

The SOR alleged that Applicant had ten delinquent medical and consumer accounts, totaling approximately \$44,000. The Judge found for Applicant on one allegation and against him on the remaining nine.

Twice during the hearing, the Judge indicated he was affording Applicant a post-hearing opportunity to address the remaining unresolved accounts by entering into payment agreements and making initial payments. Tr. at 59-60 and 64-65. Three times in the decision, the Judge noted that Applicant did not provide any proof of payments towards new payment agreements. Decision at 4, 7, and 8. For example: the Judge stated:

His five settlement agreements with SOR creditors ¶¶ 1.d-1.f and 1.h-1.i did not include any upfront payments to season his agreement . . . Without more payment documentation on Applicant's settled accounts, these accounts still reflect unfulfilled promises to pay off the agreed settlement amounts in the future, and cannot at this time be credited as fully verified resolved debts.

Payment agreements alone that are not accompanied by material good-faith payments still reflect promises to pay that do not meet the good-faith payment requirements of [Mitigating Condition] 20(d). [*Id.* at 7–8.]

In his appeal brief, Applicant asserts that he made initial payments under all five payment agreements, that he provided proof of those payments in his post-hearing e-mail submission, and that the Judge erred in finding otherwise. Applicant provided a copy of all material submitted post-hearing by email to the Judge, with screenshots of the files that were attached.

From our review of the record, it appears that Applicant timely submitted six receipts for payments that were overlooked by the Judge.¹ Although there is a presumption that an administrative judge has considered all of the record evidence, that presumption is rebutted where—as here—the judge states that the record lacked specific evidence that was in fact submitted. *See, e.g.*, ISCR Case No. 02-14950 at 6 (App. Bd. May 15, 2003). In light of the particular facts of this case, especially the Judge's emphasis on the lack of any payments towards the settlement agreements, we cannot conclude that this error was harmless, *i.e.*, it did not likely affect the outcome of the case. *See, e.g.*, ISCR Case No. 19-01220 at 3 (App. Bd. Jun. 1, 2020).

Applicant also contends that the Judge erred in finding he never held a security clearance. Decision at 3. Applicant's security clearance application reflects he was granted a secret clearance in 2011. Government Exhibit 1 at 41. Applicant further challenges the Judge's finding that he did

¹ The record before the Board contains five of the receipts (one for each SOR ¶¶ 1.d, 1.f, and 1.h and two for 1.i) but is missing one receipt—for a payment made towards the debt of SOR ¶ 1.e. Based on our review of the record and appeal brief, we conclude the missing receipt was timely submitted by email with the other materials.

not furnish a monthly budget or performance evaluations, arguing that he testified about these matters at the hearing. On remand, the Judge should consider whether these issues have merit.

Accordingly, we conclude that the best resolution of this case is to remand the case to the Judge for correction of this error and for further processing consistent with the Directive. As provided in Directive ¶ E3.1.35, the Judge shall, upon remand, issue a new decision in the case. Other issues raised in the appeal are not ripe for consideration at this time. The Board retains no continuing jurisdiction over a remanded case. However, a decision issued after remand may be appealed pursuant to Directive ¶¶ E3.1.28 to E3.1.35.

Order

The Decision is **REMANDED**.

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

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

Separate Opinion of Administrative Judge Allison Marie

On appeal, Applicant argues that the Judge erred in finding that Applicant 1) failed to provide proof of good faith payments to five of the SOR creditors; 2) never held a security clearance; and 3) failed to provide a monthly budget or employment endorsements and evaluations. Appeal Brief at 1-3.

The majority find, and I concur, that Applicant timely submitted post-hearing evidence of six payments towards repayment agreements established for various SOR debts and that the Judge appears to have overlooked said payments in crafting his Decision. The majority conclude that this makes remand appropriate, considering the Judge's emphasis in his Decision on the lack of any payments towards the agreements. For the following reasons, I disagree with my colleagues that remand is warranted and would instead affirm the Judge's decision.

Background

Applicant has been employed with the same Defense contractor since 2010. Decision at 3. As of the hearing, his salary was approximately \$100,000 annually. Decision at 4. In November 2020, as part of his current security clearance request, Applicant completed a Security Clearance Application (SCA) wherein he disclosed seven of the ten delinquent accounts that were ultimately alleged in the SOR. Government Exhibit (GE) 1 at 42-49. During his January 2021 subject interview, he discussed all ten of the SOR debts, asserting that he was already making payments on one (SOR ¶ 1.g), and that he planned to contact the nine other lenders to negotiate payment plans. GE 4 at 2-3. On September 7, 2021, Applicant was issued an SOR that alleged delinquent debt totaling over \$45,000. More than a year later, the hearing was held on September 19, 2022, following which the record was held open for 30 days for Applicant to provide additional documents in support of his case. On October 19, 2022, Applicant submitted additional material and the record closed.

Proof of Payments

The bulk of Applicant's argument on appeal is that the Judge erred in finding that Applicant failed to make good faith payments for the debts alleged at SOR ¶¶ 1.d-1.f, 1.h, and 1.i. Appeal Brief at 1-2. In his Decision, the Judge found that Applicant's post-hearing submission established that he had entered payment agreements for those five SOR debts. Decision at 3-4. The Judge also found, however, that the "payment agreements did not include any upfront good-faith payments," and that "[w]ithout any accompanying payments with his agreements, [Applicant] was unable to establish payment plans designed to produce good-faith track records of payments with these creditors." Decision at 4.2

The Judge's finding that Applicant failed to submit evidence of upfront payments pursuant to the five agreements was erroneous. Rather, the record reflects that Applicant submitted, and the Judge included in the record, evidence of the five agreements *and* the following five payments thereunder:

SOR ¶ 1.d: First payment made on October 1, 2022 (AE I)

SOR ¶ 1.f: First payment made on October 11, 2022 (AE L)

SOR ¶ 1.h: First payment made on September 30, 2022 (AE J)

SOR ¶ 1.i: First two payments made on September 30 and October 17, 2022 (AE K)

Additionally, Applicant's appeal reflects that he included a sixth document in his post-hearing submission that was inadvertently excluded from the record, and which indicates that Applicant made a first payment for the debt alleged at SOR ¶ 1.e on September 26, 2022. Appeal Brief at 15. Those six payments total approximately \$600.

² The Judge also found that Applicant had resolved the debt alleged at SOR ¶ 1.j, but that the debts alleged at SOR ¶¶ 1.a-1.c and 1.g remained unresolved for various reasons. Decision at 3-4.

It is clear from the record that Applicant timely submitted evidence of six payments and that those were subsequently overlooked by the Judge. I believe, however, that the Judge's failure to consider Applicant's post-hearing payments was harmless error. Error is harmless if: 1) there is not a significant chance that, but for the error, the Judge would have reached a different result; *or* 2) there is not a significant chance that the error fatally affects an otherwise sustainable decision. *See, e.g.*, ISCR Case No. 00-0250 at 6 (App. Bd. Jul. 11, 2001). The timing and scope of Applicant's resolution efforts, even considering the six payments, could not rise to a good faith effort to repay his debts sufficient to mitigate the Government's concern and therefore the Judge's decision is sustainable.

Timing

The Appeal Board has consistently held that the "timing of the resolution of financial problems is an important factor in evaluating an applicant's case for mitigation because an applicant who begins to resolve financial problems only after being placed on notice that his clearance was in jeopardy may lack the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his own interests." *See* ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017). Applicant has known about most of the debts at issue since at least November 2020 when he disclosed seven of them in his SCA. He discussed all of them during his security clearance interview in January 2021 and understood that the financial concerns would be addressed at hearing when he received Notice of the same on September 8, 2022. Yet he took no steps to resolve most of the accounts until the eve of or, more typically, after his security clearance hearing. The timing of his efforts would therefore impact minimally on mitigation.

