DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203
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Date: September 19, 2023

In the matter of:	)	
	)	
-----	)	ISCR Case No. 22-00172
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Dan M. Winder, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 18, 2022, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline I (Psychological Conditions) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective Jun. 8, 2017) and DoD Directive 5220.6 (January 2, 1992, as amended) (Directive). Applicant requested a hearing. On June 13, 2023, after the hearing, Defense Office of Hearings and Appeals Administrative Judge Robert E. Coacher denied Applicant's security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The sole SOR allegation asserted that, in December 2021, a licensed psychologist evaluated Applicant and opined that his judgment, reliability, and trustworthiness are not appropriately intact, as evidenced by a history of delusional belief, persecutory ideas, and limited insight. Applicant denied this allegation. The Judge found against him.

On appeal, Applicant contends that he was denied due process, that the Judge erred in his findings of fact, and that the Government failed to meet its burden of proof. Consistent with the following, we affirm.

The Judge's Findings of Fact and Analysis

Applicant, who is in his 60s, has worked for a Federal contractor since 2015. He has never been married and has no children. He has earned two associate's degrees. Serving in either an active duty or reserve military status from 1978 to 1983 and 1990 to 1996, he has held a security clearance since 2016.

In early 2020, Applicant's employer sent him for a fitness for duty examination because he reported break-ins to his residence and truck that were unsubstantiated. A doctor of osteopathic medicine (Dr. K) conducted the fitness for duty examination, opined that Applicant suffered from minor post-traumatic stress disorder and mild paranoid/compulsive thought process without psychiatric illness, and concluded he was fit for duty.

Applicant claimed employees of a local security company broke into his truck and were harassing, bullying, tormenting, threatening, and terrorizing him daily. He also accused the company of sending someone to scare his elderly mother who lived in another state. He believed neighbors who lived above him worked for the company and were conducting surveillance on him and breaking into his apartment and truck. Police officers questioned the neighbors but found nothing to support Applicant's claims. Applicant provided no proof supporting his beliefs. At the hearing, he testified that his truck was broken into every day for two years because he had noticed small differences in the positioning of a handicap placard or the truck's mirrors and visor.

Pursuant to a DoD request, Dr. S, a licensed psychologist, evaluated Applicant in late 2021. During the evaluation, Applicant related the details of his concerns, including that he was being investigated and harassed by the IRS or its agents. Dr. S diagnosed Applicant with Delusional Disorder, Persecutory Type, which impaired his judgment, reliability, and trustworthiness. Dr. S recommended he undergo a thorough personality assessment or neuropsychological evaluation to determine the specific mental health condition likely contributing to his paranoid thinking and fixed belief structure. At the hearing, Applicant denied that he told Dr. S certain items in the report, claimed the interview only lasted about 15 minutes, but also acknowledged he did not file a complaint against Dr. S for lying on her report.

In late 2022, Applicant's Counsel referred Applicant for a psychological assessment with Dr. T who has a Ph.D. in counseling and is a licensed marriage and family therapist. Dr. T opined that Applicant did not appear to present with psychological symptoms that would impair judgment. She noted that Applicant denied a history of delusional or psychotic processes and concluded none was evident. Dr. T further concluded that, although Applicant appeared naïve concerning his beliefs about being surveilled, his mental state was healthy, and he did not fit the diagnosis for paranoia because he only expressed his paranoia about the IRS and not everything else in his life.

Of the three medical assessments presented, the Judge indicated that he was giving the greatest weight to Dr. S's diagnosis and opinions. He concluded Dr. S's opinion that Applicant

has a mental health condition that impairs his judgment, reliability, and trustworthiness was not mitigated by the evidence presented.

Discussion

Due Process

Dr. S's evaluation indicated that she was basing her opinion on an interview, self-reported questionnaires, a structured personality assessment, and medical records. Government Exhibit (GE) 7 at 1. In an email dated November 7, 2022, Applicant's Counsel requested a complete copy of all documents in possession of Dr. S. Correspondence File at 2. That same day, Department Counsel provided the following response:

> DoD Directive 5220.6, para E3.1.11 lay out the discovery rules: "Discovery by the applicant is limited to non-privileged documents and materials subject to control by the DOHA. Dr. [S's] files are not subject to control by the DOHA, so they are not available through discovery. [*Id.*]

On appeal, Applicant notes his discovery request and contends that the lack of the requested documents prevented his expert from being able to interpret the results of Dr. S's tests. To the extent that he is now claiming that his right to discovery was violated, Applicant waived this issue because he did not raise a motion at the hearing challenging the Government's response and the Judge did not have an opportunity to rule on this issue. *See, e.g.*, DISCR OSD Case No. 90-0926 at 2 (App. Bd. Oct. 23, 1991) (failure to raise an abridgement of a discovery right at the hearing resulted in waiver of that issue).

Dr. T's Testimony and Report

The Judge concluded that AG ¶ 29(c) – "recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by, the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation" – was partially applicable. Regarding this mitigating condition, the Judge also stated:

> Applicant presented the opinion of Dr. T, who performed a psychosocial assessment in December 2022. While Dr. T is a duly qualified mental-health professional (she is a licensed marriage and family therapist with a Ph.D. in counseling, with years of counseling experience), there is no evidence that she is acceptable to and approved by the U.S. Government. I will take this qualifier into consideration as to the weight I give to Dr. T's testimony and report. Dr. T concluded that Applicant did not appear to present psychological symptoms that would impair his judgment. [Decision at 7.]

