KEYWORD: Guideline G; Guideline I

DIGEST: Department Counsel challenges the Judge's finding that Applicant is in full sustained remission of alcohol dependence. We examine findings to see if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." The most recent evidence by anyone qualified to provide a diagnosis is the 2014 psychological evaluation, which states that Applicant is in *early* full remission. There is nothing in the record by a psychologist or any healthcare professional to the effect that the diagnosis should be changed. Applicant's statement in his February 2015 Answer to the SOR that he had not consumed alcohol since June 2014 was evidence to which the Judge was required to give due consideration. However, Applicant submitted nothing in response to the File of Relevant Material. Therefore, there is nothing in the record to support an affirmative finding about Applicant's conduct subsequent to the SOR Answer, there is nothing, and indeed can be nothing, concerning Applicant's conduct or medical condition following the close of the record. The Judge's statement that Applicant had been abstinent for 18 months is without evidentiary foundation. Even if there were evidence that showed a greater period of abstinence than what is in the record, the Judge was not qualified to make or change a medical diagnosis. The finding is not supported by the record. Favorable decision reversed.

CASENO: 14-01490.a1

DATE: 04/15/2016

DATE: April 15, 2016

In Re:	)	
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	)	
Applicant for Security Clearance	)	
	)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a security clearance. On January 21, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–security concerns raised under Guideline G (Alcohol Consumption) and Guideline I (Psychological Conditions) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On December 15, 2015, after considering the record, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Robert Robinson Gales granted Applicant's request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge's findings of fact contained errors and whether the Judge's favorable decision ran contrary to the weight of the record evidence and, accordingly, was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant is a "self-described alcohol-dependent." Decision at 3. He began drinking at age 21, with frequency increasing to the point that, by 1998, he was drinking almost every day. He has had some interactions with the police, including two DUIs (one in 2000 and another in 2003) and an incident in 2003 in which he was driving a vehicle after drinking heavily, stopped in a parking lot to relieve himself, and was arrested for public indecency due to intoxication.

After 2003, Applicant remained periodically sober, as opposed to abstinent, for about eight years, relapsing in 2011 and again in May 2013. He characterized the 2013 incident as a response to job stress. Applicant stated in his response to the SOR that "had been 'alcohol-free' since June 2014." *Id*.

After his first DUI, Applicant attended a three-day course concerning driving and drinking. In 2003, he attended alcohol counseling and has attended Alcoholics Anonymous (AA) meetings over a period of years. He also underwent alcohol and mental health counseling from 2003 until 2005, although his counselor stated that Applicant discontinued counseling and was "unsuccessful in completing his treatment goals at that time." *Id*. at 4. The Judge stated that this report, addressed to DOHA, did not contain background information, identify any tests that might have been administered, review test results, offer a diagnosis, or identify what goals were not met.

From 2009 until 2012, Applicant underwent psychotherapy. Applicant was denied access to his records because the release he submitted did not comply with the requirements of Federal law. The psychologist who had treated Applicant had abandoned the records. Several diagnoses were included in documents that were released to Applicant, none of which involved alcohol.[1] In October 2014, Applicant underwent a psychological evaluation with a clinical psychologist at the behest of the DoD. The psychologist interviewed him and performed a number of tests. His diagnosis of Applicant included "major depressive disorder, recurrent, mild;" "generalized anxiety disorder;" and "alcohol dependence in early full remission," which was the most significant. *Id*. at 6.

The psychologist stated that (1) if Applicant could get his alcohol issues under control and work on his depression, anxiety, and stress issues, "he can probably be a reliable, consistent, and even trustworthy employee;" (2) if Applicant takes recovery and treatment seriously, he will likely be successful; and (3) Applicant is in the early phase of recovery. "He should continue in AA, obtain a sponsor, and attend groups and individual counseling. He should continue his previous course of treatment by other mental health and substance abuse professionals." *Id*. at 6.

