KEYWORD: Guideline I

DIGEST: Department Counsel's argument is based on a faulty premise, i.e., an assumption not supported by record evidence. We first note that the SOR did not allege that Applicant failed to follow a prescribed treatment plan so as to place this issue directly before the Judge. We also note that Applicant was never asked at the hearing if she ceased taking Seroquel in contravention of the directions of medical professionals. Department Counsel's brief cites no record evidence that adequately supports a conclusion that Applicant failed to follow the directions of medical professionals in ceasing the use of that drug. The fact that Dr. K's progress notes reflect Applicant should "continue current meds" and "continue current treatment" does not reasonably establish that she disregarded medical advice in ceasing to take Seroquel five or six years after she was no longer under his care. Essentially, Department Counsel is asking the Appeal Board to agree with a proposition that is not supported by the evidence. We decline to make that leap. Department counsel has failed to establish the Judge erred by not concluding that Disqualifying Condition 28(d) applied. Favorable decision affirmed.

CASENO: 19-00151.a1

DATE: 12/10/2019

DATE: December 10, 2019

In Re:	)	
	)	
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	)	ISCR Case No. 19-00151
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Brittany White, Esq., Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 22, 2019, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline I (Psychological Conditions) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 9, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge's favorable decision rested on erroneous findings of fact and whether the decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

The Judge's Findings of Fact

Applicant, who is in her 30s, has never been married and has no children. She has earned a bachelor's degree and a master's degree. Her parents divorced when she was six years old. Starting at about age 10 and periodically continuing in her teens, she received treatment for autism-related issues. She was occasionally prescribed antidepressants. At age 16, she was sexually assaulted, filed a police report about four years later, and received mental-health treatment for about six months at some point. The purported assailant was never charged. During therapy for the sexual assault, she wondered whether her father or someone else sexually assaulted her, but was later confident her father had not sexually assaulted her.

The SOR alleged that Applicant was "diagnosed with possible Psychosis, possible Bipolar Disorder, and possible Borderline or Antisocial Personality Disorder based in part on [her] history of high-risk behaviors, including assuming other people's identities, self-harm, thoughts of harming others, and taking out a $20,000 loan in [her] mother's name without her permission" (SOR ¶ 1.a) and that a licensed psychologist "diagnosed [her] with Other Specified Personality Disorder (mixed personality features) and Generalized Anxiety Disorder" in December 2018 (SOR ¶ 1.b). Decision at 2, quoting from SOR. Applicant denied SOR ¶ 1.a and admitted SOR ¶ 1.b.

Dr. K's Evaluation and Treatment

During December 2012 and January 2013, Applicant received treatment from Dr. K because she was ashamed about having an 18-month affair with a married coworker. The affair was against the company's unofficial rules. She ended the affair because it was morally wrong and they were not being forthright. She wanted Dr. K to take her concerns seriously and to help her address the underlying cause of her bad decisions. She met with Dr. K six time before he retired. She saw another doctor about once or twice before she stopped seeking counseling.

Dr.K's treatment notes indicate that Applicant assumed the identities of other people and portrayed different personalities, but did not explain how she manifested these behaviors other than patterning others in martial arts. He did indicate she sometimes adopted mannerisms of friends, but she denied assuming their identities. She told Dr. K that she was good in martial arts; however, this was an exaggeration because she had no formal training. She denied ever lying about her name or background. "Dr. K said she was a 'pathological liar' and 'made up stories' (GE [Government Exhibit] 4 at 1); however, he did not give an example or provide a basis for these conclusions." Decision at 4.

Dr. K asserted that Applicant forged her mother's signature on a $20,000 student loan application. Applicant testified she signed her mother's name on a $7,000 loan application because her mother was out of the country. She told her mother what she had done upon her return. Her mother corroborated these events. Applicant has repaid the loan and never intended to deceive her mother.

