

Date: August 29, 2023

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Applicant for Security Clearance )  
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ISCR Case No. 21-01189

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Andrea M. Corrales, Esq., Department Counsel  
James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 6, 2021, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – security concerns raised under Guideline I (Psychological Conditions) of the National Security Adjudicative Guidelines (AG) of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On June 1, 2023, Defense Office of Hearings and Appeals Administrative Judge Nichole L. Noel granted Applicant’s security clearance eligibility. The Government appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

**Judge’s Findings of Fact and Analysis**

Applicant, in his mid-40s, is married with two children. He immigrated to the United States in 2009 and was naturalized in 2011. Applicant served on active duty as a combat engineer in the U.S. military from 2011 to 2014. He earned bachelor’s and master’s degrees prior to immigrating and earned a second master’s degree in the U.S. in 2015. He has been employed as a Federal contractor since 2022.

Applicant began experiencing mental health issues in October 2018. Following days of sleeplessness and erratic behavior, his wife called the police and Applicant was involuntarily admitted to the psychiatric unit of the local hospital, where he was diagnosed with schizoaffective disorder, bipolar mood disorder, and sleep deprivation. He was stabilized with medication and released to outpatient care and, in November 2018, began seeing a psychiatric nurse practitioner (PNP). Applicant's medication and treatment plan were adjusted to address negative side effects.

In February 2019, Applicant stopped taking his medications and his symptoms returned later that month. His wife again contacted the police and Applicant was involuntarily admitted to a psychiatric unit for six days. Upon his discharge, he resumed treatment with the PNP and followed his treatment plan for five months.

In July 2019, Applicant again stopped taking his medications and his symptoms returned. He was involuntarily hospitalized in August 2019 and diagnosed with schizoaffective disorder, bipolar disorder, and catatonia. Applicant was released and resumed treatment with the PNP, but in 2020 he transferred his care to a certified registered nurse practitioner in psychiatric mental health (CRNP/PMH).

Applicant remained compliant with his treatment plan with the CRNP/PMH; however, in November 2020, he began experiencing symptoms again. His wife attempted to have him hospitalized but was unsuccessful due to COVID-19 protocols. The CRNP/PMH adjusted Applicant's medications, but he continued to experience symptoms, becoming increasingly disoriented and erratic. In December 2020, his wife filed a missing person report after Applicant wandered out of his home. He was found by police and involuntarily admitted for psychiatric care. Following this fourth hospitalization, the CRNP/PMH again adjusted Applicant's medication.

In consideration of the foregoing and in conjunction with his request for security clearance, Applicant participated in a mental health evaluation in March 2021 with a Government-approved psychologist. The psychologist diagnosed Applicant with schizophrenia spectrum disorder, in partial remission, and unspecified anxiety disorder, and opined that the conditions would require ongoing, consistent lifelong treatment to maintain stability. He opined that, while Applicant is stable on his pharmaceutical regimen, that could change and lead to the return of his symptoms if he experiences changes in his physiology, stops taking his medication, or experiences a significant increase in stress. The psychologist noted that, while Applicant "has now developed the opinion that he needs the medications and has resolved to adhere to his provider's recommendation," he also "complains about many immediate, and potentially long term, side effects of his multiple medications," which are "not inconsequential." Decision at 4 (quoting Government Exhibit (GE) 3 at 6). Specifically, the medications "seem to have muted his affect, slowed his processing speed, and negatively impacted his frontal lobe functioning (i.e., attention control and problem solving)," all of which are "cognitive skills needed to successfully safeguard information." *Id.* The psychologist concluded that "there is a considerable risk [Applicant's] symptoms will resurface at some point in the future" and therefore "his condition could negatively impact his judgment and reliability" and "diminish[] his capacity to safeguard national security information." Decision at 5 (quoting GE 3 at 7).

Following the September 2022 hearing, the Judge found that Applicant has consistently complied with his treatment plans since September 2019 and has not experienced any negative side effects or return of symptoms since his last major medication adjustment following the December 2020 hospitalization. Per the psychologist's evaluation, Applicant's symptoms have been in remission since early 2021. In addition to his quarterly medication management, Applicant has engaged in quarterly therapy since late 2021, and both of those providers consider him stable. In concluding that mitigating conditions AG ¶¶ 29(a) and 29(c) apply, the Judge noted that, while "[p]hysiological and environmental changes could decrease the effectiveness of treatment protocol, resulting in the recurrence of symptoms and the possibility of future hospitalizations," Applicant and his wife "are diligent in monitoring his behavior for the return of symptoms and . . . will seek medical intervention when it is needed." Decision at 7.

The Judge found in favor of Applicant on all allegations. On appeal, the Government argues that the Judge's application of the Guideline I mitigating conditions and her whole-person analysis were arbitrary, capricious, and not supported by the record evidence. For the reasons set forth below, we reverse the Judge's decision.

### **Discussion**

A Judge's decision can be found to be arbitrary or capricious if "it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion." ISCR Case No. 97-0435 at 3 (App. Bd. Jul. 14, 1998) (citing *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)). The Government argues that the Judge arbitrarily applied AG ¶¶ 29(a) and 29(c) "in direct contradiction with the Judge's own findings and the weight of the record evidence." Appeal Brief at 12. We agree.

#### Mitigating Condition AG ¶ 29(a)

We turn first to AG ¶ 29(a), which provides for mitigation when "the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan." It is a two-prong condition, requiring that both elements are met to apply. Here, the Judge appears to have relied entirely on Applicant's fulfillment of the second prong – that he demonstrated ongoing and consistent compliance with his treatment plan, despite the weight of evidence against finding that his condition is readily controllable with treatment.

As of the September 2022 hearing, the record reflected that Applicant had been compliant with his treatment plan for about three years, since September 2019, and had not experienced any return of symptoms since his fourth hospitalization in December 2020. The record also contained multiple indicators, however, that Applicant's stability was not permanent and could change for a variety of reasons, which detracts from a finding that his condition is readily controllable with treatment. For example, the psychologist opined that Applicant's current stability "could change

over time with changes in his physiology, if he were to stop taking medications, or if his stress level significantly increases,” which “would almost certainly [lead to Applicant experiencing] perceptual disturbances and/or disordered thinking.” GE 3 at 7.

The Judge acknowledged the foregoing concern, but apparently deemed it overcome because Applicant and his wife represented that they “are diligent in monitoring his behavior for the return of symptoms and . . . will seek medical intervention when it is needed.” Decision at 7. The Judge also noted that Applicant and his wife have “developed a plan to handle any future emergencies, in which she calls Applicant’s employer to inform them of his inability to work.” Decision at 5-6. While the Judge analyzed this information favorably, the totality of the record suggests that these precautions are an acknowledgment of the likelihood that Applicant’s symptoms may return and undercuts a finding that his condition is readily controllable at this time.

#### Mitigating Condition AG ¶ 29(c)

The Government next challenges the Judge’s application of AG ¶ 29(c), which is also a two-prong condition that affords mitigation via a recent opinion by a duly qualified mental health professional, employed or approved by the U.S. Government, that an individual’s previous condition: 1) is under control or in remission; *and* 2) has a low probability of recurrence or exacerbation. Whether the first prong was met in this case requires a more complicated analysis,<sup>1</sup> which is ultimately unnecessary because the facts unequivocally fail under the second prong.

In her mitigation analysis, the Judge echoed the psychologist’s opinion that “[p]hysiological and environmental changes could decrease the effectiveness of [Applicant’s] treatment protocol, resulting in the recurrence of symptoms and the possibility of future hospitalizations.” Decision at 7. She also noted that the psychologist’s “fair at best” prognosis was “reasonable given the nature of Applicant’s illness and *the potential for the recurrence of symptoms even when he is compliant with [his] treatment plan.*” Decision at 8 (emphasis added). Despite the foregoing, the Judge went on to find AG ¶ 29(c) applicable.

The decision is devoid of explanation for how the Judge simultaneously found that Applicant’s symptoms both have the potential for recurrence, even when he is compliant with treatment, *and* have such a low probability of recurrence as to warrant application of AG ¶ 29(c).

