KEYWORD: Guideline B

DIGEST: The Appeal Board cannot consider new evidence on appeal. A party's disagreement with the Judge's weighing of the evidence is not sufficient to demonstrate that the Judge erred. Adverse decision affirmed.

CASE NO: 12-12301.a1

DATE: 01/29/2014

DATE: January 29, 2014

In Re:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On March 14, 2013, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline B (Foreign Influence) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested that the case be decided on the written record. On November 6, 2013, after the close of the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Arthur E. Marshall, Jr. denied Applicant's request for a security clearance. Applicant appealed, pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raises the following issue on appeal: whether the Judge's decision is arbitrary, capricious, or contrary to law. For the following reasons, the Board affirms the Judge's unfavorable security clearance decision.

Department Counsel requested that the Judge take administrative notice regarding certain facts about the nation of Afghanistan. The Judge granted the request and made the following findings of fact: Despite progress made since the Taliban was deposed, Afghanistan still faces challenges like defeating terrorists and insurgents, recovering from over three decades of civil strife, and rebuilding shattered physical, economic, and political infrastructure. Afghanistan's human rights record has remained poor, and the Afghan-Taliban dominated insurgency has become increasingly sophisticated and destabilizing. Overall, the State Department has declared that the security threat to all American citizens in Afghanistan remains critical as no part of Afghanistan is immune from violence.

The Judge made the following additional findings of fact: Applicant is 48 years old. She was born in Afghanistan. She came to the United States and became a naturalized U.S. citizen in 1999. Her current husband, mother, father-in-law, mother-in-law and three sisters-in-law are citizens and residents of Afghanistan. She is currently in the process of sponsoring her husband to come to the United States. His paperwork has thus far been stalled for unknown reasons. Applicant's husband does not entirely understand the type of work she does for a living. Applicant speaks to her husband by phone only about once a month because of the expense of calls to Afghanistan. Applicant's mother has always been a homemaker and has no known affiliation with the Afghani government, Applicant speaks to her mother by phone about once a month. Applicant's mother has no plans to come to the United States. Applicant's in-laws manage a farm and have no known nexus to the Afghani government. Applicant has contacts with her in laws about 8-15 times a year by telephone. None of Applicant's sisters-in-law have any known connection to the Afghani government. Applicant converses with her sisters-in-law about 8-15 times a year by phone.

The Judge reached the following conclusions: Applicant maintains regular telephonic contact with all of her Afghani resident-citizen relatives. Under these facts, a third party coercion concern potentially exists. Terrorist groups and other criminal organizations operate within Afghanistan. They participate in nefarious activities. These facts are sufficient to find a heightened risk exists with regard to Applicant's Afghani relatives. Applicant has the burden to demonstrate evidence sufficient to refute or mitigate the allegations in the SOR. Here, the primary concern is Applicant's relationships with her husband and her mother. While they, like Applicant's in-laws, initially seem unlikely candidates for third-party manipulation, the evidence available regarding these kin is too scant to make a thorough assessment. Similarly, the available evidence reveals little about Applicant and both her life in and ties to the United States. More information is needed to assess her relationship to the United States, as opposed to any remaining loyalties she may have to her place of birth. With so few facts upon which to assess both Applicant and her kin, Applicant failed to meet her burden, and security concerns are left unmitigated.

Applicant asserts that she has no foreign interests, including financial interests. She states that her loyalties are not divided and that her loyalties lay with the United States and her two

daughters in America. She argues that she has many coworkers that also have family ties in Afghanistan, and she is not sure why she is the one deemed to be in a heightened risk situation. Applicant states that, although she has in-laws in Afghanistan, they will be immigrating and will not be a risk.

Applicant's brief includes statements of fact that are not part of the record below. The Board cannot consider new evidence in the process of deciding appeals. Directive ¶ E3.1.29

The gravamen of the Judge's decision is his conclusion that the record contained insufficient evidence on Applicant's behalf to overcome the Government's security concerns. This conclusion is sustainable. The Board finds no reason to believe that the Judge did not properly weigh the evidence or that he failed to consider all the evidence of record. *See, e.g.*, ISCR Case No. 11-06622 at 4 (App. Bd. Jul. 2, 2012). We have considered the totality of Applicant's arguments on appeal and find no error in the Judge's ultimate conclusions regarding mitigation. The only record evidence submitted by Applicant was her answer to the SOR, and the Judge accurately noted the very brief nature of her answers to the allegations.

As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. *See, e.g.*, ISCR Case No. 06-10320 at 2 (App. Bd. Nov. 7, 2007). A party's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

The Board does not review a case *de novo*. The favorable evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-11172 at 3 (App. Bd. Sep. 4, 2007). After reviewing the record, the Board concludes that the Judge examined the relevant data and articulated a satisfactory explanation for the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). "The 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). Therefore, the Judge's ultimate unfavorable security clearance decision is sustainable.

Order

The decision of the Judge is AFFIRMED.

Signed: Michael Y. Ra'anan
Michael Y. Ra'anan
Administrative Judge
Chairperson, 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