



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



In the matter of:)
)
) ISCR Case No. 15-00894
)
Applicant for Security Clearance)

Appearances

For Government: Charles Hale, Esq., Department Counsel
Nicole Smith, Esq., Department Counsel

For Applicant: Eric Eisen, Esq.

06/08/2016

Decision

CURRY, Marc E., Administrative Judge:

Applicant mitigated the drug involvement and personal conduct security concerns. Clearance is granted.

Statement of the Case

On August 18, 2015, the Department of Defense Consolidated Adjudications Facility (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement, and Guideline E, personal conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on September 17, 2015, admitting subparagraph 1.b, and denying subparagraphs 1.a and 2.a. He requested a hearing, and the case was assigned to me on March 3, 2016. On March 8, 2016, a notice of hearing was issued scheduling the case for March 30, 2016. The hearing was conducted as scheduled. I received five Government exhibits (GE 1-5), three Applicant exhibits (AE A-E), and I considered Applicant's testimony. Also, I took administrative notice of the information set forth in four documents, identified as Hearing Exhibits (HE) I through IV. The transcript was received on April 7, 2016.

Findings of Fact

Applicant is a 45-year-old single man. He graduated from college in 1993. While in college, he was a member of the U.S. Army Reserve Officer Training Corps. After finishing college, he served in the U.S. Army Reserves through 2010, when he was honorably discharged. (Tr. 70)

Applicant is an information technology consultant. Since 1995, he has owned a consulting business. Currently, his company has three employees. Applicant also co-owns a real estate business with his parents. (AE B at 4)

Applicant is highly respected by both his clients and his employees. According to one client, the president of a non-profit company, Applicant performed his consultant work effectively and concisely. Moreover, recognizing the non-profit company's limited financial means, he has demonstrated a "generosity of . . . spirit" by providing free follow-up services over the years. (AE B at 2) One of Applicant's employees characterizes him as a patient mentor with an unimpeachable work ethic who is dedicated to helping his employees reach their full potential. (AE B at 3)

Applicant has attention deficit hyperactivity disorder (ADHD) and occasional problems sleeping. (AE A) His doctor, with whom he has received treatment since 2008, has been prescribing him sleeping medications since 2010. (AE A) He never took the medicine daily, preferring instead, to manage his insomnia with herbal teas. (Tr. 22) Between October 2013 and December 2014, Applicant experienced a particularly intense period during his career when he was travelling frequently, while also balancing the responsibilities of his consulting business and his real estate business. During this period, he took Ambien, prescribed by his doctor, approximately five times per month. (GE 3 at 2; AE A, Tr. 31) There is conflicting record whether he filled the Ambien prescription from his doctor, or used Ambien prescribed to his domestic partner. (*Compare* AE A, GE 1 at 34, and Tr. 31)

ADHD is a malady that is typically more common in children than adults. Because Applicant's symptoms did not manifest themselves until he was an adult, his doctors initially misdiagnosed him, prescribing him with "a bevy of drugs" before making the ADHD diagnosis. (Tr. 63) In 2008, Applicant's doctor prescribed Applicant with the ADHD medication Adderall. (Tr. 63). Like many other ADHD medications, Adderall has many potentially dangerous side effects, including agitation, insomnia, and changes in

pulse. (GE 6 at 2; HE III) As a person with hypertension, Applicant was particularly wary of taking Adderall daily. (Tr. 64) Consequently, Applicant stopped taking the Adderall and opted to attempt to control his ADHD with therapy instead of medication. (Tr. 64)

Despite therapy, Applicant continued to struggle with ADHD symptoms in large social settings, like parties, and parades. (Tr. 25-26) Such events are overstimulating, as he receives external inputs “from all over the place,” causing him to become overcome with anxiety. (Tr. 23, 67) Consequently, he continued to take Adderall approximately once per year during such social events between 2009 and 2012. (Tr. 24) During this period, Applicant did not get a prescription for Adderall from his doctor.¹ Instead, he used Adderall that had been prescribed to his domestic partner. He chose not to get a prescription from his doctor because the medication is extremely expensive, and to the best of his knowledge, prescriptions are only filled in 30-dose increments. He opted to use the Adderall prescribed to his partner because he did not use it enough to justify the expense of filling a prescription for himself. (Tr. 26-27, 62, 65)

