DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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ARLINGTON, VIRGINIA 22203
(703) 696-4759

Date: July 11, 2023

In the matter of:	)	
	)	
-----	)	ISCR Case No. 22-02044
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 31, 2022, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline H (Drug Involvement and Substance Misuse) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective Jun. 8, 2017) and Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On May 22, 2023, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman denied Applicant's security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged that Applicant used marijuana with varying frequency from about late 2016 to about mid-2022 and that he intended to continue to use marijuana in the future. The Judge found against Applicant on both allegations. In his appeal brief, Applicant contends that Judge committed three analytical errors.

The Judge's Findings of Fact and Analysis

In his June 2022 security clearance application (SCA), Applicant disclosed that he used marijuana recreationally from about November 2016 to May 2022 and that he intended to use marijuana in the future, explaining, "I have friends who will be living in states where the drug is legal for recreational use and will possibly use it while visiting." File of Relevant Material (FORM) Item 3 at 36. During his August 2022 background interview, Applicant indicated that he used marijuana about once a month with his brother and friends and purchased it from dispensaries in adjoining states where it is legal. In his SOR Response, he said, "I would like to add that as of now I do intend to stop the use of marijuana consumption." In his response to the FORM, he further explained, "My early statement of intention to stop was to never use marijuana again. I have not had any association with marijuana since October 2022 and will not have any association again."

The Judge concluded that Applicant's marijuana use was recent, frequent, and did not happen under circumstances making recurrence unlikely and further stated:

> AG ¶ 26(b) is not fully established. Applicant acknowledged his drug involvement in his SCA, and he stated that he last used marijuana in May 2022, shortly after he was hired by . . . his current employer and before he submitted his SCA. In his response to the FORM, he stated that his last association with marijuana was in October 2022, after he submitted his SCA. He has not claimed that he has dissociated from drug-using associates, including his brother. He has not changed or avoided the environment where he used drugs. Although he declared in his answer to the SOR and response to the FORM that he will not use marijuana again, he has not provided the signed statement of intent described in AG ¶ 26(b)(3).
>
> Applicant did not disavow his answers to drug-related questions in the SCA until he received the SOR and realized that his marijuana use was an impediment to obtaining a clearance. It is not clear from the limited record whether he sincerely decided that obtaining a clearance was more important to him than his recreational use of marijuana, or whether **he simply readjusted his statement of intent** in an attempt to overcome the impact of his admission in the SCA.
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> * * *
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> The inconsistency between Applicant's answers in the SCA and his responses to the SOR and the FORM raises doubt about his true intent. Once a concern arises regarding an Applicant's eligibility for access to classified information, there is a strong presumption against granting eligibility. Applicant has not overcome that presumption. [Decision at 6-7, emphasis added, citations omitted.]

Discussion

On appeal, Applicant first contends the Judge erred by concluding that he did not submit a signed statement of intent. He argues that he submitted a "statement of change" in his SOR Response when he stated that "I would like to add that as of now I do intend to stop the use of marijuana consumption." Appeal Brief at 1. This argument is not persuasive.

AG ¶ 26(b) provides an individual could mitigate Guideline H security concerns by "acknowledge[ing] his or her drug involvement and substance misuse, provid[ing] evidence of actions taken to overcome this problem, and [establishing] a pattern of abstinence, including, but not limited to: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; and (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future illegal drug involvement or misuse is grounds for revocation of national security eligibility." Of note, Applicant's SOR and FORM responses do not contain an acknowledgment that any future illegal drug involvement would be a ground for revoking his national security eligibility. Consequently, the Judge was accurate when he stated that Applicant "has not provided the signed statement of intent described in AG ¶ 26(b)(3)." Decision at 6. Next and more importantly, a judge is responsible for determining the weight and credibility of the evidence. The Appeal Board gives deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1. As noted by the highlighted phrase in the block-quote above, the Judge considered Applicant assertions in his SOR and FORM responses as a statement of intent but did not find those statements convincing. The Judge questioned Applicant's "true intent" based on his inconsistent statements and essentially concluded that Applicant's statements in his SOR and FORM responses were insufficient to establish that he would abstain from marijuana use in the future. Based on our review of the record, we find no reason to disturb this challenged conclusion. Decision at 6.

Applicant's remaining arguments essentially advocate for an alternative weighing of the evidence. In those arguments, he asserts "the pattern of continued use is also false" and challenges the Judge's finding that Applicant had not claimed to dissociate from his brother, a drug-using individual. Appeal Brief at 1. Applicant argues that he does not use or discuss marijuana with his brother and such "limited communication [with a sibling] should not be counted as a strike against my ability to hold a clearance." *Id.*

These remaining arguments establish no error. First, the Judge did not conclude that Applicant had a "pattern of continued use" of marijuana. As noted above, he instead essentially concluded that Applicant failed to establish that he would abstain from marijuana use in the future, which was a reasonable inference drawn from the record evidence. Regarding the challenge involving Applicant's brother, the Judge's conclusion that Applicant "has not claimed that he has disassociated with drug-using individuals, including his brother," is supported by record evidence. The weight to be given such evidence is within the Judge's special province. *See, e.g.*, ISCR Case No. 18-00857 at 4 (App. Bd. May 8, 2019). It was reasonable for the Judge to conclude that Applicant's continuing contact with a drug-using individual, no matter the nature of that relationship, could lead to Applicant's further use of illegal drugs. In general, Applicant's disagreements with the Judge's weighing of the evidence are insufficient to establish that the

Judge's analysis or conclusions were arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 15-00650 at 2 (App. Bd. Jun. 27, 2016).

Applicant failed to establish that the Judge committed any harmful error. *See* Directive ¶ E3.1.32. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also* AG ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Order

The decision is **AFFIRMED**.

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Chair, Appeal Board

Signed: Gregg A. Cervi
Gregg A. Cervi
Administrative Judge
Member, Appeal Board

Signed: Allision Marie
Allision Marie
Administrative Judge
Member, Appeal Board