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: September 19, 2025

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 national security eligibility. The Government appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

On its first appeal, the Government argued that the Judge mis-weighed 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. On October 17, 2024, the Board remanded the case to the Judge for clarification on his findings and conclusions. We

noted, "The Judge may *sua sponte* or upon motion of either party reopen the record to better address the identified issues." On July 8, 2025, the Judge issued his decision on remand without reopening the record and again granted Applicant national security eligibility. The Government again appealed. For the reasons stated below, we reverse the Remand Decision.

Judge's Procedural Ruling

On November 18, 2024, the Government moved to reopen the record in the case to submit new evidence and have another hearing with new witness testimony. However, the Judge found that the Government's request "did not summarize the proffered testimony of the witnesses or otherwise offer specific enough information to warrant a new hearing. The Government did not offer affidavits from witnesses or a new mental-health evaluation." Remand Decision at 2. As a result, the Judge denied the motion for a hearing.[1]

Judge's Findings of Fact

Applicant disclosed a history of mental health treatment, beginning from when she was prescribed anti-depressant medication as a teenager after her brother was killed in a car accident. In about 2002, Applicant saw a therapist for depression after she lost her job and was prescribed anti-depressant medication, but she later terminated the relationship and medication after she felt better. Applicant stated that she has experienced depression at times in her life but asserted that she was never depressed without a valid reason, such as death of a loved one or job loss. She has never been hospitalized, and she asserted that she has never had a manic episode and that no one has ever expressed concern that she was manic or unstable.

Following a job loss in about 2011, Applicant was depressed and sought treatment with medication through a psychiatrist, Dr. L. Applicant met with Dr. L on about a monthly basis for the first year while they identified an appropriate combination of medications, and they later met quarterly for medication management. Dr. L prescribed anti-depressant Wellbutrin and mood stabilizer Lamictal, as well as anti-anxiety medications Klonopin and Buspar for use as needed.

[1] In our Remand Order, we noted, "[t]he Judge may *sua sponte* or upon motion of either party reopen the record to better address the identified issues." Remand Order at 8. On October 23, 2024, the Government inquired if the Judge intended to reopen the record and, if not, indicated their intention to move to do so. The Judge responded the same day that he would let the parties know how he planned to proceed "in the next week or so." Second Appeal Brief, Attachment 1 at 4. Having received no response, on November 18, 2024, the Government "formally request[ed] that the record be re-opened in this matter for submission of new evidence and testimony." *Id*. On December 12, 2024, the Judge informed the parties that he could "address the issues raised by the Appeal Board with the current record" and denied the Government's request to reopen. *Id*. at 3. On appeal, the Government contends the Judge erred by not reopening the record. Whether the Judge's denial of the Government's request to reopen was error is a complicated matter under the facts of this case and, considering our determination that reversal is appropriate, ultimately need not be substantively addressed. The matter of reopening a record generally, however, merits brief discussion.

The Board has in some prior cases required a showing of good cause to reopen the record on remand, but only after such a "good cause" standard had been articulated in the remanding order. *See* ISCR Case No. 02-12199 at 3 (App. Bd. Aug. 8, 2005). In the instant case, the Board did not articulate a standard under which the Judge should consider the Government's request to reopen, leaving the Judge's obligation to reopen ambiguously permissive. Moving forward, in the absence of more specific language in the Board's remand directive, a party seeking to reopen a case's record on remand should be expected to offer good cause for the judge's consideration in the request.

Outside of the initial 30-minute visit, all of Applicant's appointments with Dr. L lasted for about five to ten minutes. Applicant testified that Dr. L conducted no testing, gave no formal diagnosis, and never provided therapy or counseling.

Over the subsequent years, Applicant requested changes to her medications and dosages to find what worked best for her. In 2015, she felt the medications were not improving her quality of life and, "knowing that she could not just stop taking medication," she worked with Dr. L to successfully wean off Wellbutrin. *Id*. at 4. Applicant resumed taking Wellbutrin for about three months after her dog died in July 2020, but she has not used the medication since that time.

