When Is a Pilot Too Old to Fly?

By Kent S. Jackson
kjackson@jetlaw.com

The answer seems to be getting more gray at the temples.

WHAT DOES PETE TOWNSEND think about the age 60 rule? (He just turned 61.) If your response was “Who?” you are not of “my generation,” but if you adjusted your reading glasses for a moment and then exclaimed “The Who!” read on, old friend.

Fourteen years have passed since two FAA inspectors filed a report raising doubts about Bob Hoover's ability to fly in air shows. The FAA grounded the 70-year-old aerobatic legend and required him to undergo a battery of obscure medical tests related to his “cognitive abilities.” I have reviewed all of the legal records, and carbon dating was the only test that was not performed.

After losing his FAA medical certificate, Hoover received Australian medical and airman certificates and performed at air shows Down Under. The FAA administrator at the time, David Hinson, reinstated Hoover's FAA medical certificate in 1995. What most pilots have forgotten or never realized is that the FAA did not reinstate Bob Hoover's medical certificate as a result of any legal action. The legal process failed him. The most likely reason for the FAA's “change of heart” was the fact that Administrator Hinson was a pilot, and at the 1995 Experimental Aircraft Association convention at Oshkosh, Wis., he was surrounded by pilots carrying “Let Bob Fly” signs. So, the FAA won the legal battle, but lost the political war.

Because so many people think that Hoover won the legal fight, some pilots believe that there is legal precedent to protect them from losing their medical simply because they are “old.”

Hoover actually won the first legal round, a hearing before an administrative law judge who ruled in Hoover's favor. The FAA appealed that decision to the NTSB, and the Safety Board reversed the initial ruling. The NTSB’s final decision contains a number of very disturbing statements, such as, “We question the relevance of respondent's actual performance skills to the issue of unrestricted medical certification.” How can actual performance skills in an airplane be irrelevant to medical certification?

Instead of concerning themselves with actual skills, the Safety Board members focused on Hoover's ability to perform “backward digit span tasks accurately.” One doctor attributed some of the “abnormal” findings in Hoover's many examinations to “some form of nonspecific aging pathology.”

Fundamentally, the NTSB seemed to believe that a septuagenarian pilot who, even though in excellent physical and mental health for his age group, may still be unfit to fly. “We are convinced that the public's interest in aviation safety requires that respondent's cognitive testing results be compared with more than the norms for the average 70-year-old person,” the Board said, adding “Respondent is not seeking a license to perform everyday activities.”

The Hoover case may not bode well for aging pilots, but the legal and political landscape has become more complicated since its resolution. About the time that the FAA reinstated Hoover's medical, the Equal Employment Opportunity Commission interpreted the Age Discrimination in Employment Act (ADEA) to prohibit airlines from discriminating against hiring pilots over the age of 40. The airlines hadn’t claimed that pilots over the age of 40 were unsafe, but rather they didn’t believe such pilots were a good training investment. More recently, a California jury awarded a $63 million dollar verdict to a 63-year-old pilot who was terminated due to age discrimination.

In 1990, Congress passed the Americans with Disabilities Act (ADA). In 1999, the U.S. Supreme Court addressed the first pilot issue under the ADA. In Sutton v. United Airlines, a pair of “severely myopic twin sisters” sued United under the ADA because the airline discriminated against them on the basis of their “disability.” Their vision was correctable to 20/20, but the airline required uncorrected vision of 20/100 or better. The high court ruled that they were not “disabled” under the ADA, and therefore United did not unlawfully discriminate against them.

On the other hand, the Court ruled that the ADEA does not prevent reverse age discrimination in a 2004 case where a collective bargaining agreement favored older employees over younger ones. The average age of the current Court is 66; just prior to the death of Chief Justice Rehnquist, the average age was 71. Justice Oliver Wendell Holmes stepped down from the Supreme Court at age 90 in 1932. Although the justices don't have to make quick decisions like pilots, it is still hard to imagine a majority opinion from this group stating that 65 is too old.

Meanwhile, the rule requiring airline pilots to retire at age 60 seems destined to be revised or removed. The Congress has debated bills to extend the age or eliminate the restriction.

How does all of this add up? It is almost certain that the age of 60 will not remain as the benchmark for “old.” But what will replace it? Choosing any number is always an arbitrary process, and yet anyone would agree that 100 years old is too old to be flying paying passengers. (Ask me again in 2063.) By now, many ALPA members are probably AARP members as well, and since the airlines can't discriminate against pilots over 40 in the hiring process, it is likely that the airlines would like to extend their training investment in older new hires by a few years. Even outside the industry, baby boomers in general probably all agree that a 65-year-old pilot standing in the cockpit doorway is a comforting sight.

The issue of aging pilots will be addressed in the next few years, but it won't be determined solely by the FAA, the NTSB or the courts. Science will play a small role, and public opinion will play a large one. What number will be acceptable?

According to FAA records, Hoover’s most recent medical was issued in September 2003 when he was 81. Has he quietly retired from flying since then? Or have the insurance companies for the air shows quietly removed him from performances? Personally, I hope that Hoover flies on as a Sport Pilot, which requires no medical certificate at all. B&CA