Dr. K said that he was not going to formally diagnose Applicant. In his intake notes, Dr. K indicated his "impression" was to rule out Bipolar, Borderline, or other personality disorders. In addressing Applicant's relationship with the married coworker, Dr. K said, "she had [an] affair to gain advantage in workplace" and listed his impression as "Psychosis NOS." Decision at 5, quoting GE 4 at 9. In later notes, he repeated the impression of "Psychosis NOS" and eventually added "Borderline" personality disorder. *Id.*, quoting from GE 4 at 11. Dr. K and another doctor prescribed her Seroquel to help with her racing thoughts and to reduce her anxiety. In about March 2018, she stopped taking Seroquel.

Dr. B's Evaluation

In December 2018, a psychologist, Dr. B, conducted a [DoD-requested] psychological evaluation of Applicant. Dr. B reviewed Applicant's medical records and summarized Dr. K's notes. Dr. B noted that Applicant's insight, judgment, and memory seemed poor and many of her recollections seemed vague. Dr. B attributed Applicant's guardedness to, among other things, an intentional lack of candor. Applicant denied a history of self-harm, thoughts of self-injury, or thoughts of harm to others. Applicant denied that she was a pathological liar or assumed the identities of others. Dr. B concluded that Applicant may meet the criteria for a personality disorder and that her "behavioral health history suggests numerous behaviors that cast doubt on her judgment, reliability and/or trustworthiness; as such, it may be imprudent to grant her access to classified

information. Based on previous medical opinions and current diagnoses, she presents with conditions that could pose a significant risk to national security." Decision at 6, quoting from GE 2 at 8.

Dr. Y's Evaluation and Treatment

Between December 2018 and July 2019, Applicant had 23 appointments with Dr. Y, a psychologist. She initiated this treatment to help her with relationships. Dr. Y reviewed and assessed Dr. K's and Dr. B's reports. Dr. Y found Applicant to be responsible, candid, and discerning. They have weekly cognitive behavioral sessions. Dr. Y assessed her as a woman who is earnestly seeking to improve on a few primitive defense mechanisms that impact her primary relationships. She is professionally successful and maintains positive working relationships. For nearly seven years, her home life has been stable. She is dedicated to issues of national security and sensitive to information-sharing violations. She does not display any erratic thoughts or behaviors and has maintained a consistent, steady demeanor. Dr. Y noted that he has not seen any to the concerning behaviors referenced in Dr. K reports. Dr. Y recommended Applicant for a security clearance at the Secret level.

The Judge's Analysis

The opinions of Dr. K and Dr. B are sufficient to establish security concerns under Disqualifying Condition 28(a) -- *i.e., behavior that casts doubt on an individual's judgment, stability, reliability, or trustworthiness, not covered under any other guideline and that may indicate an emotional, mental, or personality condition, including, but not limited to, irresponsible, violent, self-harm, suicidal, paranoid, manipulative, impulsive, chronic lying, deceitful, exploitative, or bizarre behaviors* -- and Disqualifying Condition 28(b) -- *i.e., an opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness*.

The Judge concluded that Mitigating Condition 29(b) -- *i.e., the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional* -- applied and, in doing so, stated:

> During Dr. K's initial assessment of Applicant when he started his treatment, he wrote possible Psychosis, possible Bipolar Disorder, and possible Borderline or Antisocial Personality Disorder. He did not provide a prediction or probability of his belief in the accuracy of these possibilities. His concluding "impression" indicated "Psychosis NOS" and Borderline Personality Disorder. This "impression" is an evaluative determination that is short of a diagnosis and is a step towards a diagnosis. He did not tell Applicant that he diagnosed her with Psychosis and/or Borderline Personality Disorder; however, he did prescribe Seroquel, which is often used to treat serious mental-health disorders involving Psychosis. Applicant believed Seroquel

was prescribed to help her with racing thoughts and anxiety. She stopped taking Seroquel around March of 2018. There is no evidence she failed to follow treatment advice or failed to take Seroquel against the advice of a mental-health provider.

Dr. B indicated Applicant may have a personality disorder or may have mild anxiety. Dr. B focused on Applicant's behavior and conditions as the basis for a security concern; however, Dr. B's belief that Applicant has behaviors of security concern was based on Dr. K's cryptic notes and Applicant's unwillingness to provide corroboration of Dr. K's concern. Applicant acknowledged that she was under significant stress in December 2012 when she sought Dr. K's help, and she exaggerated her mental-health history to get him to take her concerns seriously. Although corroboration is not required, and the Government has no burden to present such evidence, it is notable that there was no corroboration from witness statements, hospital admissions, or police reports that Applicant's behaviors were of security concern.