The Judge's Analysis

In concluding that Applicant had mitigated concerns arising from his alcohol consumption, the Judge stated that Applicant's criminal infractions occurred many years in the past. He stated that while Applicant relapsed several times, "those relapses did not involve driving." *Id*. at 10. He states that there is no evidence that, during any of his alcohol treatment programs, Applicant was ever advised to abstain from drinking. He also concluded that there was "unsupported speculation that Applicant was self-medicating his non-alcohol-related conditions with alcohol." *Id*. He cited to Applicant's statements to the effect that Applicant understands that drinking is not an effective way to assuage anxiety. He stated that Applicant has been "abstinent since June 2014–6 months before the SOR was issued and 18 months ago[.]" *Id*. The Judge cited to the opinion of the psychologist to the effect that, if Applicant complies with therapy, substance abuse treatment, and AA attendance, he would be a stable employee. He then stated:

> Applicant chose to work with AA without any further mental health treatment. Nevertheless, his condition has continued to improve, and *I conclude that his alcohol problem is now actually alcohol dependence in "sustained full remission" and will not recur*. His relationship with alcohol no longer casts doubt on Applicant's current reliability, trustworthiness, or good judgment. *Id*. (emphasis added)

[1]This finding does not undercut Applicant's admission, and the Judge's own finding, that Applicant is alcohol-dependent. In an affidavit, dated January 14, 2014, included in the record as Item 4, Applicant stated that he sought treatment from this provider for "social issues, anxiety, and stress." Applicant stated in his Answer to the SOR that the therapist was aware of his alcohol problem. There is nothing in the record to explain why Applicant did not provide a release that complied with the Health Insurance Portability and Accountability Act of 1996.

Regarding Guideline I, the Judge stated that the 2014 diagnosis by the psychologist asserts that Applicant is at risk of self-medicating, which increases his chances of relapse. The Judge concluded that this opinion by the psychologist "is without merit," insofar the psychological evaluation contained no evidence to support it. He stated that this opinion was by someone selected by DOHA rather than by a treating physician. He stated that the criteria of Disqualifying Condition 28(b)[2] has been "minimally established." *Id*. at 12.

In examining whether Applicant has mitigated this concern, the Judge repeated the psychologist's conclusion that, with therapy, substance abuse treatment, and AA attendance Applicant would be a stable employee. The Judge stated that there is no evidence that Applicant's other psychological conditions "have caused him to be emotionally unstable, irresponsible, dysfunctional, violent, paranoid or . . . bizarre[.]" He repeated his view that Applicant's diagnosis "should be updated to alcohol dependence in sustained full remission." *Id*.

Discussion

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 applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. Directive ¶ E3.1.15. The standard applicable in security clearance decisions "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). "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

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* ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

Department Counsel challenges the Judge's finding that Applicant is actually in full sustained remission of alcohol dependence. The finding is contained in the Analysis portion of the Decision. We examine a Judge's findings to see if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive ¶ E3.1.32.1.

[2]Directive, Enclosure 2 ¶ 28(b): "An opinion by a duly qualified mental health professional that the individual has a condition covered under any other guideline that may impair judgment, reliability, or trustworthiness."

We find Department Counsel's argument to be persuasive. The most recent evidence by anyone qualified to provide a diagnosis is the 2014 psychological evaluation, which states that Applicant is in *early* full remission. There is nothing in the record by a psychologist or any other sort of healthcare professional to the effect that the diagnosis should be changed to something else. Of course, Applicant's statement in his February 11, 2015, Answer to the SOR that he had not consumed alcohol since June 2014 was evidence to which the Judge was required to give due consideration. However, Applicant submitted nothing in response to the File of Relevant Material (FORM). Decision at 2. Therefore, there is nothing in the record to support an affirmative finding about Applicant's conduct subsequent to the SOR Answer, and it goes without saying that there is nothing, and indeed can be nothing, concerning Applicant's conduct or medical condition following the close of the record. *See In re: Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 at 254 (D.C. Cir. 2013) ("[A]bsence of evidence is not evidence of absence"). Accordingly, the Judge's statement that Applicant had been abstinent for 18 months is without evidentiary foundation. Moreover, even if there were evidence that showed a greater period of abstinence than what is actually contained in the record, the Judge was not qualified to make or change a medical diagnosis. The challenged finding is not supported by the evidence in the record.[3]

Concerning mitigation, we note findings, evidence, and Applicant admissions of the following: Applicant is alcohol dependent; he has had some criminal offenses related to alcohol, such as DUI; he was not successful in a treatment program in 2005; he has relapsed into drinking on more than one occasion, most recently in June 2014, which was a year after he submitted his clearance application and months after he submitted answers to DOHA interrogatories concerning his alcohol consumption; he has been diagnosed as alcohol dependent in early full remission; the diagnosis also includes depression and generalized anxiety disorder, that might induce Applicant to self-medicate with alcohol; and that, for Applicant to show stability, he should receive therapy and substance abuse treatment and attend AA. Applicant did not provide any evidence in response to the FORM, and the record contains no evidence that Applicant has undertaken the recommended course of action other than AA attendance.