On appeal, Applicant contends the Judge erred in concluding that there was no evidence that Dr. T was acceptable to and approved by the U.S. Government. He argues that the admission of Dr's T's report and her testimony into evidence without any Government objection "was

acceptance and approval by the U.S. government." Appeal Brief at 4. Based on the facts in this case, this argument is not convincing. Applicant cites no authority in support of this contention. A party's decision not to object to evidence merely means that party has no opposition to the Judge admitting the evidence into the record and considering it. A "no objection" assertion by an opposing party does not equate to approving, accepting, or otherwise validating that evidence. In the present case, Department Counsel's "no objection" assertion to Dr. T's report did not establish that Dr. T was "acceptable to and approved by" the U.S. Government. We find no error in the Judge's analysis of Dr. T's testimony and report.[1]

Error in the Findings of Fact

Applicant contends that the Judge erred in making two findings. First, Applicant claims the Judge erred in finding he reported to his employer that the break-in of his truck in March 2020 occurred at a grocery store, while he told Dr. K it happened at a casino. A review of Applicant's letter to his employer (GE 4) and Dr. K's evaluation (GE 5 at 1) supports this challenged finding. Applicant has failed to establish the Judge erred in making that finding.

The second purported error involves a finding that police officers questioned Applicant's upstairs neighbors about the break-ins. Applicant argues that police officers asked the neighbors one question and "[t]hat is hardly a 'questioning' by Police." Appeal Brief at 5. On this issue, Dr. K's report indicated that a police detective investigated Applicant's claim in March 2020. GE 5 at 1. At the hearing, Applicant testified:

> Two police officers came to my door at first and questioned me about it. But they did not conduct any kind of investigation other than they went upstairs, they spoke to the individual that answered the door, and the question that I heard as I stood by the door, my own door, was "Do you have anything against the guy downstairs?" And the individual said, "No."
>
> The police officer proceeded to come downstairs and tell me to stay away from these guys and then they left. [Tr. at 132-133.]

Applicant testified about what he heard of the exchange between the police officers and neighbor(s) from a different floor. It is unclear whether the police asked other questions that he did not hear. Even if the Judge erred in making this finding, it was harmless because it did not

[1] The Appeal Board is cognizant of the possible predicament that an applicant may face regarding AG ¶ 29(c). The Board is aware of no designation of "duly qualified mental health professionals [as] acceptable to and approved by" the U.S. Government, except for those who are employed by, or under contract with, the U.S. Government. We are aware of no process for designating mental health professionals as "acceptable to and approved by" the U.S. Government. Nevertheless, some affirmative statement or action by a Government representative (not merely a "no objection" assertion by Department Counsel to a proffered document) is needed to meet the "acceptable to and approved by" requirement. Absent the promulgation of regulations or procedures regarding this issue, it would appear the best approach is for applicants or their representatives to coordinate first with Department Counsel about how to obtain such "acceptance" and "approval" prior to submitting evidence from a mental health professional. If that step does not lead to a successful resolution, the matter may be raised as a due process issue for the Administrative Judge to consider. Based on the record before us, this issue is not ripe for the Board's consideration.

likely affect the outcome of the case. *See, e.g.*, ISCR Case No. 19-01220 at 3 (App. Bd. Jun. 1, 2020).

Burden of Proof

Applicant contends the Government did not meet its burden of proof. In doing so, he notes the Judge concluded that "the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance." Decision at 8. Applicant argues "[q]uestions and doubts hardly meet any burden of proof." Appeal Brief at 5. This argument is not persuasive. The Judge's conclusion regarding "doubts" is based on well-established principles in security clearance adjudications.

The adjudicative guidelines address "security concerns," which in the personnel security context are doubts about an applicant's security clearance eligibility. AG ¶ 2(b) specifically provides, "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Emphasis added. The U.S. Supreme Court effectively recognized the validity of the "doubt" concept when it stated that the grant of a security clearance is a "[p]redictive judgement . . . committed to the broad discretion of the agency responsible" and that "[t]he clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials." *Department of the Navy v. Egan*, 484 U.S. 518, 529 and 531 (1988). *See also Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) ("there is a strong presumption against the issuance or continuation of a security clearance"). Furthermore, Directive ¶ E3.1.15 provides that an applicant "has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Applicant's challenge to the Judge's "doubt" conclusion does not establish any error.

Regarding the Government's burden of proof, Dr. S's evaluation (GE 7) was sufficient substantial evidence to prove the facts alleged in the sole SOR allegation and to establish AG ¶ 28(b), "an opinion of a duly qualified mental health professional that the individual has a condition that may impair judgment, reliability, or trustworthiness." *See* Directive ¶ E3.1.32.1 (setting forth the substantial evidence standard). Once that disqualifying condition was proven, the burden of production shifted to Applicant to rebut, explain, extenuate, or mitigate the resulting security concerns. *Id*. at E3.1.15.

Evidence Did Not Support the Judge's Findings or Conclusions

On appeal, Applicant challenges Dr. S's evaluation. He notes that she did not testify, contends that her report contains "statements which are either outright false or perversions of what [Applicant] told her in the 15 minutes she spent with him," and identifies the purportedly false or inaccurate statements. Appeal Brief at 6-7. These assertions amount to a disagreement with the Judge's weighing of the evidence. "Determining the weight and credibility of the evidence is the special province of the trier of fact." *Inwood Laboratories, Inc. v. Ives Laboratories Inc.*, 456 U.S. 844, 856 (1982). None of Applicant's arguments are sufficient to rebut the presumption that the Judge considered all of the record evidence or to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020). An ability to argue for a different interpretation

of the evidence is not sufficient to demonstrate error. *Id*. We find no reason to disturb the Judge's conclusion that Applicant failed to meet his burden to mitigate the alleged security concerns.

Conclusion

Applicant failed to establish that the Judge committed any harmful error or that he should be granted any relief on appeal. The Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. The decision is sustainable on the record. "The general standard is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Egan*, 484 U.S. at 528.

Order

The decision is **AFFIRMED**.

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

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board

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