DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
APPEAL BOARD
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Date: January 4, 2024

In the matter of:	)	
	)	
-----	)	USAF-M Case No. 23-00056-R
	)	
Applicant for Security Clearance	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Julie R. Mendez, Esq., Deputy Chief Department Counsel
Nicholas T. Temple, Department Counsel

FOR APPLICANT
Pro Se

On August 1, 2022, the Department of Defense (DoD) issued a statement of reasons (SOR) pursuant to DoD Manual 5200.02 (Apr. 3, 2017, as amended) (DoDM 5200.02) advising Applicant that his conduct raised security concerns under Guideline G (Alcohol Consumption) 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).

On November 15, 2022, the DoD Consolidated Adjudication Services (CAS) revoked Applicant's eligibility for access to classified information, and Applicant appealed that revocation under the provisions of DoDM 5200.02. On December 2, 2022, Under Secretary of Defense (Intelligence & Security) Ronald Moultrie issued a memorandum requiring that DoD civilian or military personnel whose clearance eligibility was revoked or denied between September 30, 2022, and the date of that memorandum be provided the opportunity to pursue the hearing and appeal process set forth in DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). As a result of Secretary Moultrie's memo, Applicant was given the opportunity to receive the process set forth

in the Directive, and he elected that process. On June 13, 2023, Defense Office of Hearings and Appeals Administrative Judge Edward W. Loughran granted Applicant's request for a security clearance. The Government appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On its initial appeal, the Government contended that the Judge failed to properly consider all available evidence, misapplied the Guideline G mitigating conditions, and misapplied Guideline I disqualifying condition AG ¶ 28(a), rendering his adverse decision arbitrary, capricious, or contrary to law. On August 31, 2023, the Appeal Board determined that the Judge erred in his failure to apply AG ¶ 28(a) to Applicant's alcohol-related conduct and suicidal ideations and remanded the case for correction of those errors. On September 14, 2023, Judge Loughran again granted Applicant's request for security clearance eligibility, and the Government appealed that decision.

Now on its second appeal, the Government asserts that the Judge failed to properly apply Guideline I disqualifying condition AG ¶ 28(b) and that his mitigation analysis under both Guidelines G and I and under the Whole-Person Concept failed to properly consider all available evidence. Consistent with the following, we affirm.

The Judge's Findings of Fact: The Judge's finding are summarized and quoted below.

In his early thirties, Applicant is single and has served in the military since 2011. He has a history of mental health, disciplinary, and criminal incidents, primarily alcohol related. After his mother's death in 2007, Applicant began having suicidal ideations. In 2014, after receiving a letter of reprimand for smoking during training, Applicant had a "panic attack" in which he stabbed himself repeatedly in the thigh with a pen, requiring treatment at the emergency room.

In 2017, Applicant was drinking when he had an argument with his girlfriend, and base security responded to a noise complaint. He was not arrested, but his command directed him to attend an alcohol and drug abuse prevention and treatment program (ADAPT), in which he was diagnosed with alcohol use disorder, mild. While enrolled in the program, he drank on one occasion a few hours after his ADAPT appointment and was treated at the hospital for alcohol consumption. He successfully completed the program in 2018 and remained abstinent from alcohol for about ten months.

In 2019, Applicant was drinking and broke a table, punched a wall, and head-butted a steel structure. After security personnel responded, he expressed suicidal ideations and was taken to the hospital and held overnight. No criminal charges or nonjudicial punishment resulted, but Applicant received a letter of admonition and was directed to return to ADAPT. While in ADAPT, Applicant was diagnosed with alcohol use disorder, severe, and his treatment recommendations included abstinence.

Applicant remained sober from completion of ADAPT until 2021 when he reported to Saudi Arabia. Although alcohol is banned in Saudi Arabia, Applicant started drinking again to fit in. Over coffee, a senior enlisted member realized that Applicant was intoxicated, and the two

returned to Applicant's apartment to retrieve the alcohol. Upon arrival, Applicant smashed all the bottles, slammed his head into the wall, and punched the wall, injuring his hand. As a result of the incident, Applicant received nonjudicial punishment under Article 15 of the Uniform Code of Military Justice, to include suspended forfeitures and a suspended reduction in rank.

Applicant again attended ADAPT from 2021 to 2022, and he received inpatient treatment for about 29 days. Applicant successfully completed ADAPT, at which he was again diagnosed with alcohol use disorder, severe, with a recommendation that he abstain from alcohol.

