DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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KEYWORD: Guideline G; F

DIGEST: The Board finds no error in the Judge giving more weight to the diagnoses and opinions of medical professionals than to Applicant's contradictory testimony or statements Adverse decision is affirmed.

CASENO: 20-01103.a1

DATE: 01/10/2022

Date: January 10, 2022

In the matter of:	
----------	ISCR Case No. 20-01103
Applicant for Security Clearance	

APPEAL BOARD DECISION

APPEARANCES

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

FOR APPLICANT
Marc T. Napolitana, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On October 22, 2020, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline G (Alcohol Consumption) and Guideline

F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On September 17, 2021, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge LeRoy F. Foreman denied Applicant's request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge erred in his findings of fact and whether the Judge's adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm.

Under Guideline G, the SOR alleged that Applicant consumed alcohol at times to excess from about 1986 to January 2020; that he was charged with driving under the influence in 1990 and was convicted of reckless driving; that he was diagnosed with Alcohol Dependence in 2014; that he continued to consumed alcohol after receiving advice in 2020 from a psychiatrist not to do so while taking prescribed medications; and that, in 2020, a licensed psychologist diagnosed him with Alcohol Use Disorder (Moderate), gave him a guarded prognosis, and determined his continued use of alcohol potentially posed a risk to his judgment, reliability, and trustworthiness concerning classified information. In responding to the SOR, Applicant admitted the allegations concerning the reckless driving conviction, the Alcohol Dependence diagnosis in 2014, and the clinical psychologist's diagnosis, prognosis, and determination in 2020. The Judge found in favor of Applicant on the allegation concerning the alleged advice from the psychiatrist in 2020 and found against him on the other allegations.

Under Guideline F, the SOR alleged that Applicant failed to file, as required, his Federal income tax returns for 2012-2018 and his 2016-2018 returns remained unfiled; that he failed to file, as required, his state income tax returns for 2014-2018 and his 2014 return remained unfiled; that he owed the Federal Government delinquent taxes for 2015-2018 totaling about $7,800; that he owed the state delinquent taxes for 2017-2019 totaling about $2,700; and that he had three other delinquent debts totaling about $17,800. In responding to the SOR, Applicant admitted each of the Guideline F allegations. The Judge found against him on all of those allegations.

Applicant's appeal brief contains documents that were not presented to the Judge for consideration. The Appeal Board is prohibited from considering such new evidence on appeal. Directive ¶ E3.1.29.

In his appeal brief, Applicant contends the Judge erred in finding that he "told his VA [Veterans Affairs] psychiatrist that he consumed 28 drinks in the preceding week and had five incidents of binge drinking in the previous month." Appeal Brief at 7. He asserts "there is no evidence in the record of [him] admitting to consuming alcohol in that frequency or amount." *Id*. However, the clinical psychologist's report states, "[I]n his visit with a VA provider in January 2020, [Applicant] noted that he consumed 28 drinks in the last week and had 5 binges in the last month." Government Exhibit (GE) 4 at 8. There is sufficient evidence in the record to support the Judge's challenged finding of fact. *See* Directive ¶ E3.1.32.1, which sets forth the review standard for findings of fact.

Applicant contends some of the Judge's conclusions are contrary to the evidence. In general, he cites to his hearing testimony to challenge conclusions the Judge made about the application of certain mitigating conditions. For example, he argues that the Judge "relied on mischaracterized reports of maladaptive alcohol use from early 2020 to support his flawed conclusion." Appeal Brief at 6. He is referring to the licensed psychologist's 2020 report that, in part, discusses treatment he received from a psychiatrist. GE 4. His brief also contends he was improperly diagnosed with alcohol use disorder, and the psychologist's opinions were based on incorrect facts and miscommunications. These arguments are not persuasive. No rule of evidence compels the acceptance of a witness's testimony. As the trier of fact, the Judge is responsible for assessing conflicting evidence and resolving 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. 14, 2007). We find no error in the Judge giving more weight to the diagnoses and opinions of medical professionals than to Applicant's contradictory testimony or statements. Applicant has not identified any harmful errors in the Judge's application of the mitigating conditions.

Applicant claims that he cannot tell whether the Judge found for or against him on a mitigating condition. In making this argument, he is apparently contending there is a contradiction between the Judge's conclusion that the mitigating condition was not established and the Judge's formal finding in favor of him on one of the SOR allegations. The conclusion and formal finding in question are not contradictory. A favorable finding on an SOR allegation can be made without applying mitigating conditions. For example, a Judge can find in favor of an applicant on an allegation because the Government simply failed to meet its burden of production on that allegation.

In his brief, Applicant highlights evidence favorable to him. In doing so, he argues the Judge improperly weighed the evidence and did not properly consider various mitigating conditions and the whole-person factors. He contends, for example, that his financial problems arose during a difficult time in his life, that he has not experienced any additional problems of that nature since his marital separation, and that he has been working with professionals to resolve those problems. Such arguments do not demonstrate harmful error. The presence of some mitigating evidence does not alone compel the Judge to make a favorable security clearance decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or vice versa. A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a 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. 19-01431 at 4 (App. Bd. Mar. 31, 2020).

Applicant further notes the Judge erred by referring to Guideline J in the decision and indicates this may be a typographical error. We agree. Viewed in light of the decision as a whole, this is a harmless typographical error. *See, e.g.*, ISCR Case No. 04-03795 at 3 (App. Bd. Jan. 25, 2007).

Applicant failed to establish the Judge committed any harmful error. 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 national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also*, Directive, Encl. 2, App. A ¶ 2(b): "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of national security."

Order

The decision is **AFFIRMED**.

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

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

Signed: Jennifer I. Goldstein
Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board