

KEYWORD: Guideline F

DIGEST: There is a paucity of evidence demonstrating a nexus between Applicant's medical conditions and the substantial unpaid debts she has amassed since her discharge in bankruptcy. Favorable decision reversed.

CASENO: 06-12765.a1

DATE: 11/16/2007

DATE: November 16, 2007

In Re:	)	
	)	
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	)	
Applicant for Trustworthiness Determination	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco Mendez, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a trustworthiness determination. On August 2, 2006, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended)

(Directive). Applicant requested a hearing. On May 22, 2007, after the hearing, Administrative Judge Christopher Graham granted Applicant's request for a trustworthiness determination. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raises the following issues on appeal: whether the Judge erred in his application of the pertinent mitigating conditions; whether the Judge's whole person analysis is arbitrary, capricious, or contrary to law; and whether the Judge erred in denying a government motion to amend the SOR. Finding error we reverse.<sup>1</sup>

### **Whether the Record Supports the Judge's Factual Findings**

#### **A. Facts**

The Judge made the following findings of fact: In November 2000 Applicant's outstanding debts totaling \$20,540 were discharged in bankruptcy. Since that time, however, Applicant has amassed numerous other debts, all unpaid at the time of the decision, for such things as bad checks, telephone services, credit cards, and medical bills. These unpaid debts total more than \$11,870.00.

Applicant has numerous medical problems, having suffered a stroke after the birth of her first child. Her physician has advised her to work only one job, due to stress. Physicians have also advised that her physical condition is not severe enough to qualify for social security disability benefits.

In August 2006 Applicant met with a credit counseling service, establishing a debt repayment plan. She has been unable to meet her debts under this plan, however. In February 2007, Applicant decided to file for bankruptcy protection again.

#### **B. Discussion**

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence—"such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record." Directive ¶ E3.1.32.1. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966). In evaluating the Judge's findings, we are required to give deference to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel has not challenged the Judge's findings of fact. Therefore, they are not at issue on appeal.

### **Whether the Record Supports the Judge's Ultimate Conclusions**

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<sup>1</sup>By memo dated August 6, 2007, Applicant stated that she no longer works for a government contractor and, therefore, has no need of a trustworthiness determination. DOHA received this memo after the completion of the hearing; therefore, the Board will continue to process Applicant's appeal. DOHA Operating Instruction No. 29 ¶ F and Directive ¶ 4.4.1.

The Appeal Board may reverse the Judge’s decision to grant, deny, or revoke a trustworthiness determination if it is arbitrary, capricious, or contrary to law. *See* Directive ¶¶ E3.1.32.3 and E3.1.33.3. Once the government presents evidence raising trustworthiness concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. *See* Directive ¶ E3.1.15. “The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole.” *See* ADP Case No. 05-12037 at 3 (App. Bd. May 10, 2007). A trustworthiness determination must be guided by common sense in light of the record as a whole. *See* Directive ¶ E2.2.3.

The Judge extended Applicant favorable application of Financial Consideration Mitigating Condition (FCMC) 3,<sup>2</sup> which concerns matters outside an applicant’s control, such as an “unexpected medical emergency.”<sup>3</sup> He noted that Applicant has suffered from hypertension and a stroke, which entailed hospitalizations and consequent missed work. He also noted that Applicant’s physicians have counseled her against obtaining a second job, in order to prevent stress. In evaluating the whole person, the Judge stated that “her financial condition is the result of her continuing health problems.” Decision at 7. He concluded that she is not extravagant and opined that she will pay off her debts in time.

We have considered the Judge’s decision, the briefs, and the record evidence. There is substantial evidence that Applicant has suffered medical problems. However, there is a paucity of evidence demonstrating a nexus between Applicant’s medical condition and the substantial unpaid debts she has amassed since her previous discharge in bankruptcy, most of which are not for medical bills. Indeed, Applicant testified that her current medical needs account for only \$120 of her monthly expenses. Examining the Judge’s decision in light of the record as a whole, his conclusion that Applicant has met her burden of persuasion is not sustainable, whether viewed in light of FCMC 3 or of his whole person analysis.

Concerning the third assignment of error, the government moved to strike language from the SOR. The Judge denied the motion on the ground that the government had “provided no legal basis for doing so.” Decision at 2. The Judge’s ruling was error. *See* ISCR Case No. 04-08547 at 3-4 (App. Bd. Aug. 30, 2007). However, this error is harmless, in that it did not affect the outcome of the case. *See* ISCR 01-23362 (App. Bd. Jun. 5, 2006); ISCR Case No. 03-09915 (App. Bd. Dec. 16, 2004); ISCR Case No. 01-11192 (App. Bd. Aug. 26, 2002).

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<sup>2</sup>Directive ¶ E2.A6.1.3.3.

<sup>3</sup>The Judge specifically concluded that FCMC 4 (Directive ¶ E2.A6.1.3.4: “The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control”) and FCMC 6 (Directive ¶ D2.A6.1.3.6: “The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts”) were not applicable to the case. Decision at 7.

**Order**

The Judge's favorable trustworthiness determination of REVERSED.

Signed: Michael Y. Ra'anan  
Michael Y. Ra'anan  
Administrative Judge  
Chairman, Appeal Board

Signed: Jeffrey D. Billett  
Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody  
James E. Moody  
Administrative Judge  
Member, Appeal Board