In March 2022, while still in ADAPT, Applicant was evaluated at DoD's request by a psychologist, who concluded: "[Applicant] does not appear to meet criteria for any current mental health disorders but has a history of mental health diagnoses including adjustment disorder, generalized anxiety disorder, and depression dating back as early as 2014 and which the service member indicated could have begun as early as 2012." Decision at 3, quoting Government Exhibit (GE) 3 at 3. Although the psychologist did not diagnose Applicant with alcohol use disorder, she noted that he met the criteria for alcohol use disorder, mild, in 2017, and alcohol use disorder, severe, in 2019 and 2021. Concerning Applicant's alcohol consumption, the psychologist concluded:

> Based upon [Applicant's] repeated alcohol use resulting in alcohol related incidents even after fully completing ADAPT twice, his pattern of emotional lability, self-harming behaviors in response to perceived criticism both with and without the use of alcohol, and his continued tendency to blame others, at least in part, for his distress and alcohol use suggest there is evidence of a material deficit in judgment, reliability, and stability. [Applicant's] minimization of alcohol use and the severity of alcohol related incidents and his avoidance of discussing self-harming behaviors until asked by this provider indicate a material defect in trustworthiness. [*Id*. at 4, quoting GE 3 at 3.]

Applicant did not start drinking alcohol until he was 21, but "it eventually took control of him." *Id*. at 4. Following the incident in Saudi Arabia in July 2021, Applicant began participating in Alcoholics Anonymous (AA) and acknowledged his alcoholism. He remained sober from July 2021 until May 2022, when he had one beer. He realized that the beer was a mistake, contacted his sponsor, and has not had a drink since. Applicant credits AA for his continued sobriety. He talks to his sponsor daily and attends meetings three to four times a week.

Applicant submitted letters attesting to his character. A lieutenant colonel who knows Applicant through AA wrote:

> During this period, I regularly maintain in-person and telephonic contact with [Applicant] to discuss sobriety issues through [AA]. I am providing this statement to attest to [Applicant's] character as I observed it during our time participating in AA meetings and meeting with him roughly every month for lunch at [military base] to further discuss sobriety related issues.

> I have many years of experience as a member of AA and [Applicant] has taken our Program seriously and he diligently follows our recommendations. He regularly attends meetings, maintains his accountability, and he is now running his own AA Meetings as a part of his service. [*Id*. at 4–5, quoting Applicant Exhibit (AE) C.]

Applicant submitted numerous other letters attesting to his "excellent performance of duties and strong moral character," from people who are familiar with his history, believe him to be rehabilitated, and recommend him for a security clearance. *Id* at 5. Included in the letters is one from the Staff Judge Advocate (SJA) at Applicant's command, who is aware of Applicant's history as he advised the commander on the nonjudicial punishment. The SJA spoke to Applicant's "commitment to his continued sobriety" and his "professionalism, work ethic, drive, and rehabilitation" before concluding that Applicant "earned his second chance and has done admirably." *Id*. at 5, quoting AE B.

The Judge's Analysis: The Judge's analysis is summarized and quoted below.

Guideline G: Alcohol Consumption

Disqualifying conditions under AG ¶ 22 are established by Applicant's alcohol-related incidents in 2017, 2019, and 2021; his diagnoses of alcohol use disorder, mild, in 2017 and alcohol use disorder, severe, in 2019 and 2021; and his consumption of alcohol after recommendations of abstinence in 2019 and 2021.

The Judge concluded, however, that the alcohol consumption security concerns were mitigated under AG ¶¶ 23(a) and (b).[1]

> Applicant is an admitted alcoholic who went through the ADAPT program three times, but still drank afterwards. Everything does not always work on the first try, and this is particularly true with alcoholics. He was sober from July 2021 until May 27, 2022, when he had one beer. He realized it was a mistake, contacted his sponsor, and has not had a drink since.
>
> Applicant credits AA for his continued sobriety, and he treats that as his therapy. He has a sponsor that he talks to daily, and he attends meetings three to four times a week. He plans on remaining sober one day at a time for the rest of this life. He is proud of his military service and hopes to continue to serve until he can retire. He realizes that a return to drinking can jeopardize that opportunity.

[1] AG ¶ 23(a): so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment; AG ¶ 23(b): the individual acknowledges his pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

> Applicant does not present a perfect case in mitigation. I nonetheless believe that he warrants another chance. I considered the length of his sobriety, and I also considered the strong support of those at his command. I found the character letters, and particularly the letters of the SJA and the lieutenant colonel who attends AA with Applicant, to be helpful. I find that Applicant established a pattern of abstinence, and alcohol consumption no longer casts doubt on his reliability, trustworthiness, and good judgment. [*Id*. at 9.]

Guideline I: Psychological Conditions

The Judge found that disqualifying condition AG ¶ 28(a)[2] is applicable to Applicant's "panic attack" in 2014, during which he stabbed himself in the thigh with a pen, and to Applicant's history of suicidal ideations and self-harming behavior, including in 2019 and 2021. The Judge also determined that Applicant's past diagnosis of major depressive disorder established a disqualifying condition under AG ¶ 28(b),[3] but he declined to apply AG ¶ 28(b) to prior diagnoses of generalized anxiety disorder and adjustment disorder. Additionally, the Judge declined to consider the DoD psychologist's opinion regarding Applicant's judgment and stability as rising to a condition within the meaning of AG ¶ 28(b).