#### Weighing Record Evidence

In addition to his and his wife’s testimony, the evidence regarding Applicant’s mental health history and status consisted of hospitalization records and opinions from three mental health

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<sup>1</sup> The psychologist qualified the remission element of the diagnosis by opining that Applicant is in *partial* remission, as opposed to *full* remission. GE 3 at 6. What, if any, impact this qualification has on the application of AG ¶ 29(c) is unclear from the record. Moreover, and importantly, the psychologist’s April 2021 report indicates that he was unaware of Applicant’s fourth hospitalization, which occurred only five months earlier, in December 2020. Specifically, the psychologist noted that Applicant’s “condition necessitated *three* involuntar[y] hospitalizations during *2018 and 2019,*” and the psychologist further opined that “it seems [Applicant’s] *symptoms came under control when he was prescribed [medications] in late 2019 as he has not had a relapse since it was added.*” GE 3 at 1, 7 (emphasis added). Therefore, the psychologist’s opinion that Applicant’s condition is in even partial remission appears to be based on incomplete information, which calls into question the legitimacy of any “remission” determination.

professionals, including Applicant's two providers and the Government-approved psychologist. Applicant's therapeutic provider submitted a three-sentence letter from April 2022 acknowledging that Applicant was engaged in treatment and that his symptoms were stable over the five months they had worked together. Applicant Exhibit (AE) A. Notably, Applicant initiated this treatment three months *after* receiving his SOR. The CRNP/PMH also submitted a two-sentence letter from April 2022, confirming that Applicant had been a patient since February 2020, and that he was compliant with treatment and stable. AE B. Neither of these providers addressed any testing conducted with Applicant, his diagnoses, or his prognosis.

Conversely, following an in-person clinical interview and testing, the psychologist wrote an extensive report that addressed Applicant's mental health history, clinical observations, and diagnostic impressions. The psychologist opined that there is considerable risk that Applicant's symptoms will resurface in the future and therefore that his condition could negatively impact his judgment, reliability, and capacity to safeguard national security information.

In summary, in the five years since Applicant began experiencing mental health concerns, he has voluntarily discontinued his medications two times; has been involuntarily hospitalized four times; and has been diagnosed with, among other things, schizophrenia spectrum disorder, including most recently by a Government-approved psychologist who opined in a robust report about serious concerns regarding Applicant's continued stability and ability to safeguard national security information. In contrast, evidence favorable to granting clearance eligibility consisted of testimony from Applicant and his wife, along with two conclusory letters from Applicant's quarterly treatment providers that state, without elaborating, that he is stable and compliant with treatment.

Administrative Judges have responsibility for, and broad discretion in weighing evidence; however, that discretion is not unlimited, and a judge is not free to draw whatever inferences and conclusions she wants. *See, e.g.*, ISCR Case No. 99-0511 at 13-14 (App. Bd. Dec. 19, 2000) (citations omitted). Moreover, a judge may not ignore or disregard "significant record evidence that a reasonable person could expect to be taken into account in reaching a fair and reasoned decision." ISCR Case No. 02-22603 at 4-5 (App. Bd. Sep. 3, 2004).

Here, the record's unfavorable evidence, such as Applicant's multiple hospitalizations, failures to follow treatment advice, and the psychologist's conclusion regarding Applicant's judgment, reliability, and capacity to safeguard national security information were highlighted throughout the Judge's findings and analysis. Even so, the Judge discounted the significant unfavorable evidence when she effectively conducted a piecemeal analysis in reaching a decision that focused on the relatively slight favorable evidence and ultimately concluded that it outweighed the unfavorable. The Judge's lack of a satisfactory explanation for her weighing of said evidence results in an unsustainable decision.

The standard applicable in security clearance decisions is that a clearance may be granted only when "clearly consistent with the interests of the national security." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." AG ¶ 2(b). From our review of the record, there was insufficient evidence for the Judge to conclude that "no doubts [exist]

about Applicant's ongoing security worthiness." Decision at 8. The Judge's decision runs contrary to the weight of the record evidence, and was therefore arbitrary, capricious, and contrary to law. The record, viewed as a whole, is not sufficient to mitigate the Government's security concerns under *Egan*. Therefore, the decision is not sustainable.

**Order**

The Judge's security clearance decision is **REVERSED**.

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

Signed: Gregg A. Cervi  
Gregg A. Cervi  
Administrative Judge  
Member, Appeal Board

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