



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: March 14, 2024

In the matter of:)	
)	
-----)	ISCR Case No. 22-01176
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Julie R. Mendez, Esq., Chief Department Counsel

FOR APPLICANT

Christopher Snowden, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On July 11, 2022, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision – security concerns raised under Guideline F (Financial Considerations) and Guideline H (Drug Involvement and Substance Misuse) of the National Security Adjudicative Guidelines (AG) in Appendix A of Security Executive Agent Directive 4 (effective June 8, 2017) and DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). On August 16, 2023, Defense Office of Hearings and Appeals Administrative Judge Roger C. Wesley denied Applicant’s security clearance eligibility. Applicant appealed that decision, and the Appeal Board remanded it to the Judge with instructions to issue a new decision. On December 4, 2023, Judge Wesley again denied Applicant’s security clearance eligibility. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged two financial concerns, both of which were found favorably for Applicant and will not be discussed further. Under Guideline H, the SOR alleged that Applicant used marijuana from April to June 2021, at which time he tested positive for marijuana during a routine employer drug screening, and that the foregoing conduct occurred after Applicant was last granted

access to classified information in about 2020. The Judge found against Applicant on all Guideline H concerns.

On its initial appeal, Applicant contended that the Judge both failed to properly consider all available evidence and applied facts not supported by the record, rendering his adverse decision arbitrary, capricious, or contrary to law, and failed to properly apply the mitigating conditions and whole-person analysis. Now on its second appeal, Applicant again asserts the same arguments, but applies those to the Judge's revised decision. Consistent with the following, we affirm.

In its decision on the initial appeal, the Board determined, *inter alia*, that the Judge's handling of the administratively noticed materials was in error. Pursuant to the remand, the Judge reopened the record, provided the parties with the administrative notice documents upon which he relied, and afforded them an opportunity to comment and object. He also provided the parties an opportunity to "argue convincingly that [Applicant's] use of CBD in this case was innocent and undertaken with the understanding that the CBD he used was not in excess of the 0.3% legal limits on THC in CBD products prescribed by the Federal Farm Act (Public Law 115-334)." Hearing Exhibits (HE) 1 and 2. The Judge referenced the knowledge criteria used by the Supreme Court to make credibility assessments of claims of innocence as guidance. *Id.*; Decision at 3. The parties submitted post-remand briefs, and Applicant provided additional documents with his. HE 6-8.

The Judge's Findings of Fact and Analysis: The Judge's findings and analysis are summarized and quoted below.

Applicant is in his mid-50s, married and divorced three times, and has one teenaged child. He attended college but has not earned a degree. He served in the military from 1996 to 2016 and was medically discharged with a disability covering multiple pain issues throughout his body. He has been employed by a defense contractor since September 2021. While employed with another contractor, he tested positive for marijuana (THC) in June 2021, and was terminated from that employment. Prior to appearing for his random drug test, he did not notify the Government or his employer that he was ingesting CBD oil. He did not challenge the positive test results nor offer any explanations to his employer as to what may have caused his positive drug test.

Applicant denied using marijuana and claimed that he tried a new CBD product recommended and given to him by a friend who "brought" it from Colorado. Prior to using the CBD oil provided by his friend, he was "gifted" CBD oil on two prior occasions "from a different source" at a local gas station. Decision at 4. He did not check the CBD oil for enhancement with THC, did not report its use on his pre-test urinalysis form, and did not list his use of CBD oil or his positive urinalysis test in his recent security clearance application (SCA). He stated that he did not list the positive test on his SCA because "he didn't think it was 'going to be a big issue' because he had not smoked marijuana prior to his positive drug test" and "his use of CBD oil was not court related." *Id.* at 5 (quoting Tr. at 27).

Applicant could not provide any product labels, correspondence, or other proof to verify his use of CBD oil prior to testing positive for marijuana. When asked to identify the specific CBD oil product he was taking, "Applicant could not (a) identify the type of CBD product he used, (b)

document the labels of the product, or (c) supply any other evidence to refute the positive results for marijuana” reported in his June 2021 test results. *Id.* at 6. When given another opportunity to furnish proof of his innocent acceptance of CBD oil products, he could provide no further proof of the CBD products used. He cut off all ties and discarded the products when he was fired, and he could not document any evidence of the CBD products he used and “exactly how they worked into my case.” *Id.*

Pressed further at the hearing for details on whether he checked to see whether the CBD products he used contained THC, Applicant replied that he did not look at the labels on the products he obtained. He said one of the suppliers was a friend who purchased the CBD from another state and his other two transactions were made at a local gas station “without any acknowledged close checking of labels.” *Id.* Applicant was unaware of whether the CBD products were sold in grocery stores or pharmacies, and he “never ‘went back to look.’” *Id.* (quoting Tr. at 38-39). Applicant could offer no proof of his claimed innocent ingestion of THC oil.

Based on the evidence produced, interpretation of the test results associated with Applicant’s June 2021 positive drug test leaves only three plausible explanations: (1) Applicant knew, or is imputed to have known, there was THC in the CBD that exceeded or likely exceeded authorized federal limits; (2) Applicant did not know the CBD he consumed was likely to contain an excessive amount of THC; or (3) Applicant consumed a substantial amount of CBD oil either at one time or through repeated ingestion, so that even if the CBD oil met federal legal limits (i.e., 0.3 per cent), it would still result in a positive urinalysis test result. Application of CBD oil use under either of the situations covered in (2) or (3) could produce a favorable innocence result for Applicant based on a finding that he ingested a presumably legal product. Conversely, application of the situation covered [in] (1) would not. *Id.*

In his credibility assessment of Applicant’s denials of any knowing use of THC-laced CBD oil prior to his positive test, the Judge concluded that favorable explanations of his positive test “are neither plausible nor credible without more information from Applicant on the identity and sources of the CBD oil he claims to have obtained and used.” *Id.* Applicant’s claims of innocent use “without any effort to assess the THC content of the CBD oil products he was given are not enough to meet established Appeal Board credibility assessment requirements. . . . More corroborating information from Applicant is needed to reconcile his claims of innocent use with the positive test results.” *Id.* at 6-7.

The Judge found that Applicant did not meet his evidentiary burden of proving he did not know, or through reasonable inquires could not have known, that the CBD oil he obtained contained THC above the 0.3% limits set by law. Without more documented explanations from Applicant, he failed to meet the evidentiary burden of proof. Without more time to establish sustained abstinence from illegal CBD oil, Applicant did not provide sufficient evidence that he is no longer a recurrence risk. No mitigating conditions applied.

Discussion

The Board tasked the Judge to provide the parties with appropriate notice of materials outside of the record that he intended to use and to resolve apparent conflicts in the evidence, including whether Applicant knowingly used or consumed an illegal drug. Post-remand, we find that adequate notice of materials relied on has been provided to the parties and requested comments and arguments were appropriately submitted and appended to the record. We now turn to the positive drug test.

In our initial decision in this case, we held that the applicant bears the burden of establishing innocent consumption in positive drug test cases. An applicant's positive test for an illegal drug is sufficient to establish various Guideline H disqualifying conditions.¹ Once a positive drug test is proven, an applicant has the burden to rebut, explain, extenuate, or mitigate the security concerns arising from that positive test. Directive ¶ E3.1.15. When an applicant claims the positive drug test was the result of innocent use or consumption, the key issue will likely be whether he or she presented sufficient evidence to prove that claim and thereby refute the pertinent SOR allegations. Such a determination may hinge on an assessment of the applicant's credibility. If an applicant successfully refutes the pertinent SOR allegations, those allegations should be resolved in favor of the applicant, and the judge does not need to conduct a mitigation analysis regarding them. *See* ISCR Case No. 22-01176 at 5 (App. Bd. Oct. 24, 2023).

Applicant now alleges that the Judge did not consider all relevant evidence, apply applicable mitigating conditions, evaluate his credibility, and evaluate the Whole-Person factors, including the positive steps he has taken in mitigation, rendering the decision arbitrary, capricious, and contrary to law. Applicant's brief consists, in large measure, of a disagreement with the Judge's weighing of the evidence, which is not enough to show that the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 19-03344, 2020 WL 82584892 at *2 (App. Bd. Dec. 21, 2020). There is a rebuttable presumption that the Judge considered all the record evidence unless the Judge specifically states otherwise, and Applicant's bare assertion that the Judge did not consider evidence is not sufficient to rebut that presumption. *Id.* Upon our review, the Judge's findings are supported by substantial evidence of record, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1.

The Judge took great effort to analyze Applicant's claims of innocent ingestion of CBD oil that could have triggered a positive test for THC and attempted to resolve any likely scenario supporting innocent ingestion. The record supports the Judge's conclusion that "Applicant did not meet his evidentiary burden of proving he did not know, or through reasonable inquires could not have known that the CBD oil he obtained" contained THC above the 0.3% limits set by the Farm Bill and endorsed in his home state of residence. Decision at 10. While the Judge's analysis was

¹ For example, AG ¶¶ 25(a), "any substance misuse;" 25(b), "testing positive for an illegal drug," and possibly others depending on the circumstances.

comprehensive, it did not include any and all possible scenarios that Applicant raises on appeal that may have resulted in a positive drug test. To the extent there is error, it is harmless, as it is not outcome-determinative. *See, e.g.*, ISCR Case No. 10-01846, 2011 WL 4904418 at *2 (App. Bd. Sep. 13, 2011).

Applicant argues that the Judge “presented a false dichotomy that the *only* two plausible explanations for the positive drug test are 1) [Applicant] consumed marijuana or 2) [Applicant] purchased ‘poor-quality CBD oil from an unlicensed retailer of CBD produced from a hemp plant by an unlicensed farm source containing THC content in excess of [.3] percent.’” Appeal Brief at 9 (quoting Decision at 10). He argues that the Judge failed to consider alternative explanations such as that Applicant legally purchased CBD from a licensed retailer, that the licensed retailer purchased the CBD from a licensed farm source, and that one or both failed to comply with regulatory requirements on labeling; that the Government chose not to guarantee the labeling of CBD oil; that the CBD oil contained no labeling disclosing the THC content; or that Applicant’s positive drug test resulted from legal use of CBD oil with .3% THC. *Id.*

Applicant presented no convincing evidence to suggest any of these scenarios likely resulted in his positive drug test, thereby failing to carry his burden of proof. Without presentation of relevant, material, and convincing evidence raising the likelihood of an alternative scenario, the Judge was not required to imagine and analyze every possible reason for Applicant’s positive drug test result. When given the opportunity to return to the local gas station where the CBD oil was obtained and search for evidence of a similar container, manufacturer, distributor, or label, or to contact the “friend” who provided the CBD oil originating from Colorado to provide a statement or proof of the contents, Applicant failed to act. In the end, Applicant’s failure to provide sufficient and convincing evidence rebutting the Government’s test result evidence was determinative.

The Judge’s analysis and whole-person assessment considered Applicant’s background and character favorably, but he concluded that the character evidence was insufficient to overcome the evidentiary deficiencies with respect to his claims of innocent ingestion in light of the positive drug test. The Judge reasonably concluded that “favorable alternative explanations of his positive drug test are neither plausible nor credible without more information from Applicant on the identity and sources of the CBD oil he claims to have obtained and used” and that Applicant’s “claims of innocent use of CBD oil without any effort to assess the THC content of the CBD oil products he was given are not enough to meet established Appeal Board credibility assessment requirements.” Decision at 6-7.

The Judge acknowledged that Applicant was committed to abandoning all involvement with CBD; however, when viewed in light of only two years since his positive drug test and his inability to document the type of CBD oil he claimed to have used, it was insufficient to mitigate the drug use concerns established under AG ¶¶ 25(a), (b), and (c).²

² AG ¶ 25(a) – any substance misuse; AG ¶ 25(b) – testing positive for an illegal drug; AG ¶ 25(c) – illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The record supports the Judge’s ultimate conclusion that Applicant failed to prove his claim that his positive drug test for THC resulted from innocent ingestion of CBD oil. The Judge properly determined that the only relevant mitigating condition was AG ¶ 26(a), and that the evidence presented was insufficient to establish it. On appeal, Applicant contends that the Judge erred by failing to properly explain why application of AG ¶ 26(a) only garnered partial credit. Appeal Brief at 17. The Judge held that “without more time to establish a probative pattern of sustained abstinence from the use of CBD oil,” Applicant did not provide sufficient evidence “that he is no longer a recurrence risk.” Decision at 11.

AG ¶ 26(a) affords mitigation where “the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.” The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. That silence, however, does not relieve a judge of the obligation to construe and apply pertinent provisions of the Directive in a reasonable, common-sense way. *See* ISCR Case No. 02-08032, 2004 WL 1434394 at *5 (App. Bd. May 14, 2004). The Board has repeatedly held that, if the record reflects a significant period of time has passed without misconduct by an applicant, then the judge must articulate a rational basis for concluding why that time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. *Id.* Here, the Judge adequately explained that he did not consider two years as “evidence of sustained abstinence” in order to safely predict that the risk of recurrence is low. This coupled with Applicant’s “inability to document” the type of CBD oil he claims to have used inured to his detriment in establishing mitigation.

Applicant also argues the Judge asserted facts without evidence. In particular, he takes issue with the Judge’s discussion of how much THC must be present in CBD products to cause a positive drug test. We note that the Judge’s administrative notice documents and the parties’ written briefs adequately discuss these matters and other issues related to the laws surrounding CBD products. *See* HE 1-5. While Applicant failed to show what type of CBD product he claims to have used, the discussion of how much THC any particular product may contain is relevant on background, but not determinative to the ultimate security determination.

Although not raised by the parties on appeal, our review of the record reveals that the Judge failed to discuss the application of security concern AG ¶ 25(f) – any illegal drug use while granted access to classified information or holding a sensitive position – despite finding against Applicant on SOR ¶ 1.c, alleging Applicant used marijuana and tested positive after he had been granted access to classified information in about 2020. Given the Judge’s findings on SOR allegations ¶¶ 1.a and 1.b, which we sustain, we find any error in this regard to be harmless.

We have considered the entirety of the arguments contained in Applicant’s appeal brief. 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 Mut. 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 adverse decision is sustainable on this record. “The general standard 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)

Order

The decision is **AFFIRMED**.

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

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

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