The Judge noted that Applicant—in addition to his alcohol abuse disorder—has mental health issues that include suicidal ideations for about 14 years and repeated self-harming behavior. However, the Judge highlighted, the DoD psychologist found that Applicant does not meet the criteria for any current mental health disorders, his credible testimony that he is doing better is supported by numerous character letters, and there have been no additional incidents "since Applicant got a grip on his alcohol problem in July 2021." *Id*. at 12.

The Judge found that Applicant's mental health conditions are under control and have a low probability of recurrence or exacerbation; that he no longer shows indication of emotional instability; and that there is no indication of a current problem. He determined that mitigating conditions of AG ¶¶ 29(a), (d), and (e)[4] "are partially or completely applicable and sufficient to

[2] AG ¶ 28(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.

[3] AG ¶ 28(b): an opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness.

[4] AG ¶ 29(a): the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan; AG ¶ 29(d): recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by, the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation; AG ¶ 29(e): there is no indication of a current problem.

alleviate any psychological conditions security concerns." *Id.*

Discussion

There is no presumption of error below. The appealing party has the burden of raising and establishing that the Judge committed factual or legal error that is prejudicial. *See, e.g.*, ISCR Case No.19-01689 at 3 (App. Bd. Jun. 8, 2020). In deciding whether the Judge's rulings or conclusions are erroneous, we will review the decision to determine whether: 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. *See, e.g.*, ISCR Case No. 97-0435 at 3 (App. Bd. Jul. 14, 1998).

On appeal, Department Counsel raise four issues: that the Judge's mitigation analysis under Guideline G was arbitrary and capricious as it failed to address Applicant's history of treatment and relapse; that his mitigation analysis under Guideline I was arbitrary and capricious as it ran contrary to the weight of the evidence; that his whole person analysis was arbitrary, capricious, and contrary to law; and that he "erred as a matter of law in failing to apply [AG ¶ 28(b)] to Applicant's adjustment disorder, generalized anxiety disorder, and materially-defective judgment and stability." Appeal Brief (AB) at 12. We find none of Department Counsel's arguments persuasive.

Failure to Apply AG ¶ 28(b)

We turn first to Department Counsel's argument that the Judge erred as a matter of law in declining to find that Applicant's adjustment disorder and generalized anxiety disorder were "conditions" within the meaning of AG ¶ 28(b), which requires "an opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness." Department Counsel's arguments on this issue are perplexing at best.

First, the plain language of AG ¶ 28(b) requires an opinion by a duly qualified mental health professional that an applicant has such a condition. Although the DoD psychologist noted "a history of mental health diagnoses including adjustment disorder, generalized anxiety, and depression dating back as early as 2014," GE 3 at 1, the psychologist does not provide any of the following fundamental details: the identity of the mental health professional who rendered the diagnoses; the qualifications of the mental health professional; the dates of any such diagnoses; and whether she gleaned this diagnostic history from medical records or from Applicant himself. Most importantly, the DoD psychologist herself found in March 2022 that Applicant "does not appear to meet criteria for any current mental health disorder[.]" *Id.* Put simply, the record does not establish the bare minimum requirements of AG ¶ 28(b) for generalized anxiety disorder and adjustment disorder—an opinion by a **duly qualified mental health professional** that Applicant

has either disorder. In advocating for application of AG ¶ 28(b), Department Counsel fail to acknowledge or address these fundamental deficiencies in the Government's position.[5]

Second, Department Counsel's argument regarding psychological diagnoses of security concern runs contrary to controlling policy established by the Director of National Intelligence (DNI). Department Counsel argue at length (AB at 17–22) that the Judge erred when he held that generalized anxiety disorder and adjustment disorder do not present a per se security concern and that he would not apply AG ¶ 28(b) to those diagnoses without a particularized showing "as to how the condition may impair the individual's judgment, stability, reliability, and trustworthiness." Decision at 10. Advocating the contrary position, Department Counsel argue that "their symptomology is such that each presents a Guideline I concern per se." AB at 18. After a discourse on the "symptomology" of each disorder as described in the DSM-5, Department Counsel unilaterally conclude that both disorders are of security concern per se because the "differential diagnoses" are so serious. *Id.* at 19–20. As an example, Department Counsel argues: "No reasonable factfinder could opine that 'bipolar and psychotic disorders' are unlikely to impair judgment, stability, reliability, or trustworthiness. Generalized Anxiety Disorder, which often resembles those disorders, should be treated the same." *Id*. at 20.