Over time, Applicant grew less satisfied with Dr. L's treatment, believing that he was putting insufficient effort into identifying a long-term solution, and began favoring advice and support from other medical professionals, including her primary care physician, her mother with 40 years of experience as a registered nurse, and her best friend with 20 years of experience as a pharmacist. Applicant consulted with her preferred care team about her rheumatoid arthritis and learned that her prescribed mood stabilizer, Lamictal, could negatively interact with her arthritis medication. In June 2021, Applicant told Dr. L that she was discontinuing the mood stabilizer and that she would contact him if needed in the future. Applicant had no further contact with Dr. L.

In January 2022, about seven months after ending her relationship with Dr. L and in conjunction with her request for national security eligibility, Applicant was evaluated by Dr. B, a DoD-connected psychologist. Dr. B's final report identified that her findings and diagnosis were based on Applicant's Personality Assessment Inventory, which was completed online prior to their interview, the interview with Applicant, Dr. B's post-interview telephonic consult with Dr. L, and other unidentified "available records."

Dr. B summarized her phone consult with Dr. L in the final report. Regarding Applicant's diagnosis, Dr. L opined that Applicant was most consistent with Bipolar II disorder or a mixed bipolar condition, but that he was unsure of Applicant's most accurate diagnosis because he was focused on treating her symptoms. Dr. L had never seen evidence of Applicant having a full manic episode but observed some hypomania. Dr. B found that Applicant had diagnostic history of bipolar disorder and adjustment disorder with anxiety, observed signs of hypomania during the interview, endorsed a current diagnosis of bipolar disorder, and concluded that Applicant's prognosis is poor and her judgment, reliability, and trustworthiness are likely to be impaired.

Applicant testified that "Dr. B was cold, judgmental, and condescending to her" during the evaluation, which she contended lasted 30 minutes, and that Dr. B repeatedly inquired about Applicant's decision to discontinue taking Lamictal and treatment with Dr. L. Remand Decision at 5. Applicant came to have the impression that she would be unable to keep her job without taking Lamictal, and so she resumed in February 2022 under the medication management of her primary care physician.

In May 2022, Applicant sought a "fresh evaluation and professional opinion" and consulted with Dr. P, a Doctor of Psychology. *Id*. at 10. For her evaluation with Dr. P, Applicant took the Minnesota Multiphasic Personality Inventory 2 test (MMPI-2) and asserted that she met with Dr. P in person for several hours for a biopsychosocial assessment. Dr. P found that Applicant's

personality was within normal limits, diagnosed her with adjustment disorder with anxiety, and found no current evidence of bipolar disorder.[2] Dr. P concluded that Applicant's prognosis was good, and she is reliable, stable, and trustworthy. The Judge found that "Dr. B's report contains errors that undermine her findings" and that Dr. P's report contained "one error [that] does not undermine the findings of the report." *Id*. at 7, 10.[3]

Multiple witnesses testified on Applicant's behalf and opined favorably about her professionalism, reliability, and trustworthiness, and noted that they had not observed her act in an unstable or hypomanic way. Applicant also submitted into evidence 11 letters of reference from work colleagues, which provided similar favorable opinions of her.

Discussion

On appeal, the Government argues that the Judge's Remand Decision is arbitrary and capricious, as he erred: by 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) and (b); and in mis-applying the Whole-Person Concept. The Government also argues that the Judge was biased and failed to give the parties proper notice that he was taking Administrative Notice. The Government's arguments have merit.

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 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. 95-0600, 1996 WL 480993 at *3 (App. Bd. May 16, 1996) (citing *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

When an appeal issue raises a question of law, the Board's scope of review is plenary. *See* DISCR OSD Case No. 87-2107, 1992 WL 388439 at *3-4 (App. Bd. Sep. 29, 1992) (citations to federal cases omitted). If an appealing party demonstrates factual or legal error, then the Board must consider the following questions: (1) Is the error harmful or harmless?; (2) Has the nonappealing party made a persuasive argument for how the judge's decision can be affirmed on alternate grounds?; and (3) If the judge's decision cannot be affirmed, should the case be reversed or remanded? *See* ISCR Case No. 02-08032 at 2 (App. Bd. May 14, 2004).