Clearly, the most reliable diagnosis is from Dr. Y, who had 23 sessions with Applicant from December 2018 to present. Treatment is continuing and the condition has not completely resolved. The magnitude of Dr. Y's contacts with Applicant, and their recency merits more weight than the opinions of Dr. K and Dr. B. Applicant's character statement from her mother, and performance evaluations provide further corroboration of Dr. Y's opinion that Applicant is sufficiently trustworthy to receive access to classified information. Psychological conditions security concerns are mitigated due to the application of AG ¶ 29(b).

Discussion

Department Counsel contends that the Judge's decision is flawed. She argues the Judge's decision rested on erroneous findings of fact, failed to consider or analyze record evidence that detracted from the findings and conclusions, improperly shifted the evidentiary burden to the Government, and was unsupported by any reasonable reading of the record. We do not find Department Counsel's argument persuasive.

There is no presumption of error below, and the appealing party has the burden of raising and demonstrating factual or legal error by the Judge. *See, e.g.,* ISCR Case No. 00-0339 at 3 (App. Bd. Mar. 22, 2001). Although a Judge is required to examine the relevant evidence and relevant adjudicative guidelines, he or she need not discuss each and every piece of record evidence, which would be a practical impossibility (s*ee, e.g.,*ISCR Case No. 12-01500 at 3 (App. Bd. Aug. 25, 2015) nor address all of the analytical factors set fourth in the adjudicative guideline (*see, e.g.,* ISCR Case No. 17-02236 at 2 (App. Bd. Jul. 2, 2018). The application of the adjudicative guidelines is not reducible to a simple formula, but rather requires the exercise of sound judgment within the parameters set by the directive. *See, e.g.*, ISCR Case No. 01-27371 at 4 (App. Bd. Feb. 19, 2003).

Department Counsel contends that the Judge erred in concluding Applicant did not have a diagnosis of a psychological or psychiatric condition. In this regard, we wrote that Applicant admitted SOR ¶ 1.b, which stated she was "diagnosed with Other Specified Personality Disorder (mixed personality features) and Generalized Anxiety Disorder" in December 2018. While Dr. B's report specifically states that Applicant "has never been officially diagnosed," it noted she met the "diagnostic profile" for those disorders. GE 2 at 7-8. Even though the Judge may haved erred in failing to address directly Applicant's SOR admission that she was "diagnosed" with those disorders, this was a harmless error because it did not likely affect the outcome of the case. *See, e.g.*, ISCR Case No. 11-15184 at 3 (App. Bd. Jul. 25, 2013). As the "Concern" paragraph of Guideline I states, "[a] formal diagnosis of a disorder is not required for there to be a concern under this guideline." Directive, Encl. 2, App. A ¶ 27. The Judge correctly found that Dr. K identified his "impressions" of Applicant's mental-health conditions (Decision at 4-5, citing GE 4) and accurately stated that Dr. B indicated Applicant "may meet the criteria for a personality disorder" (Decision at 6, citing GE 2 at 7). The Judge also noted Dr. B stated that Applicant's "behavioral health history suggests numerous behaviors that cast doubt on her judgment, reliability and/or trustworthiness; as such, it would be imprudent to grant her access to classified information." Decision at 6, quoting GE 2 at 8. The Judge's decision reflects that he made detailed findings and conclusions about the nature and scope of Dr. K's and Dr. B's concerns regarding Applicant's mental health. Based on Dr. K's notes and Dr. B's report, the Judge correctly concluded that Disqualifying Conditions ¶¶ 28(a) and 28(b) applied in this case. Once the Judge concluded the appropriate disqualifying conditions applied, a formal diagnosis by a medical professional that Applicant had the identified mental health disorders, even if one existed, was not a critical or determinative factor because the burden at that point was squarely on her to mitigate the pertinent security concerns. In other words, given the scope of Dr. K's notes and Dr. B's report, we cannot discern how Applicant's mitigation burden would have changed or increased if either doctor or both had made a formal diagnosis of the identified mental health disorders. Department Counsel's contention the Judge erred in concluding that Applicant was not diagnosed with a psychiatric or psychological disorder fails to establish an analytical deficiency that warrants relief.

