qualifies for an LLP license under each of these provisions.

1. Is Mr. Parnell eligible for an LLP groundfish license based on ownership of the F/V MOCCASIN on June 17, 1995? No.

According to the official LLP record, Thomas Young owned the F/V MOCCASIN on June 17, 1995.⁷ Mr. Parnell produced a Bill of Sale that he purchased the F/V MOCCASIN from Eddie Byford on March 1, 2000.⁸ The Bill of Sale does not show that Mr. Parnell owned the F/V MOCCASIN on June 17, 1995. At most, it shows he owned the F/V MOCCASIN on March 1, 2000. I therefore find that Mr. Parnell did not own the F/V MOCCASIN on June 17, 1995.

Even assuming that the F/V MOCCASIN made the harvests necessary for an LLP license – an assumption I examine in the next issue – Mr. Parnell does not meet the first definition of eligible applicant because he did not own the F/V MOCCASIN on June 17, 1995. I conclude that Mr. Parnell is not eligible for an LLP groundfish license based on ownership of the F/V MOCCASIN on June 17, 1995.

⁶ A qualified person for the LLP means “a person who was eligible on June 17, 1995, to document a fishing vessel under chapter 121, Title 46, USC.” 50 C.F.R. § 679.2.

⁷ IAD at 2.

⁸ Bill of Sale (March 1, 2000).

2. Is Mr. Parnell eligible for an LLP groundfish license based on ownership of the fishing history of the F/V MOCCASIN? No.

Mr. Parnell purchased the F/V MOCCASIN and “all fishing history both past and present” of the F/V MOCCASIN from Eddie Byford on March 1, 2000.⁹ While the Bill of Sale shows that Mr. Byford sold Mr. Parnell all the “past” fishing history of the F/V MOCCASIN that Mr. Byford owned, the Bill of Sale does not show what past fishing history of the vessel – which dates of the vessel’s past fishing history – Mr. Byford owned. It is not necessary to decide which parts of the vessel’s past fishing history Mr. Byford owned, and sold to Mr. Parnell, because even if Mr. Byford owned all of the past fishing history of the F/V MOCCASIN, and sold it all to Mr. Parnell, Mr. Parnell does not qualify for an LLP license.

Assuming that Mr. Parnell owns the entire fishing history of the F/V MOCCASIN, Mr. Parnell does not qualify for an LLP groundfish license because the F/V MOCCASIN is not “a vessel from which the minimum number of documented harvests of license limitation groundfish . . . were made in the relevant areas during the qualifying periods specified in § 679.4(k)(4) and (k)(5).”¹⁰

For Mr. Parnell to qualify for an LLP groundfish license with a Central Gulf endorsement based on the F/V MOCCASIN, the F/V MOCCASIN must have made one documented harvest of license limitation groundfish in the Gulf of Alaska or the Bering Sea/Aleutian Islands during the General Qualification Period (GQP), January 1, 1988 through June 27, 1992.¹¹ Additionally, the F/V MOCCASIN must have made one documented harvest of license limitation groundfish in the Central Gulf during the Endorsement Qualification Period (EQP), January 1, 1992 through June 17, 1995.¹²

The official LLP record indicates that, while the F/V MOCCASIN made documented harvests of license limitation groundfish in the Central Gulf during the GQP, it did not make any documented harvests of license limitation groundfish in the Central Gulf during the EQP.¹³ Mr. Parnell did not offer any evidence or argument that the official LLP record is incorrect. I therefore find that the F/V MOCCASIN did not harvest any license limitation groundfish in the Central Gulf during the EQP. Since the F/V MOCCASIN did not make the harvests necessary for an LLP license, I conclude that Mr. Parnell is not eligible for an LLP groundfish license based upon ownership of the fishing history of the F/V MOCCASIN.

⁹ Bill of Sale (March 1, 2000).

¹⁰ 50 C.F.R. § 679.2

¹¹ 50 CFR § 679.4(k)(4)(i) & (iv).

¹² 50 CFR § 679.4(k)(4)(ii)(H).

¹³ IAD at 4.

3. Is Mr. Parnell eligible for an LLP groundfish license based on section 504 of the Rehabilitation Act of 1973? No.

Section 504 of the Rehabilitation Act of 1973 provides in relevant part:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, 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 receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.¹⁴ [emphasis added]

To be eligible for an LLP license under the Rehabilitation Act, an applicant must show four things: first, the applicant is an individual with a disability, as defined by the Act;¹⁵ second, apart from the disability, the applicant is otherwise qualified for an LLP license; third, the applicant is being denied an LLP license solely by reason of his disability; fourth, the LLP is a program conducted by a federal Executive agency.¹⁶ I assume, without deciding, that Mr. Parnell is an individual with a disability and thus meets the first requirement.¹⁷ Mr. Parnell provided a letter from a former treating physician describing Meniere's disease, a hearing impairment from which he suffers, as well as hearing evaluations from two audiologists, the most recent dated December 15, 1999.

Mr. Parnell meets the fourth requirement. The License Limitation Program is a program conducted by an Executive agency, namely the National Marine Fisheries Services within the National Oceanic Atmospheric Administration, which is part of the Department of Commerce.