[2] Omitted from the Judge's Remand Decision was the full context of this portion of Dr. P's diagnostic recommendation: "At this time, the MMPI-2 does not indicate any specific clinical disorders. In essence, there is no evidence that she has a current diagnosis of Bipolar Disorder. *This does not dispute the psychiatrist's diagnosis*." Applicant Exhibit (AE) I at 2 (emphasis added).

[3] These purported errors ascribed to both mental health professionals are more accurately evidentiary conflicts and inconsistencies in Applicant's reporting, which are addressed more fully, below.

Official Notice

We have long held that, under the concept of official notice, "the parties are entitled to a meaningful opportunity to respond to an agency's decision to take official notice of facts that can be crucial to the determination of issues before it." DISCR Case No. 90-1550 at 7 (App. Bd. Mar. 25, 1992). Here, the Judge *sua sponte* took official notice of the Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) and the criteria for Bipolar II disorder, focusing specifically on the criterion for a Hypomanic Episode, which he then used to discredit Dr. B's diagnostic impressions. However, the Judge did not notify either party of his decision to take notice of this information or give them a meaningful opportunity to respond. This was in error. It is compounded by the errors discussed below.

Guideline I Analysis

We turn next to the Government's arguments about the Judge's application of the disqualifying and mitigating conditions under Guideline I. The Government first argues that the Judge's finding that AG ¶ 28(d)[4] was not established was arbitrary, capricious, and contrary to law, and is unsupported by the totality of the record evidence. We agree.

The Judge's analysis under Guideline I found that Dr. B's report established AG ¶¶ 28(a)[5] and (b),[6] but that AG ¶ 28(d) was not established. He provided no analysis for his application of AG ¶¶ 28(a) and (b), other than to note that these disqualifying conditions applied "despite the errors and omissions" in Dr. B's report. Remand Decision at 14. He did not identify the behavior of concern in applying AG ¶ 28(a). However, we note that his decision to apply AG ¶ 28(a) contradicts his statement in his mitigation analysis that "there is no evidence showing that Applicant has been erratic, unreliable, untrustworthy, had incidents at work or with law enforcement, or behaved in a way that was problematic." *Id*. at 16.

The Judge then found that AG ¶ 28(d) was not established because there were "no medical records or documentation in this case showing a prescribed treatment plan that Applicant failed to follow." *Id*. at 14. He further noted that "[t]here was no evidence that Applicant failed to take prescribed medication or attend required counseling sessions." *Id*. In doing so, he arbitrarily discounted Applicant's own testimony at the hearing, which reflects:

> DEPARTMENT COUNSEL: At one point, you -- toward the -- in June of -- in June of 2020, you had an office appointment with Dr.

[4] 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, including, but not limited to, failure to take prescribed medication or failure to attend required counseling sessions.

[5] 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.

[6] 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.

> [L]. And you had told him that you were going to discontinue Lamictal. Did he try to dissuade you not to do that?
>
> APPLICANT: Yeah, I believe we discussed this earlier. He may have said that, I don't advise that; I don't think that's a good idea. But there was no discussion about it. It was not adamant on it. He did not say, you know -- he didn't -- I would've never thought about it again, unless it had been brought up when I had my evaluation with Dr. [B]. It would've -- that five-minute conversation would've never crossed my mind again.
>
> . . .
>
> Other than him saying, you know, I don't think that's a good idea, no. And I assured him, like I sought him out in the beginning, if at any point, I felt that things were going sideways or going down or going up, that I would have no problem to call and see him again.

Transcript (Tr.) at 79-80. Applicant's testimony was supported and amplified by Dr. B's evaluation and report, and in particular her consultation with Dr. L:

> To the contrary, Dr. [L] stated today that [Applicant] presented to his office for an appointment in June 2021 and informed him that she had discontinued Lamictal. He attempted to educate her on the dangers of not taking a mood stabilizer for her condition, but she refused to resume pharmacotherapy for bipolar disorder. She did accept prescriptions of Klonopin and buspar during that appointment. He requested that she return in October 2021 for follow-up, but [Applicant] has not returned to see her psychiatrist since the June 2021 appointment.

