



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 14-03727
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Stephen Jon Moss, Esq.

12/15/2015

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense's (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. In 2004, Applicant, who was a physician's assistant, was arrested and charged with Possession of Controlled Substance by Fraud, when he wrote pain medication prescriptions for his disabled brother. The charge was deferred for two years. He has mitigated the personal conduct security concerns. Clearance is granted.

History of the Case

On January 22, 2015, acting under the relevant Executive Order and DoD Directive,¹ the DoD issued a Statement of Reasons (SOR) detailing personal conduct security concerns. DoD adjudicators could not find that it is clearly consistent with the national interest to grant or continue Applicant's security clearance. On February 23, 2015, Applicant answered the SOR and requested a hearing. On May 27, 2015, I was

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

assigned the case. On June 17, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing for a hearing to be convened on July 9, 2015.

At the hearing, Government's Exhibits (Ex.) 1 through 7 and Applicant's Exhibits A-1 through A-6 were admitted without objection. Applicant testified at the hearing. On July 17, 2015, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he asserted he was charged with attempting to possess a controlled substance by fraud for which he paid a fine and did community service. He denied falsifying his Electronic Questionnaires for Investigations Processing (e-QIP). His admissions are incorporated as facts. After a thorough review of the pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 53-year-old physician's assistant who has worked for a defense contractor since March 2013 and he seeks to obtain a security clearance. He has a disabled brother. And he inappropriately continued to prescribe medication to his brother without authorization or approval of the attending physician. (SOR Answer, Ex. A-4) Applicant's older brother, who had a history of alcohol and drug abuse, illegally wrote prescriptions on a stolen prescription pad and called in prescriptions to a pharmacy. (SOR Answer, Ex. A-4) His older brother, who was living with Applicant, was a medical doctor who, in 2003, had his medical license suspended by the state medical board. (SOR Answer, Ex. 4, Tr. 34)

From November 1992 through November 1998, Applicant served in the Army National Guard and was honorably discharged as a corporal (E-4). In 2009, he served in Armenia. (Tr. 29) From May 2005 through August 2008, he served in Iraq and in 2011 in Afghanistan. (Tr. 18, 29) He again served in Afghanistan starting in March 2013. (Tr. 29)

Applicant received a deferred sentence for possession of a schedule III/IV² controlled substance by fraud. (Ex. 2, A-2, A-5) Between February 2003 and January 2004, 22 forged prescriptions were filled at a pharmacy. (Ex. 2) The forged prescriptions were on a prescription pad for a doctor for whom the Applicant had previously worked.

In Applicant's April 2013 e-QIP, even though the question restricted the time period to the previous seven years³ he felt it important to fully disclose the issue. He stated that in March 2004, he was accused of writing false prescriptions at a pharmacy. (Ex. 1, Ex. A-6, Tr. 28, Tr. 36) He stated he had been prescribing medications for his disabled brother who did not have health insurance coverage.

² The drugs involved were Ultram (Tramadol), a narcotic-like pain reliever; Norco, which contains an opioid pain medication used to relieve moderate to severe pain; and Hydrocodone, an opioid pain medication. (Exs. 4-7)

³ Applicant would have had to reveal the information when asked on the e-QIP if he had ever been charged with a felony.

Applicant's brother suffered a stroke and had significant cognitive impairment. (Ex. 16) When his brother was a university student, without health insurance, a gas room heater malfunctioned filling the apartment with carbon monoxide. (Tr. 31) His brother suffered brain damage caused by anoxia resulting in loss of cognitive thinking, short-term memory, and debilitating his left side, and causing pain. (Tr. 33) The supervising physician had authorized medication for one month, but Applicant continued the prescriptions for another nine or ten months. (Ex. 1, Ex. 2, Ex. A-6, Tr. 16) Since 2005, his disabled brother has not needed pain medication.

Applicant failed to control his prescription pad and his other brother used it to illegally obtain drugs. (Ex. 1, A-6) At the time, he was unaware his brother also used the same prescription pad to write prescriptions on five to seven occasions. (Tr. 33) Applicant has not spoken to this brother in ten years. (Tr. 40)

Applicant pleaded no contest to a misdemeanor and adjudication was deferred for two years. (Ex. 1, Tr. 18) He paid a \$1,500 fine and performed 100 hours of community service. He surrendered his medical license for one year and then requested reconsideration. (Tr. 37) He was recertified by the state medical board and has an active, unrestricted state license. (Ex. 1, A-6, Tr. 18) He is credentialed at three local hospitals. (Tr. 22, 38)

While in Iraq, Applicant had a telephonic interview concerning the 2004 incident. (Tr. 19, 38) He disclosed that his older brother had a history of alcohol and drug abuse and had attempted to call in prescriptions for his own personal use. (Tr. 19) Applicant took full responsibility for the prescriptions written for his disabled brother occurring after the one month that had been authorized by the attending physician. (Tr. 19)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this

decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination of the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The Government has an interest in examining all relevant and material adverse information about an applicant before making a clearance decision. The Government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when they perceive disclosure to be prudent or convenient. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the government relies on to perform damage assessments and limit the compromise of classified information.

In 2003 and 2004, Applicant exceeded his authorization as a PA and wrote prescriptions for his brother. The narcotic drug prescription for pain reduction was authorized for one month by the attending physician, but Applicant continued to write prescriptions following the one month authorization. The pain medication was for his brother who had suffered a stroke. At the same time, without his knowledge, his other brother was also using the prescription pad to write unauthorized prescriptions or call in unauthorized prescriptions. This brother's medical license had been suspended. The pertinent disqualifying conditions are AG ¶ 16(d)(3), "a pattern of rule violations."

The mitigating condition outlined in AG ¶ 17(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment applies.

The unauthorized prescription of pain medication is not a minor infraction. However, these events occurred more than ten years ago. The prescriptions were written for his brother who had suffered a stroke and did not have medical insurance. This constitutes a unique circumstance that is unlikely to recur. His PA medical license was restored after one year and he is currently credentialed with three hospitals. With the passage of time, actions by the state medical board, and his subsequent service as a contractor with the U.S. military in Iraq and Afghanistan, the conduct does not cast doubt on his current reliability, trustworthiness, or good judgment.

In Applicant's 2013 e-QIP, he indicated that in March 2004 he was accused of writing false and fictitious prescriptions at a pharmacy and explained he had been prescribing medications for his disabled brother who did not have health insurance coverage. The supervising physician had authorized medication for one month, but Applicant continued the prescriptions thereafter. He did not control the prescription pad and his other brother wrote additional fraudulent prescriptions. Applicant took responsibility his actions.

The SOR alleged Applicant, in a July 2013 interview, said he had forged prescriptions for a controlled substance for his own use and took responsibility for the criminal action to protect his brother. However, there is no evidence of what was said except what Applicant testified to at the hearing. There is no summary of the interview. Applicant never said the drugs were for his own use or that he was attempting to protect his brother from prosecution. There is no evidence support the SOR 1.c allegation.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable

participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has served in the Army National Guard and as a contract employee serving with the U.S. military in Iraq and Afghanistan. Ten years ago, under unique circumstances, Applicant, as a physician's assistant, continued writing prescriptions for his brother's pain medication after the authorization period ended. His e-QIP responses were sufficiently detailed to put the government on notice of what occurred in 2004. He did not falsify his e-QIP or provide false information or misleading information during a July 2013 telephone interview.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his personal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Personal Conduct: FOR APPLICANT

Subparagraphs 1.a – 1.c: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge