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: October 17, 2024

In the matter of:	)	
-----	)	ISCR Case No. 22-00396
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Troy Nussbaum, Esq., Department Counsel
Andrea M. Corrales, Esq., Deputy Chief Department Counsel

FOR APPLICANT
Carl Marrone, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 21, 2022, DoD issued a Statement of Reasons (SOR) advising Applicant of the basis of that decision – security concerns raised under Guideline G (Alcohol Consumption), Guideline J (Criminal Conduct), and Guideline I (Psychological Conditions) 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 July 3, 2024, Defense Office of Hearings and Appeals Administrative Judge Ross D. Hyams granted Applicant security clearance eligibility. The Government appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On appeal, the Government does not challenge the Judge's favorable findings under Guidelines G and J but argues that the Judge misweighed the Guideline I evidence and misapplied

the Guideline I disqualifying and mitigating conditions, rendering his decision arbitrary, capricious, and contrary to law and the record evidence. For the reasons stated below, we remand the Judge's decision.

The Judge's Findings of Fact: The Judge's findings of fact relevant to the Guideline I allegations are summarized below.

Applicant is in her early fifties and has worked for her current employer since November 2020. She earned a bachelor's degree in 1996, married in 2019, and has two adult stepchildren. The SOR alleged as follows:

Applicant was diagnosed with bipolar disorder in about 2010 and was treated by a psychiatrist until 2021. In January 2022, a DoD-contracted psychologist diagnosed her with bipolar disorder and an unspecified anxiety disorder (SOR ¶ 3.a);

Applicant discontinued her treatment and medication against medical advice and has not returned to see her psychiatrist since June 2021 (SOR ¶ 3.b); and

Applicant was evaluated by a DoD-contracted psychologist in January 2022, who gave her a poor prognosis and found that her judgement, reliability, and trustworthiness are likely to be impaired because she discontinued treatment against medical advice, does not think she needs mental health interventions or medications at this time, and showed signs of hypomania during the interview (SOR ¶ 3.c).

Applicant has sought mental health help during difficult periods of her life. As a young person, she took anti-depressants after her sibling was killed in a car accident and, after a job loss in 2002, she saw a therapist to treat her depression. Although she has experienced depression at times, Applicant stated that she has never had a manic episode, and no one has ever expressed concern that she was manic. She has never been hospitalized, accused of erratic behavior, or involved in any incidents at work. Applicant asserted that she has never been depressed without a reason, such as the death of a loved one or job loss.

In about 2011, Applicant sought psychiatric treatment after a job loss left her depressed. After a brief initial consult, she saw her psychiatrist a few times per year to renew prescriptions, but she did not receive psychotherapy or counseling. Applicant testified that the psychiatrist did not conduct any testing or give her a formal diagnosis, but rather that he treated her symptoms. The Judge noted that "[t]here is no documentation in the record from this psychiatrist showing a diagnosis, prognosis, treatment plan, recommendations, or conclusions." Decision at 4.

Over the course of her treatment with this psychiatrist, Applicant's medications included an anti-depressant, anxiety medication for use as needed, and a mood stabilizer. At times, Applicant requested to vary dosages or medications to find what worked best for her. In 2015, Applicant "did not feel the medications were improving her quality of life" and successfully "worked with her psychiatrist to wean off the anti-depressant medication." *Id.* After her dog died, Applicant went back on anti-depressants again for three months and then again stopped.

Over time, Applicant relied less on her psychiatrist as she felt he was putting minimal effort into their interactions and not looking for long-term solutions. She had developed a better support system with her primary care physician, her mother who is an experienced nurse, and her best friend who is a pharmacist. In 2021, after discussions with these advisors, Applicant started to wean off the mood stabilizer, in part because she discovered that it could hinder medication she took for rheumatoid arthritis. Applicant advised her psychiatrist why she intended to wean off the medication, and "he was not adamantly opposed to it." *Id.* at 4. In June 2021, she was completely off the medication and "then terminated her relationship with the psychiatrist, as he only provided her prescriptions, which she no longer needed from him," as she could get any necessary prescriptions from her primary care physician. *Id.* Applicant was completely off the mood stabilizer for six months with no problems.

In January 2022, Applicant met with a DoD-contracted psychologist as part of the security clearance process. The two had a thirty-minute online meeting, during which Applicant recalled being nervous and talking a lot about her love of gardening. Applicant also completed an online questionnaire.

> Other than Applicant's [security clearance application], the specific records reviewed and relied upon by the DoD-connected psychologist were not identified or included with her report or submitted into the record for this case. The evaluator's report includes incorrect dates and timeline of some events, which undermines the findings. The report states that Applicant's former psychiatrist focused on treating her symptoms and did not have an accurate diagnosis for her, which supports Applicant's testimony.
>
> Applicant reported that during the thirty-minute online meeting, the evaluator made several negative comments to Applicant about her medication. She had the impression from the evaluator that without it she would be unable to keep her job or retain a security clearance. For this reason alone, after the meeting she requested her regular doctor re-prescribe the mood stabilizer, and she has been taking it since that time. [*Id.* at 4–5 (internal citations omitted).]

After receiving the SOR in May 2022, Applicant retained a psychologist for an evaluation. She completed two online assessments and met with the psychologist in person "for several hours." *Id.* at 5. He reported that the evaluation and the testing showed that her personality was within normal limits, with no current evidence of bipolar disorder. He diagnosed her with adjustment disorder with anxiety and stated that her prognosis was good and that she is reliable, stable, and trustworthy. Applicant also met online with a physician, who interviewed her and reviewed her health records. He concluded that she does not have major depressive disorder and he does not believe she has bipolar affective disorder. He noted that depression affects 50% of the population and that medication to treat the condition as needed is appropriate.

Three witnesses, including her supervisor and a vice president of the company, testified to Applicant's trustworthiness and professionalism. Applicant also submitted eleven character letters from work colleagues, attesting to her reliability, trustworthiness, and fitness to hold a security clearance.

The Judge's Analysis: The Judge's analysis relevant to the Guideline I allegations is summarized and quoted below.

Under AG ¶ 28, the following disqualifying conditions are potentially applicable in this case:

> (a) behavior that casts doubt on an individual's judgment, stability, reliability, or trustworthiness, not covered under any other guideline and that may indicate an emotional, mental, or personality condition, including, but not limited to, irresponsible, violent, self-harm, suicidal, paranoid, manipulative, impulsive, chronic lying, deceitful, exploitative, or bizarre behaviors;
>
> (b) an opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness; and
>
> (d) failure to follow a prescribed treatment plan related to a diagnosed psychological/psychiatric condition that may impair judgment, stability, reliability, or trustworthiness, including, but not limited to, failure to take prescribed medication or failure to attend required counseling sessions.

The DoD-contracted psychologist's report establishes AG ¶¶ 28(a) and (b), but "AG ¶ 28(d) was not established because there was insufficient evidence in the record of a treatment plan from Applicant's former psychiatrist to rebut Applicant's credible testimony about her mental health history and care." *Id*. at 9.

The following mitigating conditions under AG ¶ 29 apply: (a) the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan; (b) the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional; (d) the past psychological/psychiatric condition was temporary, the situation has been resolved, and the individual no longer shows indications of emotional instability; and (e) there is no indication of a current problem.