This sweeping and surprising argument is inconsistent with current Federal policy. There is an established list of the seven psychological diagnoses that raise security concerns per se. Contrary to Department Counsel's argument, neither generalized anxiety disorder nor adjustment disorder is on that list. In November 2016, DNI issued a memorandum revising the mental health questions in Section 21 of Standard Form 86, the security clearance application (SCA). *See* 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. *See also* ISCR Case No 20-01838 at 6, n. 3 (App. Bd. Dec. 29, 2022). 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. The Judge plainly did not err in his decision that AG ¶ 28(b) is inapplicable to generalized anxiety disorder and adjustment disorder without further elaboration from a psychologist. Department Counsel fail to acknowledge or address the fact that they are urging the Appeal Board to adopt a position contrary to current Federal policy regarding psychological diagnoses.

Putting aside the diagnoses of generalized anxiety disorder and adjustment disorder, we turn next to Department Counsel's argument that the Judge erred in declining to apply AG ¶ 28(b) to the DoD psychologist's opinion in her concluding paragraph that "there is evidence of a material deficit in judgment, reliability, and stability" and "a material defect in trustworthiness." GE 3 at 3. Although the DoD psychologist concluded that Applicant does not meet the criteria for any current mental health disorders, Department Counsel nevertheless argue that her opinion about his judgment and stability rises to the level of a "condition" within the meaning of AG ¶ 28(b). The

[5] The Judge highlighted this issue by noting that "[i]t is unclear if the DoD meant to allege these diagnoses." Decision at 10.

Judge declined to consider her opinion in this regard to be equivalent to a "condition" and instead interpreted that language "as commenting on Applicant's behavior and how that behavior reflected poorly on his judgment, reliability, stability, and trustworthiness." Decision at 11. Department Counsel argues that "[b]ecause Guideline I is concerned with 'psychological conditions,' rather than 'psychological *disorders*,' this conclusion was in error." AB at 21 (emphasis in original). The Judge, however, made explicit findings on this issue, and there is nothing in his decision to suggest that he conflated "psychological conditions" with "psychological disorders." The Judge's conclusion that the psychologist's opinion fell short of a "condition" is firmly grounded in the psychologist's own report, in which she specifically finds no current mental disorders and instead in her concluding paragraph provides a general opinion as to Applicant's judgment and trustworthiness based on his history. Department Counsel's attempts to convert this opinion on judgment and trustworthiness into a psychological condition within the meaning of AG ¶ 28(b) are overreaching and provide no reason for us to disturb the Judge's conclusion to the contrary.

In summary, Department Counsel's argument that the Judge erred as a matter of law in failing to apply AG ¶ 28(b) to Applicant's adjustment disorder, generalized anxiety disorder, and purported "materially defective judgment" is without merit.

Arbitrary and Capricious Mitigation and Whole-Person Analyses

Department Counsel argue that the Judge's mitigation analyses under Guideline I and Guideline G do not consider important aspects of the record and that his whole person analysis is similarly arbitrary and capricious. Here again, we do not find Department Counsel's arguments persuasive.

Regarding Guideline I, Department Counsel argues that the Judge failed to articulate a rational connection between the facts found and the choice made in mitigation and that he arguably rendered a decision so implausible that it cannot be ascribed to a mere difference of opinion. AB at 23–24. To the extent that we understand Department Counsel's argument in this section, they appear to be again combing through the DSM-5 to assess the severity and amenability to treatment of various disorders that were not established under AG ¶ 28(b) and arguing attenuated issues that were neither alleged in the SOR nor inquired into at hearing (*e.g.*, Applicant's failure "to establish whether his present pharmaceutical regimen is a viable long-term solution for his treatable conditions." AB at 24). The Judge entered robust findings on the Guideline I issues and thoroughly detailed his reasoning and analysis. Department Counsel's arguments generally amount to a disagreement with the Judge's weighing of the evidence. A party's ability to argue for an alternative interpretation of the evidence is not sufficient to demonstrate error. *See, e.g.*, ISCR Case No. 19-01400 at 2 (App. Bd. Jun. 3, 2020).

Regarding Guideline G, Department Counsel argues that the Judge erred in his mitigation analysis in that he failed to adequately address Applicant's history of treatment and relapse. Specifically, Department Counsel argues that the Judge failed "to explain convincingly why Applicant's latest period of abstinence" is different from his prior periods of abstinence that ended in relapse. AB at 16. We disagree. The Judge articulated that he considered Applicant's active

participation in AA, which includes talking to his sponsor daily and attendance at meetings three to four times a week; the length of his sobriety including the totality of his periods of abstinence; his current abstinence; and the strong support of those at the command, which included character references from the command staff judge advocate and from a senior officer who attends AA meetings with Applicant. These facts upon which the Judge relied are amply supported in the record.[6] Although Department Counsel may again disagree with the Judge's weighing of the evidence, we find no reason to conclude that the Judge erred in his mitigation analysis under Guideline G. Additionally, the record shows that the Judge complied with the requirements of the Directive in his whole-person analysis by considering all relevant evidence in reaching his decision. *See, e.g.*, ISCR Case No. 19-01400 at 2.