As a related matter, Department Counsel asserts the Judge erred in failing to conclude that Disqualifying Condition 28(d) -- *i.e., failure to follow a prescribed treatment plan related to a diagnosed psychological/psychiatric condition that may impair judgment, stability, reliability, or trustworthiness, including, but not limited to, failure to take prescribed medication or failure to attend required counseling session* -- was applicable. The main point in Department Counsel's assertion is that Applicant failed to take a medication as prescribed. More specifically, she contends:

> Applicant was prescribed Seroquel in the late 2012, and this medication continued to be prescribed by subsequent providers and which she continued to take until sometime between 2017 and spring 2018. Applicant knew that a diagnosis of some sort was required in order for the doctor to prescribe the medication. Although she insisted at the hearing that she was not aware of what the diagnosis was, Applicant also continued to take Seroquel and seek medication management from 2012 until 2017 or 2018. At that point, she ceased taking the medication, although she was not

> told to do so by any mental health professionals at the time. It defies reason to conclude that an individual who, without an opinion of a medical professional, ceases taking psychiatric medication prescribed for a diagnosed condition is not failing to follow a prescribed treatment plan related to an underlying condition. The Judge's findings in this regard are therefore reversible. [Appeal Brief at 15.]

Department Counsel's argument is based on a faulty premise, *i.e.*, an assumption not supported by record evidence. We first note that the SOR did not allege that Applicant failed to follow a prescribed treatment plan so as to place this issue directly before the Judge. We also note that Applicant was never asked at the hearing if she ceased taking Seroquel in contravention of the directions of medical professionals. *See* Tr. at 36–38, 42-48 and 59. Department Counsel's brief cites no record evidence that adequately supports a conclusion that Applicant failed to follow the directions of medical professionals in ceasing the use of that drug. The fact that Dr. K's progress notes reflect Applicant should "continue current meds" and "continue current treatment" does not reasonably establish that she disregarded medical advice in ceasing to take Seroquel five or six years after she was no longer under his care. GE 4 at 8-11. Essentially, Department Counsel is asking the Appeal Board to agree with a proposition that is not supported by the evidence. We decline to make that leap. Department counsel has failed to establish the Judge erred by not concluding that Disqualifying Condition 28(d) applied.

Department Counsel argues that the Judge improperly shifted the evidentiary burden to the Government by stating:

> In this mitigation analysis, the Judge noted that "[a]lthough corroboration is not required, and the Government has no burden to present such evidence, it is notable that there is no corroboration from witness statements, hospital admissions, or police reports that Applicant's behaviors were of security concern." By intimating that Government failed somehow to meet its burden by not providing affirmative evidence of Applicant's psychological condition, the Judge impermissibly shifted the burden back to the Government to prove that Applicant's psychological conditions were of concern. [Appeal Brief at 24-25, quoting Decision at 10-11.]

We do not read the Judge's language in this case the way Department Counsel does. Considering all the facts and circumstances and reading the Judge's decision as a whole, Department Counsel's contention is unpersuasive. First, the Judge found that disqualifying conditions did apply. Second, the Judge specifically noted that the Government had no burden to present corroboration. Finally, as a matter of common sense, the Judge may consider the lack of corroboration in determining the weight to be given to certain evidence. *See. e.g.*, ISCR Case No. 98-0419 at 4 (App. Bd. Apr. 30, 1999). The Judge's comment about the lack of corroborating evidence demonstrates no error.

Department Counsel argues that the Judge failed to address relevant facts that detract from his conclusions. She states, for example, that "Applicant only began being treated by Dr. Y after she was evaluated by the CAF psychologist." Appeal Brief at 18-19. This statement is not accurate. Dr.