> Applicant provided sufficient evidence to show that her condition is under control and in remission and that she is now stable. She provided documentation from a psychologist and a physician [who] conducted more recent evaluations of her. The psychologist stated that she was within normal limits, she had temporary anxiety, and there was no current evidence of bipolar disorder. He stated that her prognosis was good, and she is reliable, stable, and trustworthy. The physician and addiction specialist found that she does not have major depressive disorder or a problem with alcohol and he does not believe she has bipolar affective disorder.
>
> Applicant is under her regular doctor's care and obtains medications, as needed, from her. There is sufficient evidence in the record, including her credible testimony, to find that her past psychological symptoms and conditions were

> temporary, the situation has been resolved, and there are no current indications of emotional instability or indication of a current problem.
>
> Applicant has provided sufficient evidence showing that she proactively seeks care when she needs it. In the past she has obtained counseling and medication to treat feelings of depression or anxiety. Neither are disqualifying conditions, and both are experienced by the majority of the population at different times in life. Her mood and symptoms are under control. She has acted in good faith in seeking treatment and terminating treatment when it was no longer needed. The alternative would be to take medications forever that she no longer needs. Applicant worked with her psychiatrist to change her medications and dosages to best suit her. She worked with him to wean off her medications and had successful outcomes. She restarted medication to cope with temporary grief or anxiety, and then stopped when it was no longer needed, which is completely appropriate. She terminated her relationship with the psychiatrist when he was no longer needed, and she sought treatment with other professionals she could rely on.
>
> In this case there is insufficient evidence of a current problem. . . . [T]here is insufficient evidence that Applicant has been erratic, unreliable, untrustworthy, had incidents at work or with law enforcement, or behaved in a way that was problematic. The record shows she is a high achiever and professionally focused. She has the liberty, responsibility, and autonomy to make decisions about her health care and medical providers, and the decisions she made were reasonable and appropriate.
>
> This case involves differing expert opinions from mental health treatment providers. The Government's evaluator only met with Applicant for a half an hour before making her assessment. Her report contains date and timeline errors, and draws its conclusions and diagnoses from this information, which undermines its credibility. It also contains information that supports Applicant's testimony and contradicts its findings. For these reasons, I give the January 2022 report little weight. Applicant submitted two evaluations and a prognosis from a psychologist and a physician from May 2022. They each spent more time with Applicant, and their conclusions are well reasoned and credible. I find these reports to be reflective of the current circumstances, credible, and accurate, and give these two reports more weight. [Decision at 10–11.]

Discussion

On appeal, the Government argues that the Judge's decision is arbitrary and capricious, as he erred in four regards, specifically: in giving insufficient weight to the DoD-contracted psychologist's report and too much weight to Applicant's two experts; in failing to apply disqualifying condition AG ¶ 28(d); in applying mitigating conditions AG ¶¶ 29(a), (b), (d), and (e); and in mis-applying the Whole-Person Concept.

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. 97-0184 at 5, n.3 (App. Bd. Jun. 6, 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's decision fails in each regard. We decline to address the full scope of the Government's arguments at this time, as our review is hampered by the Judge's failure to articulate a satisfactory explanation for his conclusions. The areas that require a fuller explanation include the following:

Date and Timeline Errors: The central issue in the Government's appeal is the Judge's conclusion that Dr. B's report is due "little weight" because it "contains date and timeline errors," and it relies upon this faulty information for its conclusions and diagnoses, which "undermines its credibility." Decision at 10–11. The Government makes two arguments in this regard: that "[n]owhere in the Decision did the Judge identify what date or timeline errors he perceived with this report" and that the report contains no inconsistencies, other than a timeline discrepancy in Dr. B's narrative that the Government attributes to Applicant. Appeal Brief at 17.

We agree that the Judge failed to sufficiently identify and explain the purported errors, which weakens his analysis and complicates appellate review. Our review, however, reveals significant inconsistencies between Applicant's testimony regarding her treatment history and Dr. L's recollection of the same, as summarized by Dr. B in her report (*e.g.*, whether Applicant was already under treatment for depression when she presented to Dr. L in 2010 and how often she requested to go back on an anti-depressant after weaning herself off). It appears that the Judge may have resolved those discrepancies in Applicant's favor and then concluded that Dr. L's account was erroneous, as he at one juncture referenced "Applicant's credible testimony about her mental health history and care" being more persuasive than "evidence in the record of a treatment plan from Applicant's former psychiatrist." Decision at 9. But it is unclear whether those are the "errors" to which the Judge is referring.