The Judge's mitigation analysis is based in large measure on his own conclusion that Applicant is in sustained full remission and upon a concomitant discounting of the only psychologist's opinion in the record concerning the appropriate diagnosis.[4] Concerning the psychologist's evaluation, the record contains no contravening opinion by another healthcare provider upon which a sustainable conclusion could be based, rendering the Judge's analysis at best speculative. Other comments, such as that Applicant's more recent relapses into alcohol consumption did not involve driving a car, while consistent with the record, are of minimal relevance, insofar as there are no Criminal Conduct allegations in the SOR. Concerning Guideline I in particular, the

[3]We also note the Judge's finding that there is no evidence that Applicant had ever been advised to abstain from alcohol. The SOR alleged, at ¶ 1.b., that Applicant "continued drinking alcohol . . .despite awareness that you were alcohol dependent and it had been recommended that you discontinue all alcohol use." Applicant admitted this allegation.

[4]There is a letter from a medical professional that contains no diagnosis but merely reports that Applicant had discontinued counseling and was unsuccessful in completing treatment goals.

Judge concluded that the record satisfies the criteria of Mitigating Condition 29(e): "there is no indication of a current problem."[5] As stated above, however, there is insufficient evidence in the record to support this conclusion, especially given Applicant's failure to respond to the FORM.[6] In addition, the Judge's statement that Applicant's other conditions do not render him dysfunctional, paranoid, bizarre, etc., is of little significance, insofar as he had concluded that the Disqualifying Condition from which this language was drawn had not been established.[7]

In light of the foregoing, we conclude that the Judge's decision fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; reflects a clear error of judgment; fails to consider an important aspects of the case; offers an explanation for the decision that runs contrary to the weight of the record evidence; and is so implausible that it cannot be ascribed to a mere difference of opinion. *See* ISCR Case No. 14-02563 at 3, *supra.*

Order

The Decision is **REVERSED**.

[5]Directive, Enclosure 2 ¶ 29(e). The Judge appeared to discount the psychologist's opinion, in part, on the ground that he was "selected by the DoDCAF to perform a mere psychological evaluation" and was not "a treating physician who has a continuing professional relationship, not merely a one-day series of tests and a brief interview." Decision at 12. We note first of all that the Directive states the following: "A duly qualified mental health professional (*e.g.*, clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this [G]uideline." Enclosure 2 ¶ 27. Accordingly, DoD complied with the explicit requirements of the Directive in obtaining the psychologist's evaluation of Applicant. Such compliance, in and of itself, does not constitute a reasonable basis to discount the evaluation. The Judge is correct that the record contains no evidence of an opinion by a treating psychologist or other healthcare provider who has a continuing relationship with Applicant, presumably such as the one he consulted beginning in 2009. However, the Directive presumes a nexus between admitted and proven conduct under any of the Guidelines and an applicant's eligibility for a clearance. *See, e.g.*, ISCR Case No. 14-04648 at 3 (App. Bd. Sep. 9, 2015). In this case, Applicant admitted each of the allegations in the SOR, and the Government presented substantial evidence in support of them as well, including but not limited to the psychologist's evaluation. It was Applicant's responsibility to provide evidence in rebuttal, explanation, extenuation, or mitigation of the facts that he admitted and that were also established by the record. Directive ¶ E3.1.15.

[6]The Judge "erroneously concluded that MC 29(e) applied even through the record is silent on Applicant's current condition . . . [The psychologist's] conclusions were specifically conditioned upon Applicant's engaging in therapy for his mental health conditions, which he has refused to do. The Judge inaccurately characterized 'as mere speculation' [the psychologist's] well-reasoned conclusions that Applicant's mental health condition directly impacts his ability to remain abstinent and is part of the cause of his recent relapses . . . the Judge substituted his own . . . opinion for that of a professional mental health clinician." Appeal Brief at 13.

[7]Directive, Enclosure 2 ¶ 28(a): "behavior that casts doubt on an individual's judgment, reliability, or trustworthiness that is not covered under any other guideline, including but not limited to emotionally unstable, irresponsible, dysfunctional, violent, paranoid, or bizarre behavior[.]"

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

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

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board