Department Counsel failed to establish the Judge committed harmful error. None of their arguments are enough to rebut the presumption that the Judge considered all of the record evidence or sufficient to demonstrate the Judge weighed the evidence in a manner that was arbitrary, capricious, or contrary to law. The Judge's decision is sustainable on the record.

The decision is **AFFIRMED**.

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

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

[6] At hearing and on appeal, Department Counsel question Applicant's involvement in AA. During cross-examination at hearing, Department Counsel called on Applicant to recite the 12 steps of the program and then questioned him sharply when Applicant conflated Step 5, which requires one to admit one's wrongs to another person, with Step 9, which requires one to make amends with others. On appeal, Department Counsel represent that "Applicant was unable to answer basic questions about AA" and proclaim Applicant's conflation of Steps 5 and 9 to be "a discrepancy [Applicant] could not explain." AB at 9. To the contrary, the Appeal Board notes that the record—to include Applicant's testimony at hearing—satisfactorily supports the Judge's findings and conclusions regarding Applicant's involvement in AA.

Separate Opinion of Board Member Allison Marie

I would reverse the Decision below. The Majority focuses much of its discussion on what it considers to be several unsupported arguments made by the Government. In doing so, however, it overlooks legitimate errors in the Judge's analysis and the very serious and insurmountable concerns about Applicant's security clearance worthiness. For the following reasons, I respectfully dissent.

Guideline G Analysis

As a result of Applicant's alcohol-related incidents in 2017, 2019, and 2021, his diagnoses of mild alcohol use disorder in 2017 and severe alcohol use disorder in 2019 and 2021, and his disregard of recommendations to abstain from alcohol following his multiple ADAPT enrollments, the Judge found five of the seven Guideline G disqualifying conditions applicable. He concluded, however, that concerns regarding Applicant's alcohol consumption were mitigated through application of AG ¶¶ 23(a) and (b) due to Applicant's most recent length of sobriety, his participation in AA, and favorable character evidence provided by his command. On appeal, the Government contends that the Judge's mitigation analysis failed to adequately address Applicant's history of alcohol treatment and relapse.

The extent to which security concerns are mitigated through the passage of time is a question that must be resolved based on the evidence as a whole. *See, e.g.*, ISCR Case No. 18-01926 at 4 (App. Bd. Sep. 20, 2019). Here, the record reflects the following: during and after his 2017 enrollment in ADAPT, Applicant abstained from alcohol for about ten months before relapsing (Tr. at 38); while participating in ADAPT a second time in 2019, Applicant failed to comply with his plan for abstinence when he drank a few hours after an ADAPT appointment and was hospitalized for alcohol consumption (GE 3 at 2-3); Applicant was advised to abstain from alcohol following his 2019 ADAPT enrollment and remained sober for nearly two years before relapsing (Tr. at 39-40); Applicant was again advised to abstain from alcohol following his third ADAPT enrollment in 2021 and remained sober for about one year before having a drink in May 2022 (Tr. at 48). As of his June 2023 hearing, Applicant was sober for about 13 months.

The Judge did not address Applicant's prior periods of sobriety and multiple relapses in his analysis other than to comment that "[e]verything does not always work on the first try, and this is particularly true with alcoholics." Decision at 9. This analysis was deficient considering the record as a whole and, in particular, that Applicant is well beyond his "first" try. The Judge's failure to convincingly explain why Applicant's current period of sobriety is long enough or otherwise demonstrates a clear and established pattern of abstinence in light of his multiple prior – *and sometimes lengthier* – unsuccessful periods of sobriety was in error. *See, e.g.*, ISCR Case No. 18-01926 at 4; ISCR Case No. 18-02526 at 3-4 (App. Bd. Dec. 20, 2019).

"The Board *must* consider not only whether there is evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings." ISCR Case No. 97-0727 at 3 (App. Bd. Aug. 3, 1998) (emphasis added). Based

on his history of treatment, sobriety, and relapse, Applicant's latest 13 months of sobriety and decreasing participation in AA[7] are insufficient to establish that future alcohol-related incidents are unlikely to recur (AG ¶ 23(a)) or a pattern of abstinence (AG ¶ 23(b)) such that alcohol consumption no longer raises concerns about his reliability, trustworthiness, and good judgment.