Similarly, our review reveals inconsistencies between Dr. B's narrative of her interview with Applicant and Applicant's testimony, which the Judge again may simply have resolved in favor of the Applicant's account. However, the Judge's failure to identify specific errors in Dr. B's report—whether they were in the summary of Dr. L's interview or in Dr. B's own findings—leaves us guessing at what errors the Judge was referring to and speculating as to how he resolved the discrepancies between the report and Applicant's testimony. This constitutes error on his part. As we have previously stated, the Judge's decision must be written in a manner that allows the parties and the Board to discern what findings the Judge is making and what conclusions he is reaching. *E.g.*, ISCR Case No. 17-00944 at 4–5, n.4 (App. Bd. Feb. 15, 2019).

Unspecified "Information": In a closely related issue, the Government challenges the Judge's conclusion that Dr. B's report "contains information that supports Applicant's testimony and contradicts its findings." The Government again highlights that the Judge did not explain this conclusion and argues that the conclusion is without basis in the record. We concur that the Judge erred in that he did not specify what in Dr. B's report was internally inconsistent.

Failure to Identify Applicant's "Condition" in Mitigation Analysis: The Government challenges the Judge's conclusion that mitigating conditions AG ¶¶ 29(a), (b), (d), and (e) apply. A fundamental problem in resolving the Government's appeal is that the Judge did not specify what "condition" he believed to have been mitigated. Said differently, the Judge determined that, under AG ¶ 29(a), the *identified condition* is readily controllable with treatment and there is consistent compliance with the treatment plan; that, under AG ¶ 29(b), Applicant has voluntarily entered a counseling or treatment program for a *condition* that is amenable to treatment; and that, under AG ¶29(d), Applicant's past psychological/psychiatric *condition* was temporary and the situation has been resolved. But the Judge never clearly articulated to *which diagnosis* he was referring. Additionally, the Judge's finding that AG ¶ 29(a) is applicable appears inconsistent with his conclusion that disqualifying condition AG ¶ 28(d) did not apply because the Government did not present sufficient "evidence in the record of a treatment plan from Applicant's former psychiatrist to rebut Applicant's credible testimony about her mental health care history and care."

One of the more problematic aspects of this record that further obscures our ability to assess the Judge's analysis is the fact that he did not address the details of the Government's psychological evaluation when finding it to be less persuasive than the one offered by Applicant's expert. For reasons not disclosed in the record, the Government did not obtain Applicant's treatment records from Dr. L and submit them to Dr. B for her review. Instead, Dr. B conducted a telephone interview of Dr. L and summarized that conversation in her report.[1] If we are to accept Dr. B's summary as accurate, Applicant's treating psychiatrist of ten years stated that Applicant "presents with bipolar (most likely type II or else a mixed type)." Government Exhibit (GE) 4 at 3 and 7. Based on her interviews of Applicant and Dr. L, Dr. B rendered two diagnoses: "Bipolar disorder" and "Unspecified anxiety disorder." *Id*. at 6. After receipt of the SOR, Applicant sought a psychological evaluation from Dr. P, who found "no evidence that she has a current diagnosis of Bipolar Disorder" and diagnosed her with adjustment disorder with anxiety, which he opined was "a temporary disorder related to anxiety caused by her clearance as not being approved." Applicant Exhibit I at 2.

Compounding the lack of clarity regarding the competing mental health assessments, the diagnoses submitted in the Government's psychological evaluation are not the standard, recognizable diagnoses that Administrative Judges typically receive and for which they can take administrative notice of the relevant sections of the Diagnostic and Statistical Manual of Mental Disorders, 5th edition. (DSM-5). Putting aside the diagnosis of anxiety disorder as not typically of security concern,[2] we note that Dr. B's generic diagnosis of "bipolar disorder" is not a diagnosis

---

[1] As the Judge noted, "[t]here is no documentation in the record from this psychiatrist showing a diagnosis, prognosis, treatment plan, recommendations, or conclusions." Decision at 4. It is unclear from Dr. B's report whether Dr. L was referring to his notes while speaking to her or relying on his recollection.

