NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Application of	)	Appeal No. 95-0008
	)	
CHARLES J. PETTICREW,	)	DECISION
Appellant	)	
_____	)	July 3, 1996

STATEMENT OF THE CASE

On February 15, 1995, Appellant Charles J. Petticrew filed a timely appeal of an Initial Administrative Determination [IAD] issued by the Restricted Access Management Division [Division] of the National Marine Fisheries Management Service [NMFS] on December 29, 1994. The IAD denied Appellant's request for additional Quota Share [QS] under the Individual Fishing Quota [IFQ] program for Pacific halibut and sablefish due to the absence of actual landings during a QS qualifying year and the lack of authority of the Division to issue QS on the basis of hardship or special circumstance. The Appellant has adequately shown that the IAD has a direct and adverse effect on his interests. The Appellant did not request a hearing, nor is one needed because the facts are not in dispute.

ISSUES

1. Whether NMFS is required to calculate the QS of a physically disabled applicant on the basis of his estimate of halibut and sablefish landings that might have made but for his disability.

2. Whether the IFQ program subjects the Appellant to unlawful discrimination because of his physical disability.

BACKGROUND

In an affidavit accompanying his appeal, the Appellant states that he commercially fished sablefish and halibut in southeast Alaska from 1975 through 1980. In November 1981, the Appellant was involved in an accident that resulted in the amputation of his right leg above the knee and injuries to his left leg and foot. The Appellant underwent rehabilitation for his injuries and, as a result, did not fish again until 1985. He claims that his landings from 1985 to 1990, which formed the basis for his allocation of qualifying pounds,[1] were reduced because of his physical disability.

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[1]Under former 50 C.F.R. § 676.20(b), the amount of qualifying pounds allocated to an applicant was based on the total legal landings made from the vessels the applicant owned or leased during the base years. The base years for halibut were 1984-1990; for sablefish, they were 1985-1990. Qualified

In his application for QS, the Appellant claimed total legal landings of 468,548 pounds of halibut in two regulatory areas and 134,470 pounds of sablefish in one area. These figures are not the Appellant's actual landings totals; rather, they are his estimate of the amount he would have landed during the base years if he had not been disabled. Appellant's figures are based primarily on landings he made during the period 1975 - 1981, before his disabling accident. The Appellant's calculations assume a 120 percent increase in efficiency that he claims would have resulted if he had used circle hooks instead of J-type hooks. The Appellant wanted the Division to substitute his estimated landings in place of his actual landings in all but two instances.

The Division credited the Appellant with 71,128 qualifying pounds of halibut and 5,579 qualifying pounds of sablefish. The remainder of Appellant's claims (397,420 pounds of halibut and 128,891 pounds of sablefish) were denied by the Division. The appeal, as originally filed, seeks to have the denied amounts added to the qualifying pounds already allocated to the Appellant. Nine months after filing his appeal, the Appellant sought to amend his claim as a result of discovering another 1978 halibut landing for which he believes he should receive credit. His amended claim would be for 456,422 pounds of halibut, instead of 397,420 pounds.[2]

On appeal, the Appellant argues that the Rehabilitation Act of 1973[3] and implementing regulations of the Department of Commerce[4] require that he be compensated for the reduction in catch he claims resulted from his physical disability. The Appellant argues that the IFQ regulations unlawfully discriminate against him, because they consider only the landings that he made in the years following his injuries and do not take into account the effect of his disability on the amount of his landings during the base years. He argues, therefore, that the IFQ regulations, in violation of the Act, do not afford him an equal opportunity to benefit from the program to the same degree as applicants who do not have a recognized disability.

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applicants were credited with their highest five-year total of landings of each species in each regulatory area. This regulation has been renumbered as 50 C.F.R. § 679.40(a)(4), effective July 1, 1996. *See,* 61 Fed. Reg. 31,270 (1996).