Guideline I Analysis

The Judge found disqualifying condition AG ¶ 28(a) applicable to Applicant's "panic attack" in 2014, wherein he stabbed himself repeatedly in the thigh with a pen, as well as Applicant's 14-year history of suicidal ideations and repeated self-harming behavior. He declined to apply disqualifying condition AG ¶ 28(b) to the DoD psychologist's March 2022 opinion that Applicant's past and ongoing conduct evinced material deficits and defects in his judgment, reliability, stability, and trustworthiness. With no incidents since July 2021, Applicant's testimony that "he is doing better," and "the lay evidence, by way of the character letters, [that] supports that testimony," the Judge found mitigating conditions AG ¶¶ 29(a), (d), and (e) were "sufficient to alleviate any psychological conditions security concerns." Decision at 12.

Failure to Apply AG ¶ 28(b) to Psychologist's Opinion

The DoD psychologist identified Applicant's past diagnoses but declined to provide a formal diagnosis following the March 2022 evaluation. Still, she opined that,

> Based upon [Applicant's] repeated alcohol use resulting in alcohol related incidents even after fully completing ADAPT twice, his pattern of emotional lability, self-harming behaviors in response to perceived criticism both with and without the use of alcohol, and his continued tendency to blame others, at least in part, for his distress and alcohol use suggest there is evidence of a material deficit in judgement, reliability, and stability. [Applicant's] minimization of alcohol use and the severity of alcohol related incidents and his avoidance of discussing self-harming behaviors until asked by this provider indicate a material defect in trustworthiness.

Id. Due to Applicant's "reported lack of gaining any significant benefit from therapy and his continued tendency to blame others for distress, *these potential material defects remain constant*." *Id*. at 2 (emphasis added). Despite the foregoing, the Judge found AG ¶ 28(b) inapplicable to the psychologist's opinion, noting "I do not find that the opinion by the psychologist that Applicant has poor judgment, reliability, stability, and trustworthiness equates to an opinion by the psychologist that he has 'a condition that may impair judgment, stability, reliability, or trustworthiness,' as many people have poor judgment, stability, reliability, and trustworthiness,

[7] Applicant began attending AA in September 2021. Tr. at 49. As of March 2022, he was attending AA six or seven times per week and expressed his intention to continue doing so. GE 3 at 3. By June 2023, fifteen months later, he had reduced his AA participation to three or four times per week. Tr. at 50-51.

without having a 'condition.'" Decision at 11. The Government argues that the Judge's failure to apply AG ¶ 28(b) to the psychologist's opinion was in error.

In his AG ¶ 28(b) analysis, the Judge appears to equate the term "condition" with "diagnosis." The Majority follows suit. This narrow interpretation is contrary to the plain language of the Directive, which distinguishes between diagnoses and conditions throughout the Guidelines and makes clear that a "formal diagnosis of a disorder is not required for there to be a concern under [Guideline I]." *See* AG ¶ 27. Where the Directive contemplates the necessity of a *diagnosis* for a disqualifying condition to apply, it states so explicitly. Indeed, a diagnosis is specifically required under multiple disqualifying conditions throughout the Directive, including elsewhere in Guideline I.[8] Conversely, AG ¶ 28(b) requires "an opinion by a duly qualified mental health professional that the individual has a *condition* that may impair judgment, stability, reliability, or trustworthiness." (Emphasis added.) Exclusion of the word "diagnosis" from AG ¶ 28(b) is instructive that "condition" is not intended to be synonymous with "diagnosis," and instead contemplates something broader.

The word "condition" is defined as a "state of being" or, more specifically, "a usually defective state of health."[9] Under its plain language, AG ¶ 28(b) does not require a *diagnosed* condition, but rather contemplates an applicant's state of psychological health. When a qualified mental health professional opines that an applicant's current state is such that his judgment, stability, reliability, or trustworthiness may be impaired, that is sufficient to invoke AG ¶ 28(b), even absent a formal diagnosis.[10]

Here, the DoD psychologist affirmatively opined that Applicant's history of alcohol use issues, pattern of emotional lability and self-harming behaviors, tendency to blame others for his distress and alcohol use, minimization of his alcohol use and the severity of related incidents, and avoidance of discussing his self-harming behaviors all evidence material deficits or defects in judgment, reliability, stability, and trustworthiness. GE 3 at 3. This opinion was sufficient to invoke application of AG ¶ 28(b), and the Judge erred in declining that analysis.

Failure to Fully Consider Psychologist's Opinion

The Government also argues that it was arbitrary and capricious for the Judge to reject the psychologist's adverse opinion as a security concern under Guideline I because, in doing so, he

[8] *See* AG ¶ 22(d) ("diagnosis by a duly qualified medical or mental health professional . . . of alcohol use disorder"); AG ¶ 22(f) ("alcohol consumption, which is not in accordance with treatment recommendations, after a diagnosis of alcohol use disorder"); AG ¶ 25(d) ("diagnosis by a duly qualified medical or mental health professional . . . of substance use disorder"); AG ¶ 28(d) ("failure to follow a prescribed treatment plan related to a diagnosed psychological/psychiatric condition that may impair judgment, stability, reliability, or trustworthiness").