To meet the second and third requirements of Section 504, Mr. Parnell must prove that he is "otherwise qualified" for an LLP license and is being denied "solely by reason of her or his disability." *Schumacher I* explains:

¹⁴ 29 U.S.C. § 794(a).

¹⁵ The definition of "individual with a disability" in the Rehabilitation Act is at 29 U.S.C. § 705(20). A "disability" is a physical or mental impairment that "constitutes or results in a substantial impediment to employment" or "substantially limits one or more major life activities." 29 U.S.C. § 705(9)(A)(B).

¹⁶ *Jonathan Schumacher*, Appeal No. 00-0010 at 5 (Sept. 16, 2002); *Charles G. West*, Appeal No. 03-0011 at 4 (July 28, 2004); *MGF Fisheries, Inc.*, Appeal No. 02-0027 at 11 (Dec. 28, 2004); *Rex W. Duncan*, Appeal No. 04-0006 at 4 (June 29, 2005). All prior OAA decisions are available on the NMFS Alaska Region website: <http://www.fakr.noaa.gov/index/appeals/decisionsbynumber.asp>

¹⁷ I do not decide whether Mr. Parnell is an individual with a disability because I conclude that, even if he is, he does not meet the second and third requirements for a Rehabilitation Act claim.

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 the program, not the individual's disability, is causing the individual to be denied.¹⁸

The Department of Commerce regulations implementing the Rehabilitation Act adopt this standard. The regulations define an otherwise qualified individual as one who meets "the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity."¹⁹ Under these regulations, a measure cannot be a reasonable accommodation if it changes a fundamental requirement of a program.²⁰

Thus, to be eligible for an LLP license based on the Rehabilitation Act, Mr. Parnell must propose a reasonable accommodation, that is, a change in a non-essential requirement of the LLP that, if made, would enable him to receive an LLP license. Mr. Parnell has proved only that he has a disability. Proof of a disability by itself does not make Mr. Parnell eligible for an LLP license. Granting Mr. Parnell an LLP license based solely on proof of a disability is not a reasonable accommodation. It would abrogate the essential requirement of eligibility for an LLP license: ownership of a vessel on June 17, 1995, that made the harvests necessary for an LLP license, *or* ownership of the qualifying fishing history of a vessel apart from the vessel.

Mr. Parnell was not denied an LLP license because of his Meniere's disease or because of any reason intrinsically related to his disability. The criterion of vessel ownership or vessel history ownership

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

¹⁸ *Schumacher I* at 6 (emphasis in original).

¹⁹ 15 C.F.R. § 8c.3, definition of "qualified individuals with handicaps", subsection (2). This term means the same as an "otherwise qualified" individual. The regulation differentiates between programs "under which a person is required to perform services or to achieve a level of accomplishment" and "any other program or activity." Whatever the type of program, the disabled person must meet the "essential eligibility requirements" of the program to be "otherwise qualified."

²⁰ Final Rule, 53 Fed. Reg. 19,270, 19,272 (1988)(commentary to regulations).

or lack of disability.”²¹

Mr. Parnell was denied an LLP license because he did not meet the essential eligibility requirement for an LLP license. I therefore conclude that Mr. Parnell is not eligible for an LLP groundfish license based on section 504 of the Rehabilitation Act of 1973.

FINDINGS OF FACT

Based on a preponderance of evidence in the record, I find that:

1. William Parnell did not own the F/V MOCCASIN on June 17, 1995.
2. The F/V MOCCASIN did not make any harvests of license limitation groundfish in the Central Gulf between January 1, 1992 and June 17, 1995.

CONCLUSIONS OF LAW

1. William Parnell is not eligible for an LLP groundfish license based on ownership of the F/V MOCCASIN on June 17, 1995.
2. William Parnell is not eligible for an LLP groundfish license based on ownership of the fishing history of the F/V MOCCASIN.
3. The F/V MOCCASIN did not make the harvest in the endorsement qualification period required by 50 C.F.R. § 679.4(k)(4)(ii)(H) for an LLP groundfish license with a Central Gulf endorsement.
4. Granting Mr. Parnell an LLP license based solely on proof of a disability is not a reasonable accommodation under the Rehabilitation Act.
5. William Parnell is not eligible for an LLP groundfish license based on Section 504 of the Rehabilitation Act of 1973.

DISPOSITION

The IAD that is the subject of this Decision is **AFFIRMED**. This Decision takes effect on August 2, 2006, unless by that date the Regional Administrator takes further action pursuant to 50 C.F.R. § 679.43(o).

William Parnell or RAM may submit a Motion for Reconsideration, but it must be received by this

²¹ *Jonathan Schumacher*, Appeal No. 00-0010 at 9 (Sept. 16, 2002). *Accord Rex W. Duncan*, Appeal No. 04-0006 at 9 (June 29, 2005).

Office not later than 4:30 p.m. Alaska time on the tenth day after this Decision, July 13, 2006. A motion for reconsideration must be in writing, must specify one or more material matters of fact or law that the administrative judge overlooked or misunderstood, and must be accompanied by a written statement in support of the motion.

Mary Alice McKeen
Administrative Judge