[2]By making a new claim for additional halibut pounds for the first time on appeal, the Appellant raises the question of whether that portion of his claim should be denied as untimely. *See, e.g.,* Tiger, Inc., Appeal No. 95-0100, Decision on Reconsideration, February 26, 1996, at 7, *aff'd,* March 4, 1996, in which we stated that we will not consider an appeal based on a claim that was never presented to the Division. In light of my decision to affirm the IAD in this appeal, I do not rule on whether the Appellant's proposed amendment constitutes a new claim that should be denied as untimely.

[3]Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1994).

[4]15 C.F.R. § 8c.30(b)(1) (1996).

DISCUSSION

Under 50 C.F.R. § 679.40(a)(4)(1996), the Division is required to calculate QS on the basis of actual, not hypothetical, landings made during the base years. No exceptions to this rule, hardship or otherwise, are provided in the IFQ regulations. The North Pacific Fishery Management Council expressly rejected allowing QS on the basis of hardship or unavoidable circumstance.[5] The Council determined that providing a three-year qualifying period and allowing applicants to select their best five years of fishing during the base years[6] was sufficient to compensate applicants whose catch had been reduced as a result of circumstances beyond their control, and that no additional hardship provisions would be considered for the IFQ program.

This Office has denied relief to a number of appellants seeking QS on the basis of landings that they claimed would have been made but for an unavoidable circumstance or hardship.[7] We have ruled in these appeals that the Division has no authority to allocate qualifying pounds that are not based on actual landings. I reach the same conclusion in this appeal.

The Appellant here argues, however, that the method of QS calculation chosen by the Council is in conflict with, and in violation of, federal law outside the Magnuson Act.[8] This challenge to the legality of the IFQ regulations is not within the purview of this Office. An Appeals Officer must presume the legal validity of the agency's own duly promulgated regulations.[9] The IFQ regulations in question were duly promulgated through notice and comment rulemaking pursuant to the requirements of the

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[5]The Council made the decision at its September 28-October 5, 1994, meeting.

[6]The Council, in basing QS on an applicant's best of five of six or seven years (for sablefish and halibut, respectively), recognized the need to "discount the effects on a person's catch history of one or two years of relatively poor performance due to weather, injury, illness, the EXXON VALDEZ oil spill, or other unfortunate circumstance beyond the control of fishermen." *See,* 57 Fed. Reg. 57134 (1992).

[7]*See* Kenneth M. Adams, Appeal No. 95-0004, decided March 22, 1995, effective April 19, 1995; William E. Crump, Appeal No. 95-0024, decided June 27, 1995, effective July 27, 1995; Jimmy D. Hutchens, Appeal No. 95-0094, decided June 28, 1995, affirmed January 1, 1996; and Michael C. Hatten, 95-0136, decided January 30, 1996, affirmed January 18, 1996. All of these cases deal with the EXXON VALDEZ oil spill of 1989, in which Appellants argued that they would have had landings but for the spill.

[8]Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1882 (1994).

[9]George M. Ramos, Appeal No. 94-0008, Regional Director's Decision on Review, at 4, April 21, 1995.

Administrative Procedure Act, 5 U.S.C. § 553 (1988).[10] The AO has no authority to invalidate IFQ regulations and to order the relief sought on the basis of an alleged conflict with federal statutes. Such broad review authority lies with the courts, and Appellant's redress on this legal argument must be sought in that forum.

CONCLUSIONS OF LAW

1. NMFS may not calculate the QS of a physically disabled applicant on the basis of landings of halibut or sablefish that might have been made but for the applicant's disability.

2. Appellant's claim that the IFQ program subjects him to unlawful discrimination because of his physical disability is beyond the purview of this Office.

DISPOSITION

The Division's IAD denying additional qualifying pounds of halibut and sablefish to Appellant is AFFIRMED. This decision takes effect on August 2, 1996, unless by that date the Regional Director orders review of the decision. Any party, including the Division, may submit a Motion for Reconsideration, but it must be received at this office not later than 10 days after the date of this decision [July 15, 1996].

John G. Gissberg
Appeals Officer

I have reviewed this decision to ensure compliance with applicable laws, regulations, and agency policies, and consistency with other appeals decisions of this office.

Edward H. Hein
Chief Appeals Officer

[10] *Id.*, at 2. *See,* 58 Fed. Reg. 59,375 (1993).