Y performed a psychiatric evaluation of Applicant on December 1, 2018, and began periodic individual psychotherapy sessions with her seven days later. Applicant Exhibit (AE) I at 6. In contrast, Dr. B evaluated Applicant on December 12, 2018. GE 2 at 1. We do not find convincing Department Counsel's argument that Applicant's efforts to seek treatment from Dr. Y is comparable to an applicant who takes action to resolve delinquent debts after his or her security clearance is placed in jeopardy due to those debts. In this regard, we note that Applicant sought treatment from Dr. Y more than two months before the SOR was issued. Moreover, nothing restricts an applicant from obtaining an expert opinion to counter a DoD-requested psychological evaluation. Department Counsel also contends that "Dr. Y did not review or comment on the report authored by Dr. B." Appeal Brief at 20. This is not accurate. Dr. Y's letters state, "I have read and assessed the reports provided to [Applicant] in relation to her clearance hearing, including those of Dr. B . . . and Dr. K . . . ." AE at 1 and AE I at 6.

Regarding Applicant's post-hearing submission, Department Counsel contends the "Judge all but directed an outcome-oriented opinion from Dr. Y himself, as he instructed Applicant as to exactly what would be required in order to rebut the Government evidence." Appeal Brief at 20-21. In making this contention, Department Counsel cites to an exchange at the hearing between the Judge and Applicant in which he told her to give Dr. Y the notes of Dr. K so that Dr. Y could factor those notes into his assessment. First, it merits noting that we have previously cautioned Judges to refrain from providing advice to applicants that goes beyond the language of the Directive and, if applicable, the current Pre-Hearing Guidance. *See, e.g.*, ADP Case No. 18-00329 at 3 (App. Bd. Dec. 14, 2018). That said, we recognize that Judges often point out to *pro se* applicants matters that they may want to consider presenting as part of a post-hearing submission. In this case, we find no harmful error in the Judge's comments. Second, we note that Dr. B was presented with Dr. K's notes before evaluating Applicant's mental health status. Showing Dr. Y the notes of Dr. K did not direct a particular opinion from him. Third, to the extent that Department Counsel is contending that the Judge was biased against the Government, we do not find that argument persuasive. There is a rebuttable presumption that a Judge is impartial and unbiased, and a party seeking to overcome that presumption has a heavy burden of persuasion. *See, e.g.*, ISCR Case No. 14-03108 at 3 (App. Bd. May 20, 2015). Department Counsel's arguments fail to meet the heavy burden on her to rebut the presumption of impartiality.

A key point in Department Counsel's arguments is that the notes of Dr. K and report of Dr. B outweigh the letters of Dr. Y. A Judge is required to weigh conflicting evidence and to resolve such conflicts based upon a careful evaluation of factors such as the comparative reliability, plausibility, and ultimate truthfulness of conflicting pieces of evidence. *See, e.g.*, ISCR Case No. 05-06723 at 4 (App. Bd. Nov. 4, 2007). A Judge is neither compelled to accept a DoD-required psychologist's diagnosis of an applicant nor bound by any expert's testimony or report. Rather, the Judge has to consider the record evidence as a whole in deciding what weight to give conflicting expert opinions. *See. e.g.,* ISCR Case No. 98-0265 at 4 (Mar. 17, 1999) and ISCR Case No. 99-0288 at 3 (App. Bd. Sep. 18, 2000). In this case, the Judge's conclusion that the magnitude and recency of Dr. Y's contacts with Applicant in combination with other corroborating evidence merited more weight than the uncorroborated opinions of Dr. K and Dr. B is sustainable.

The balance of Department Counsel's arguments are a challenge to the Judge's weighing of the evidence and his whole-person assessment. However, a party's disagreement with the Judge's weighing of the evidence or an ability to argue for the different interpretation of the evidence is not sufficient 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. 15-00650 at 2 (App. Bd. Jun. 27, 2016).

Department Counsel has failed to establish that the Judge committed any harmful error. The record supports a conclusion that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Auto Ins. Co.,* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. V. United States*, 371 U.S. 156, 168 (1962)). The Judge's favorable decision is sustainable on this record.

Order

The Decision is **AFFIRMED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

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