[9] *Condition*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2019).

[10] The Judge's discretion does not extend to ignoring the plain language of the Directive. *See, e.g.*, ISCR Case No. 99-0557, 2000 WL 1247736 at *2 (App. Bd. Jul. 10, 2000).

overlooked significant record evidence and the purpose of the security clearance adjudication process. The Majority does not address this argument; however, it has merit.

The Judge discounted the DoD psychologist's concerns about Applicant's judgment, reliability, stability, and trustworthiness, and instead relied upon her evaluation as evidence *in favor* of Applicant's suitability for security clearance eligibility. Specifically, the Judge found "the most persuasive evidence" in his Guideline I analysis "to be the evaluating psychologist's opinion that '[Applicant] does not appear to meet criteria for any current mental health disorders' and the absence of any security significant behavior since Applicant embraced AA and his sobriety." Decision at 12 (quoting GE 3 at 1). This analysis is problematic for several reasons. First, it emphasizes Applicant's remedial *alcohol* conduct as mitigating of his *mental health* concerns and thereby conflates the two issues despite that they are – as the Board made clear in its previous decision – separate and distinct. *See* USAF-M No. 23-00056-R at 5 (App. Bd. Aug. 31, 2023).

Moreover, in reaching the foregoing conclusion, the Judge failed to explain his reliance on one passage of the psychologist's evaluation as "the most persuasive evidence," while simultaneously disregarding that same psychologist's multiple and weighty concerns about Applicant's current trustworthiness and stability. A judge's decision must be a commonsense determination based on consideration of the evidence as a whole, not just those pieces of evidence that support his final decision. *See* AG ¶ 2(c); ISCR Case No. 94-0964, 1996 WL 648762 at *3 (App. Bd. Jul. 3, 1996). Even if it was appropriate for the Judge to decline to apply AG ¶ 28(b) to the opinion about Applicant's judgment, reliability, stability, and trustworthiness, that opinion remains substantial evidence about the characteristics expected of those entrusted with access to classified information.

Curiously, the Judge does not challenge the psychologist's opinion about Applicant's material defects, but rather embraces it in his analysis for why AG ¶ 28(b) should not apply, despite that "Applicant has poor judgment, reliability, stability, and trustworthiness." Decision at 11. By not analyzing this opinion, even independently from AG ¶ 28(b), the Judge is essentially concluding that, as long as there is no diagnosis associated, it is acceptable for security clearance holders to have poor judgment, reliability, stability, and trustworthiness. Such a conclusion is contrary to the purpose of DOHA adjudications and undermines the Directive's essential purpose of protecting classified information. *See* ISCR Case No. 16-02592 at 3 (App. Bd. Jan. 31, 2018); ISCR Case No. 01-24356, 2003 WL 21430899 at *3 (App. Bd. Feb. 26, 2003).

Additionally, the psychologist – the only mental health professional to offer an opinion in this case – provided detailed concerns about Applicant's mental health status, which also warranted evaluation in the Judge's decision. Although a judge is not required to discuss each and every piece of record evidence, his failure to discuss important aspects of a case is error. *See, e.g.*, ISCR Case No. 03-07874 at 4 (App. Bd. Jul. 7, 2005). Here, the Judge failed to mention, let alone discuss those legitimate concerns, which include that: Applicant has had numerous overseas deployments and assignments cancelled as a result of his self-harming behavior; alcohol use disorder, which was diagnosed as recently as about eight months prior to the March 2022 evaluation, is "often a lifetime illness prone to relapse;" while alcohol contributes to Applicant's

poor decision-making, he has also demonstrated self-harm with no indications of alcohol use; and there is a high possibility that Applicant could decompensate significantly without treatment. GE 3 at 1-3. By not acknowledging these concerns, the Judge failed to sufficiently analyze how Applicant's lengthy history of mental health issues – including serious manifestations thereof in 2014, 2017, 2019, and 2021, some of which occurred with little or no alcohol consumption – are mitigated other than through the mere and relatively brief passage of time without incident and relatively recent cessation of drinking.

Misapplication of Guideline I Mitigating Conditions

The Government next argues that the Judge's Guideline I mitigation analysis is arbitrary, capricious, and incomplete. Other than to note that the Judge "entered robust findings on the Guideline I issues and thoroughly detailed his reasoning and analysis," the Majority summarily concludes that the Government's argument amounts to a disagreement with the Judge's weighing of the evidence. This conclusory rejection leaves the Government's legitimate argument substantively unaddressed.

The Judge found three mitigating conditions "partially or completely applicable," including AG ¶¶ 29(a), (d), and (e). Decision at 11-12. He subsequently failed, however, to sufficiently analyze those factors in light of relevant evidence that contradicts their application.