Applicant has not used Adderall in this manner since 2012. He recognizes that such uses raises the issue of whether he was abusing a prescription drug recreationally, and raises questions regarding his “readiness to follow rules [and] regulations.” (AE C) In March 2016, Applicant executed an affidavit promising never to engage in the practice of using drugs prescribed to others in the future, with the understanding that doing so will result in the automatic revocation of his security clearance. (AE C)

Applicant completed a security clearance application in 2013. (GE 2) He answered “no” in response to Section 23, which, in part, asked whether he had ever illegally used, or otherwise misused, any prescription drug. (GE 2 at 31-32) Applicant completed another security clearance application in 2014. (GE 1) In response to the same question regarding misuse of prescription drugs, Applicant disclosed his use of Ambien and Adderall that was prescribed to someone else. (GE 1 at 34) Applicant listed it on the second application because, upon further thought, he concluded that his use of his partner’s prescription drugs could be construed as misuse. (Tr. 20-21)

Approximately five years ago, Applicant inadvertently overbilled a client. An employee of the client submitted the service invoice, not recognizing the discrepancy. When Applicant received his payment, he immediately recognized the mistake, notified his client of the overbilling. Before the client could offer a remedy to satisfy the overpayment, Applicant credited the entire overpayment, totalling \$10,300 to his client. (AE B at 1) Per the client, if Applicant did not contact her, “this error would have gone undetected until an annual audit was conducted.” (AE B at 1)

¹Applicant’s doctor was aware of Applicant’s ADHD diagnosis and would have prescribed Adderall if Applicant had asked him. (AE A)

Policies

In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to 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. 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."

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 as to obtaining a favorable security decision.

Analysis

Guideline H, Drug Involvement

Under this guideline, ". . . misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations," (AG ¶ 24) Drug abuse is "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction." (AG ¶ 24(b))

Applicant's doctor prescribed Ambien to Applicant during the period that Applicant was taking it. There is record evidence that indicates that Applicant may have opted to use Ambien that was prescribed to his domestic partner, rather than filling his own prescription. Given the short period that Applicant used this medication, and the minimal amount that he took it, I conclude that whether or not he filled his doctor's prescription for Ambien before taking it has no security significance.

Conversely, Applicant's use of Adderall without a prescription triggers the application of AG ¶ 25(a), "any drug abuse." Applicant only took Adderall from his partner's prescribed supply once per year over a five-year period. His last inappropriate use of Adderall occurred four years ago. Now, he recognizes the negative security ramifications of using this medication without his doctor prescribing it, and he signed an

affidavit swearing not to use it again in this manner. The following mitigating conditions apply:

AG ¶ 20(a), the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

AG ¶ 20(b)(4), a signed statement of intent with automatic revocation of clearance for any violation.

Applicant has mitigated the drug involvement security concern.

Guideline E, Personal Conduct

Under this guideline, "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." (AG ¶ 15) Moreover, "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." (*Id.*) Applicant's omission of his misuse of prescription drugs from his 2013 security clearance application raises the question of whether AG ¶ 16(a), "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities," applies.

Applicant completed another security clearance application in 2014. He testified that upon reviewing the same question and considering his response on the previous application, he concluded that his use of Adderall without a prescription could, in fact, constitute misuse. Consequently, in an abundance of caution, he listed it. Considering that this disclosure occurred before his investigative interview, and considering the extraordinary record evidence of his integrity - returning approximately \$10,300 to a customer that was inadvertently overbilled - I conclude that Applicant's testimony is credible, and that he did not intentionally omit the prescription drug information from his 2013 security clearance application. AG ¶ 16(a) does not apply, and there are no personal conduct security concerns.

Whole-Person Concept

Under the whole-person concept, 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.

Although Applicant used a medication without his doctor's prescription, it was a medication that he had been prescribed in the past, and he was using it for its intended purpose - to treat symptoms associated with ADHD, a malady that he had earlier been diagnosed. He was not using it for intoxication, to experience euphoria, or to hallucinate. Although Adderall certainly has potentially hazardous side effects and requires a prescription because of these side effects, Applicant's misuse was infrequent, and has not occurred in four years. Given his credibility, his good character, the minor nature of the misuse compared to other types of prescription drug misuse, and the amount of time that has elapsed since the last misuse, I conclude Applicant has mitigated the security concerns.

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, Guideline H:	FOR APPLICANT
Subparagraphs 1.a - 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	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 eligibility for a security clearance. Eligibility for access to classified information is granted.

MARC E. CURRY
Administrative Judge