



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203
(703) 696-4759

Date: November 21, 2023

<p>In the matter of:</p> <p style="text-align: center;">-----</p> <p>Applicant for Security Clearance</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>ISCR Case No. 23-00093</p>
---	--	-------------------------------

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT

Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 6, 2023, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – security concerns raised under Guideline H (Drug Involvement and Substance Misuse) of the National Security Adjudicative Guidelines (AG) of Security Executive Agent Directive 4 (effective June 8, 2017) (SEAD 4) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On September 15, 2023, Defense Office of Hearings and Appeals Administrative Judge Robert E. Coacher denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30. For reasons stated below, we remand the Judge’s decision.

Applicant, 25, has worked for his federal contractor employer since March 2022. He submitted a security clearance application (SCA) in April 2022, wherein he disclosed that he began using marijuana in 2015 in lieu of medication for pain relief due to a fractured vertebra and nerve damage in his back, and that he continued using the drug until March 2022, the month prior. As of his SCA, Applicant described his marijuana use frequency as “[n]ightly or on weekends only.” File of Relevant Material (FORM) Item 4 at 32. During Applicant’s security clearance interview the following month, in May 2022, the investigator recorded that, “[s]ince 03/2020 to present,

[Applicant] no longer uses marijuana on the weekends because he works on weekends,” and he “occasionally uses marijuana throughout the week on as a needed basis to help with pain management.” FORM Item 5 at 3.

Based on the SCA and investigator’s summary, the SOR alleged that Applicant used marijuana from 2015 to May 2022, and that he used marijuana after completing his SCA in April 2022. Applicant responded to the SOR by admitting that he used marijuana beginning in 2015 but averred that he stopped using the drug in March 2022 once he understood he would be undergoing a security clearance investigation. He further denied that he used marijuana after completing his SCA. With respect to the conflicting usage end date recorded by the investigator, Applicant explained, “I honestly thought she was asking me about the use of marijuana as for what I stated on the [SCA].” FORM Item 3.

The Judge found against Applicant only on the allegation concerning marijuana use generally, concluding that insufficient time had passed to mitigate the alleged security concern. With respect to the concern that Applicant used marijuana after completing his SCA, the Judge found that Applicant used marijuana through May 2022, but ultimately ruled in Applicant’s favor on the allegation itself because “it does not create a separate disqualifying condition under the AGs.” Decision at 4. Still, the Judge considered his finding that Applicant used marijuana after completing the April 2022 SCA to note that such use “casts doubt upon [Applicant’s] current reliability, trustworthiness, and good judgment,” and for purposes of conducting the whole-person analysis. Decision at 5, 6.

On appeal, Applicant challenges the Judge’s finding that he used marijuana through May 2022 and after completing his SCA in April 2022. In support of his position, he reiterates that he informed the investigator that he had stopped smoking marijuana and had switched to using federally legal CBD for pain relief. This argument merits consideration as two issues arise from the Judge’s finding about post-SCA marijuana use: 1) the evidence regarding this matter is conflicting and the Judge’s decision should have discussed how he resolved said conflicts; and 2) there is no evidence that, even if reasonably established, Applicant’s post-SCA marijuana use was done with notice of its security significance.

With respect to the first issue, the Judge’s finding that Applicant continued to use marijuana after completing his SCA was drawn from the May 2022 interview summary, wherein the investigator recorded, generally, that Applicant “occasionally uses marijuana throughout the week on as a needed basis to help with pain management.” FORM Item 5 at 3. Notably, the investigator made no specific notation about the timing of Applicant’s last marijuana use. This timing differs from that self-reported by Applicant’s in his April 2022 SCA and March 2023 SOR Response, both of which consistently reported that Applicant stopped using marijuana in March 2022, before submitting his SCA.

When conflicts exist within the record, a judge must weigh the evidence and resolve such conflicts based upon a careful evaluation of factors such as the evidence’s “comparative reliability, plausibility and ultimate truthfulness.” ISCR Case No. 05-06723 at 4 (App. Bd. Nov. 14, 2007).

In some cases, inconsistencies in record evidence can be credited to an applicant's intentional omission or changing reports during a clearance investigation where motive to do so is apparent. In very rare situations, however, important evidentiary inconsistencies may be the result of faulty interview reporting, and resolution of the inconsistencies must be done in consideration of the reliability of the evidence as a whole. Here, the investigator's summary contains other inconsistencies from the information provided by Applicant in his SCA, such as the frequency of Applicant's marijuana use as of his clearance processing. In his April 2022 SCA, Applicant affirmatively stated that he used marijuana on the weekends, yet the interview summary from one month later reflected that Applicant had not used marijuana on the weekends since 2020. There is no apparent reason for Applicant to have provided such conflicting information between his initial voluntary SCA disclosure and the subsequent interview, which lends to the possibility that the interview notes were misrecorded or inaccurate. In light of the foregoing, Applicant's explanation for the inconsistency and repetition of his March 2022 marijuana cessation date throughout his self-reported investigation materials support the credibility of his timing, and the Judge erred by not explaining why he found one piece of evidence more credible than the other.

Turning to the issue of notice, the Appeal Board has "long held that applicants who use marijuana after having been placed on notice of the security significance of such conduct may be lacking in the judgment and reliability expected of those with access to classified information." ISCR Case No. 20-01772 at 3 (App. Bd. Sep. 14, 2021). We have recently clarified, however, that the effective timing of such notice is fact dependent and must be evaluated on a case-by-case basis. *See* ISCR Case No. 22-02132 at 4 (App. Bd. Oct. 27, 2023). Here, Applicant's potential marijuana use after completing his SCA is only relevant to the whole-person analysis if the evidence establishes that he understood the security significance of further marijuana use after initiating the clearance process and that he demonstrated a disregard of the security clearance eligibility standards by continuing such use. Even if the Judge's finding that Applicant used marijuana after submitting his SCA represented a reasonable weighing of conflicting record evidence, there is no evidence in the record that Applicant understood such post-SCA use to be problematic at the time and therefore should not have been considered under the Whole-Person Concept.

In this regard, it bears noting that, while marijuana use remains prohibited under Federal law, in response to the increase in the number of state and local governments legalizing or decriminalizing such use, in December 2021 the Security Executive Agent issued a Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position (SecEA Clarifying Guidance). The Guidance instructs, among other things, that "prior recreational marijuana use by an individual may be relevant to adjudications but not determinative," and reiterates the requirement that agencies utilize the Whole-Person Concept "to carefully weigh a number of variables in an individual's life to determine whether that individual's behavior raises a security concern, if at all, and whether that concern has been mitigated such that the individual may now receive a favorable adjudicative determination." SecEA Clarifying Guidance at 2. Considering the foregoing, we are unable to conclude that the Judge's finding that Applicant used marijuana after submitting his SCA did not likely affect the outcome of the case. Notably, the Judge did not reference the Guidance in conducting his analysis.

We conclude that the best resolution of this case is to remand the case to the Judge to correct the above-identified harmful error and for further processing consistent with the Directive. Upon remand, a Judge is required to issue a new decision. Directive ¶ E3.1.35. The Board retains no jurisdiction over a remanded decision. However, the Judge's decision issued after remand may be appealed pursuant to Directive ¶¶ E3.1.28 and E3.130.

Order

The Judge's adverse security clearance decision is **REMANDED**.

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

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

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