[2] In November 2016, DNI issued a memorandum revising the mental health questions in Section 21 of Standard Form 86, the security clearance application (SCA). DNI Memorandum on Revisions to the Psychological and Emotional Health Questions on the Standard Form 86, Questionnaire for National Security Positions, dated November 16, 2016. As revised, the SCA lists the psychological disorders that are considered by their very nature to raise security concerns: Psychotic Disorder, Schizophrenia, Schizoaffective Disorder, Delusional Disorder, Bipolar Mood Disorder, Borderline Personality Disorder, and Antisocial Personality Disorder. *See also* ISCR Case No. 20-01838 at 6, n.3 (App. Bd. Dec. 29, 2022).

found in the DSM-5, as she failed to distinguish between bipolar I disorder or bipolar II disorder, failed to specify whether the current or most recent episode was hypomanic or depressive, failed to specify whether Applicant was in partial or full remission, and failed to specify whether, if Applicant was not in remission, the episode was mild, moderate, or severe.

Confronted with these differing diagnoses, the Judge did not clearly articulate which ones he was discarding and which one he was referring to in determining whether Applicant had mitigated the concern. For example, the Judge found that "Applicant provided sufficient evidence to show that her *condition* is under control and in remission and that she is now stable,"[3] but did not articulate which of these diagnoses was the *condition* that is amenable to treatment and now under control. Decision at 10. The Judge hints at a conclusion that he discounted the bipolar disorder diagnosis in stating that Applicant had in the past "obtained counseling and medication to treat feelings of depression or anxiety," noting that neither is a disqualifying condition." *Id.* Nevertheless, his failure to state explicitly whether he discounted the bipolar disorder diagnosis and to articulate a satisfactory explanation for that conclusion is error.

In sum, the Judge failed to write his decision in a manner that allows us to discern what findings he made and what conclusions he reached in the areas noted above. We conclude that the best resolution of this case is to remand the case to the Judge to correct the identified errors. The Judge may *sua sponte* or upon motion of either party reopen the record to better address the identified issues. 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 E3.1.30. Other issues in the case are not ripe for consideration at this time.

---

[3] Decision at 3 (emphasis added). We note that this language aligns with AG ¶ 29(c), a mitigating condition that the Judge did not explicitly apply.

Order

The Judge's decision in ISCR Case No. 22-00396 is **REMANDED**.

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

Signed: James B. Norman
James B. Norman
Administrative Judge
Member, Appeal Board

Separate Opinion of Board Member Allison Marie

The Judge found that the report prepared by the Government's evaluator "contains date and timeline *errors*" and, as a result, afforded the report "little weight." Decision at 10-11 (emphasis added). On appeal, the Government contends that the report contained no errors and challenges the Judge's decision to discount it. The majority conclude, and I agree, that the Judge's failure to identify the purported errors constitutes harmful error that must be cured on remand. I disagree, however, with several matters related to this conclusion.

In its analysis about the report's purported "errors," the majority identifies multiple "significant inconsistencies" in the evidence. These evidentiary conflicts were wholly unaddressed by the Judge, and I agree that they must be addressed on remand. *See* ISCR Case No. 05-06723 at 4 (App. Bd. Nov. 14, 2007) (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.").

The majority's identification of the aforementioned evidentiary conflicts in its discussion about the report's alleged "errors," however, is unnecessarily suggestive. The Judge did not assert that the report offered conflicting information from other record evidence, but rather specifically asserted that it contained "errors." If the Judge indeed found "errors" in the report, he should identify them on remand – independently – before proceeding to his weighing analysis.

I also disagree with the majority's repeated speculation that the Judge "may simply have resolved" the inconsistencies in Applicant's favor. Whether or not the "significant inconsistencies" identified by the majority are the "errors" relied upon by the Judge, the Board should not hypothesize about the Judge's unknown weighing analysis if that analysis is a defect assigned to be cured on remand.

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