Government Exhibit (GE) 4 at 3. The record supports application of AG ¶ 28(d), as Applicant stopped taking Lamictal against the advice of Dr. L. The Judge's finding to the contrary ignored this record evidence, which was in error.

Moving to the Judge's application of mitigating conditions, we find his analysis incomplete and unsupported by the record evidence. In applying AG ¶¶ 29(a) and 29(b),[7] the Judge only addressed Applicant's history of anxiety and depression and found that these conditions are readily controllable with treatment. In doing so, he blatantly ignored the record evidence that Applicant was diagnosed and treated for some version of bipolar disorder, as discussed below. He further erroneously found that she "consistently took her medication and attended her appointments with Dr. L," despite the evidence discussed above to the contrary. Remand Decision at 15. The Judge

[7] AG ¶¶ 29: (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.

found that, "[i]n this case, the most reliable account of Applicant's mental health history and treatment is her own testimony." *Id.* at 16. Yet he fails to consider significant contrary record evidence and evidentiary inconsistencies, including those found throughout Applicant's own disclosures.

While the Judge's analysis focused on purported inaccuracies in Dr. B's evaluation, the record reflects multiple inconsistencies in Applicant's statements as made to all three doctors who evaluated her in 2022 and at other points during her national security adjudication. These include but are not limited to variances in reporting of her past diagnoses and medication and treatment history; variances in the milligrams of Lamictal she was prescribed;[8] variances in her reason for resuming Lamictal;[9] and variances in the details of her DUI. When conflicts exist within the record, a judge must weigh the evidence and resolve such conflicts based upon a careful evaluation of factors such as the evidence's "comparative reliability, plausibility and ultimate truthfulness." ISCR Case No. 05-06723 at 4 (App. Bd. Nov. 14, 2007). Here, the Judge was required to weigh the conflicting evidence and articulate a sustainable rationale for resolving it – here, universally – in Applicant's favor. Considering the record as a whole and specifically Applicant's other reporting inconsistencies, we see no reasonable and sustainable way for him to have done so.

Another significant factor in the Judge's favorable analysis was his finding that Applicant presented sufficient evidence to rebut "that she has bipolar disorder." Remand Decision at 15. Contrary to that finding, a close review of the record leaves no doubt that Applicant was diagnosed with and treated for bipolar disorder by Dr. L, even though the type was not specified with reference to the DSM. In her Answer to the SOR, Applicant acknowledged that she treated with Dr. L from approximately 2010 to 2021, and that, while she "has had a treatable condition and successfully and willingly treated it in the past, [she] is no longer in need of continued treatment for Bipolar Disorder." SOR Response at 7. She separately acknowledged that she had a "previous diagnosis of Bipolar Disorder and wished to reevaluate." *Id.* at 8.

The diagnosis was further substantiated by Applicant's Answers to Interrogatories, in which she noted, "I have and am currently taking Lamictal (50 mg) for mood swings. Although it has never been officially diagnosed or any tests performed, *it has been suggested I may be bipolar*." GE 2 at 14 (emphasis added). Applicant also disclosed her past bipolar disorder diagnosis to Dr. P during the evaluation on May 12, 2022. In his report, Dr. P noted that Applicant "admits that she was treated for Bipolar Disorder by a local psychiatrist" and that the "diagnosis of Bipolar Disorder from the psychiatrist was approximately ten years ago, and she was being treated successfully."

[8] For example, Applicant reported in her March 2022 interrogatory response that her prescription upon resuming Lamictal the prior month was for 50 milligrams "for mood swings." GE 2 at 14. Two months later, however, in her May 2022 evaluation with Dr. H, a board-certified addiction and internal medicine doctor, Applicant reported that she started on 100 milligrams when she resumed the medication. AE J at 1.

[9] For example, Applicant reported to Dr. H that she felt "subpar" after she weaned off Lamictal and, when she decided to resume the medication in February 2022, she "consulted another physician as her insurance had changed and required a change of provider." AE J at 1. At hearing, however, Applicant testified that her decision to discontinue treatment with Dr. L was driven by her opinion that the relationship had become unproductive and that she was "an easy cash cow" for him, and her increasing reliance on support from other medical professionals, including her general practitioner. Tr. at 56, 59-61. She also explained that her motivation for resuming the medication in February 2022 was the impression that she would be unable to keep her job without it.