AG ¶ 29(a) affords mitigation when both "the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan." During the March 2022 evaluation, the DoD psychologist referred Applicant for continued mental health treatment, including medication management. GE 3 at 3. This recommendation was made separately and distinctly from Applicant's express intention to continue attending AA six or seven times per week. *Id*. As of the hearing, Applicant was engaged only in medication management with his general practitioner, participated in no other mental health treatment, and had reduced his AA participation by half. Tr. at 50-51, 53-54. The Judge appears to have credited Applicant's AA participation as mental health treatment, noting that Applicant "treats that as his therapy." Decision at 9. This credit, however, is inexplicable and unsupported by anything in the record or Appeal Board caselaw. Applicant's failure to engage in mental health treatment – something expressly recommended by the psychologist as part of Applicant's treatment plan – renders mitigating condition AG ¶ 29(a) inapplicable.

AG ¶ 29(d) is a three-prong condition that affords mitigation when "the past psychological/psychiatric condition was temporary, the situation has been resolved, and the individual no longer shows indications of emotional instability." Here, the analysis fails at the first prong because the record is devoid of evidence that Applicant's conditions of security concern were temporary. To the contrary, Applicant's lengthy history of mental health issues and diagnoses is well-evidenced, including suicidal ideations continuing from 2007 to as recently as September 2021, and repeated violent self-harming behaviors from at least 2014 to as recently as June 2021. Moreover, the DoD psychologist opined explicitly about the current and ongoing nature of those

issues if left untreated. The Judge's conclusion that Applicant's mental health concerns were "temporary" is unsupported by the record and therefore application of AG ¶ 29(d) was erroneous.

Finally, AG ¶ 29(e) affords mitigation when "there is no indication of a current problem." The Judge appears to rely on the passage of less than two years without a reported incident and the support of Applicant's command to conclude that Applicant's mental health concerns are not currently a problem. In doing so, however, the Judge disregarded unfavorable record evidence, including the psychologist's concerns about material defects in Applicant's judgment, reliability, stability, and trustworthiness, and her opinions that those material defects *remain constant* and there is a high possibility that Applicant could decompensate significantly without ongoing treatment. Judges have considerable latitude when applying disqualifying and mitigating conditions under the Directive; however, that discretion is not unlimited. *See, e.g.*, ISCR Case No. 98-0611, 1999 WL 33127159 at *1 (App. Bd. Jun. 3, 1999). In light of the record, less than two years without incident is insufficient to establish mitigation under AG ¶ 29(e).

Whole-Person Concept

The Judge's whole person analysis failed to consider significant contrary evidence. He observed that Applicant "was sober from July 2021 until May 26, 2022, when he had one beer[,] . . . realized it was a mistake, contacted his sponsor, and has not had a drink since," that he "plans on remaining sober one day at a time for the rest of his life," and that "there have been no additional [mental health] incidents since Applicant got a grip on his alcohol problem in July 2021." Decision at 12. Generally speaking, promises of future good behavior carry less weight than "a track record of reform and rehabilitation." ISCR Case No. 06-17541 at 4 (App. Bd. Jan. 14, 2008). This is especially so in light of Applicant's multiple prior attempts to abstain, followed by resumed drinking.

The remainder of the Judge's whole person analysis was based on favorable character references, which the Judge acknowledges as "lay evidence."[11] "There is some point at which evidence, though it exists, becomes so slight and so thoroughly outweighed by contrary evidence, that it would be an abuse of discretion to base a decision upon it." *Lauvik v. I.N.S.*, 910 F.2d 658, 660 (9th Cir. 1990). For the reasons already addressed, such is the case here. In total, Applicant has had four significant incidents of concern since 2014, two of which occurred with admitted alcohol interaction, one of which occurred after having consumed only two beers, and one of which occurred without any known alcohol consumption; has completed mandatory ADAPT three times; and has unsuccessfully attempted abstinence three times for periods ranging from 10 months to two years. The favorable evidence relied upon by the Judge is too scant to overcome the concerns raised by Applicant's longstanding, and currently largely unaddressed, mental health concerns.

[11] The Judge highlighted two letters as particularly helpful. *See* Decision at 9 (citing AE B; AE C). It bears noting that the authors of those letters met Applicant after he returned to the U.S. following the incident overseas in July 2021, and therefore had each known Applicant for less than two years as of their letters of support.

Conclusion

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). "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). A favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information. *See* AG ¶ 2(b). In the instant case, the record discloses many reasons to doubt Applicant's current judgment and reliability and to conclude that he has failed to meet his burden of persuasion regarding mitigation. The Judge's analysis failed to articulate a satisfactory explanation for its conclusions, failed to consider important aspects of the case, and ran contrary to the weight of the record evidence. Furthermore, the record evidence viewed as a whole is not sufficient to mitigate the Government's security concerns under the *Egan* standard. Accordingly, I would reverse the Judge's decision.

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