Meaningful Track Record

More significant in this case, however, is Applicant's track record of payments. The Board has held that until an applicant has a "meaningful financial track record it cannot be said as a matter of law that he has initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." ISCR Case No. 01-21386 at 3 (App. Bd. Jun. 11, 2003). The concept of "'meaningful track record' necessarily includes evidence of actual debt reduction through payment of debts." ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 2007). An applicant must demonstrate that he has "established a plan to resolve his financial problems and taken *significant* actions to implement that plan." ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006) (emphasis added). By close of the record in this matter, Applicant made six of the total 180 monthly payments anticipated under his five payment agreements. One or two payments towards a debt, all made after the hearing was held, do not amount to significant action to implement his payment agreements, nor do they establish the requisite "track record." Having already considered the five underlying payment agreements when he concluded that Applicant's efforts failed to mitigate the Government's concern, the Judge could not have concluded that the otherwise overlooked six initial payments amounted to a meaningful track record sufficient to transform Applicant's efforts to good faith repayment efforts and mitigating.

Under the harmless error standard cited, above, the Judge's failure to consider evidence of Applicant's six post-hearing payments would be harmless because there is not a significant chance that the error fatally affected his otherwise sustainable decision.

Security Clearance History

Applicant next argues that the Judge incorrectly found that Applicant had never held a security clearance. Appeal Brief at 2; Decision at 3. From the record evidence, it appears that Applicant has held a Secret clearance since 2011. *See* GE 1 at 41; Tr. at 33. To the extent that the Judge's finding regarding Applicant's security clearance history is an error, it does not appear to have been decisive in the Judge's overall decision and, therefore, is harmless.

Failure to Furnish Monthly Budget, Endorsements, or Performance Evaluations

Applicant finally takes issue with the Judge's finding that he did not furnish a monthly budget or performance evaluations because he testified about those matters at hearing and the Judge did not specifically request supporting documentation. Appeal Brief at 2. These arguments are without merit.

With respect to his monthly budget, the transcript reflects that when the Judge tried to determine the details of Applicant's expenses to ascertain his ability to repay his creditors, Applicant indicated that he was unsure about the specific amounts, had not revisited the subject since receiving a promotion two months prior, and tried to provide a "rough estimate" on the spot:

Judge: What do you estimate for the remainder every month after paying all your expenses right now?

Applicant: Let me see can I run -- I haven't run the numbers quite recently, since my recent promotion.

Judge: You mentioned your rent, your car payment. But you estimate you have over each month that you could use to address on some of these outstanding debts that haven't been resolved.

Applicant: Let me see here. I would say roughly -- I'm going to take a shot and say I would maybe have like \$1,000 maybe, to take care of the remaining ones. This is a rough estimate right now without me actually having to actually sit down and break down all of my budgeting things item-by-item.

Tr. at 34, 61-62. Estimates of a few monthly expenses do not amount to a budget or provide a reliable roadmap of an individual's ability to pay expenses. The Judge's ultimate finding that

Applicant did not furnish a budget, either at hearing or in his post-hearing materials, is therefore not erroneous.

Finally, with respect to evidence of Applicant's work performance, the only times that these matters were discussed at hearing were when Applicant disclosed having recently received a promotion (Tr. at 31, 34-35) and discussed his performance reviews in conjunction with anticipated bonuses (Tr. at 45). In DOHA proceedings, it is the applicant's responsibility to present "evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." Directive ¶ E3.1.15. Neither the Judge nor Department Counsel are obligated to identify or present evidence in support of Applicant's case for mitigation. *See, e.g.*, ISCR Case No. 15-04003 at 3 (App. Bd. May 25, 2017).

Accordingly, I dissent from the Majority Opinion that remand is necessary in this case.

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