AE I at 1. Dr. P also opined: "In essence, there is no evidence that she has a current diagnosis of Bipolar Disorder. *This does not dispute the psychiatrist's diagnosis*." *Id*. at 2 (emphasis added). His assessment of Applicant was that "[t]he MMPI assessment actually indicates no specific disorder of any kind." *Id*. at 3. We note that Dr. P's report makes no mention of the fact that Applicant had resumed taking Lamictal prior to taking the MMPI, the effect that such medication would have on the accuracy of the evaluation, or the diagnostic implication of her resuming a medication prescribed to address mood swings and, more specifically, bipolar disorder.

We recognize that Dr. B's evaluation had significant room for improvement. We previously noted that "Dr. B's generic diagnosis of 'bipolar disorder' is not a diagnosis 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." Remand Order at 7-8. However, we also note that neither Security Executive Agent Directive 4, nor Appeal Board precedent require a diagnosis under the DSM to raise concerns under this adjudicative guideline. *See* ISCR Case No. 01-02046 at 3 (App. Bd. May 22, 2003). Instead, the judge must consider all of the record evidence and weigh it accordingly. Here, the Judge's finding that "Applicant's testimony and the two medical reports she submitted in evidence rebut Dr. B's diagnosis that she has bipolar disorder" overlooks the evidence that she was diagnosed with some form of bipolar disorder and was treated for it for at least ten years by Dr. L. Remand Decision at 15.

The Board will not disturb a judge's weighing of the record evidence unless there has been a showing that the judge acted in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 00-0621 at 3 (App. Bd. Jan. 30, 2002). We have addressed conflicting expert opinions in the past, noting that a judge "is neither compelled to accept a DoD-required psychologist's diagnosis of an applicant nor bound by any expert's testimony or report. Rather, the Judge has to consider the record evidence as a whole in deciding what weight to give conflicting expert opinions." ISCR Case No. 19-00151 at 8 (App. Bd. Dec. 10, 2019). However, the Judge here failed to consider the whole record when he discounted Applicant's previous admissions of a ten-year treatment with Lamictal and prior diagnosis of bipolar disorder. The Judge then improperly elected to focus only on the diagnoses of anxiety and depression in his mitigation analysis. In doing so, he failed to articulate a satisfactory explanation for his conclusions that Applicant successfully met her burden to mitigate the Government's concerns and that she should be eligible for a security clearance under the Whole-Person Concept. We need not address the rest of the Government's claims.

A favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information. *See* ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014). In the case before us, the record discloses many reasons to doubt Applicant's current judgment and reliability and to conclude that Applicant has failed to meet her burden of persuasion regarding mitigation. The Remand Decision is not sustainable.

Conclusion

When the Board finds that a judge's decision is unsustainable, we must determine if the appropriate remedy is remand or reversal. The former is appropriate when the legal errors can be corrected through remand and there is a significant chance of reaching a different result upon correction, such as when a judge fails to consider relevant and material evidence. If the identified errors cannot be remedied on remand, the decision must be reversed. Such is the case when, after addressing the identified error, the Board concludes that a contrary formal finding or overall grant or denial of national security eligibility is the clear outcome based on the record. ISCR Case No. 22-01002 at 4 (App. Bd. Sep. 26, 2024) (citation omitted).

The Government has met its burden on appeal of demonstrating reversible error below. Considering the record as a whole, the Judge's decision is arbitrary and capricious as it fails to examine relevant evidence and important aspects of the case, fails to articulate a satisfactory explanation for material conclusions, and runs contrary to the weight of the record evidence. Accordingly, the Judge's favorable decision is not sustainable under *Egan*. After addressing the identified errors, the Board concludes that a denial of national security eligibility is the clear outcome based on the record and the Judge's favorable decision is reversed

Order

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

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

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

Signed: Jennifer Goldstein
Jennifer Goldstein
Administrative Judge
Member, Appeal Board