

DATE: June 3, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-20110

APPEAL BOARD DECISION AND REVERSAL ORDER

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) dated July 24, 2003 which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline H (Drug Involvement). Administrative Judge Roger C. Wesley issued a favorable security clearance decision dated January 29, 2004.

Department Counsel appealed the Administrative Judge's favorable decision. The Board has jurisdiction under Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

The following issues have been raised on appeal: (1) whether certain factual findings by the Administrative Judge are erroneous; (2) whether the Administrative Judge misapplied pertinent provisions of the Adjudicative Guidelines; and (3) whether Applicant can be granted a probationary or conditional security clearance. For the reasons that follow, the Board reverses the Administrative Judge's decision.

Scope of Review

On appeal, the Board does not review a case *de novo*. Rather, the Board addresses the material issues raised by the parties to determine whether there is factual or legal error. There is no presumption of error below, and the appealing party must raise claims of error with specificity and identify how the Administrative Judge committed factual or legal error. Directive, Additional Procedural Guidance, Item E3.1.32. *See also* ISCR Case No. 00-0050 (July 23, 2001) at pp. 2-3 (discussing reasons why party must raise claims of error with specificity).

When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. Directive, Additional Procedural Guidance, Item E3.1.32.3. In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's 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 (July 14, 1998) at p. 3 (citing Supreme Court decision).

In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. Compliance with state or local law is not required because security clearance adjudications are conducted by the Department of Defense pursuant to federal law. *See* U.S. Constitution, Article VI, clause 2 (Supremacy Clause). *See, e.g.*, ISCR Case No. 00-0423 (June 8, 2001) at p. 3 (citing Supreme Court decisions).

When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact 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. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1. The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

When an appeal issue raises a question of law, the Board's scope of review is plenary. *See* DISCR Case No. 87-2107 (September 29, 1992) at pp. 4-5 (citing federal cases).

If an appealing party demonstrates factual or legal error, then the Board must consider the following questions:

Is the error harmful or harmless? *See, e.g.*, ISCR Case No. 00-0250 (July 11, 2001) at p. 6 (discussing harmless error doctrine);

Has the nonappealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? *See, e.g.*, ISCR Case No. 99-0454 (October 17, 2000) at p. 6 (citing federal cases); and

If the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded? (Directive, Additional Procedural Guidance, Items E3.1.33.2 and E3.1.33.3).

Appeal Issues⁽¹⁾

1. Whether certain factual findings by the Administrative Judge are erroneous. Department Counsel contends the Administrative Judge erred by finding: (a) Applicant's use of prescription pain medication had not been shown to be abusive to the point of addiction; (b) Applicant used pain medication to excess during military service between 1998 and 2002; (c) Applicant consulted multiple military and civilian facilities to obtain prescription medication; and (d) Applicant's pain management specialist gave a favorable prognosis.⁽²⁾

The Board must consider whether "[t]he Administrative Judge's findings of fact 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. In making this review, the Board shall give deference to the credibility determinations of the Administrative Judge." Directive, Additional Procedural Guidance, Item E3.1.32.1.⁽³⁾ In doing so, the Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole.

Department Counsel correctly points out that the record evidence shows Applicant was diagnosed in 1999 with "prescription opiate dependence" and "opiate withdrawal - active" (Government Exhibit 4). Indeed, on appeal, Applicant does not dispute that he was so diagnosed.⁽⁴⁾ The Judge's finding that Applicant did not use prescription pain medication to the point of addiction cannot be sustained because there is documentary medical evidence that plainly contradicts the Judge's finding.

Department Counsel correctly notes that there is no record evidence that Applicant served in the military, or that Applicant consulted military facilities to obtain prescription medication. Therefore, to the extent the Judge's findings

refer to military service or military facilities, they are erroneous and not sustainable.

The record evidence in this case does not support the Administrative Judge's finding that Applicant's pain management specialist "expresses confidence in Applicant's ability to avoid prescription drug abuse through his new medication regimen" and "assur[es] that Applicant can continue to perform his assigned duties without risk of judgment lapses so long as he remains [o]n his prescribed medication" (Decision at p. 6). At the hearing, the Administrative Judge expressed concern that Applicant had not submitted any documentary evidence from his treating physicians that would provide a prognosis concerning his taking prescription pain medication for his medical condition (Hearing Transcript at p. 51).⁽⁵⁾ The Judge granted Applicant time to obtain such documentation and submit it after the hearing (Hearing Transcript at p. 52). Applicant made a post-hearing submission (Applicant Exhibit B), which was admitted into evidence without objection from Department Counsel. Applicant Exhibit B consists of three one-page documents: a November 7, 2003 cover letter from Applicant; a one-page November 5, 2003 letter from a physician treating Applicant for renal stones; and a one-page November 6, 2003 letter from a physician treating Applicant for "intractable pain syndrome & cephalgia." The November 6, 2003 letter from the physician treating Applicant for pain states "[Applicant's first name]'s prognosis is: guarded, will require pain medication indefinitely, monitor in office every 3 mo. Patient is stable on medication and able to perform daily activities." The Judge's findings place a favorable gloss on the November 6, 2003 letter that does not reflect a plausible interpretation of that document in light of the record evidence as a whole.

2. Whether the Administrative Judge misapplied pertinent provisions of the Adjudicative Guidelines. Department Counsel contends the Administrative Judge erred by: (a) not applying Drug Involvement Disqualifying Condition 3; (b) misapplying Drug Involvement Mitigating Condition 4; and (c) misapplying Drug Involvement Mitigating Condition 3. For the reasons that follow, the Board concludes Department Counsel's contentions have merit.

(a) Drug Involvement Disqualifying Condition 3. Department Counsel contends the Administrative Judge should have applied Drug Involvement Disqualifying Condition 3⁽⁶⁾ because Government Exhibit 4 shows Applicant was diagnosed with "prescription opiate dependence" and "opiate withdrawal - active." This claim of error is persuasive. Judges are required to apply pertinent provisions of the Adjudicative Guidelines.⁽⁷⁾ If there are Adjudicative Guidelines that, on their face, appear to be applicable to the facts of a particular case, then the Judge must apply them or articulate a rational basis for not doing so.⁽⁸⁾ As noted earlier in this decision, the Judge's finding that Applicant did not use prescription pain medication to the point of addiction cannot be sustained. Given the record evidence in this case, the Judge's failure to apply Drug Involvement Disqualifying Condition 3 is indicative of arbitrary and capricious action by the Judge.

(b) Drug Involvement Mitigating Condition 4. Department Counsel contends the Administrative Judge erred by applying Drug Involvement Mitigating Condition 4⁽⁹⁾ because (i) the Judge relied on erroneous fact-finding to apply that mitigating condition; (ii) there is not sufficient record evidence to support a finding of a favorable prognosis; and (iii) Applicant failed to present medical evidence to corroborate his claims about his regimen of taking pain medication.

Given the totality of the record evidence in this case, the Administrative Judge's application of Drug Involvement Mitigating Condition 4 is not sustainable. The medical reports from Applicant's current treating physicians (Applicant Exhibit B) do not provide a reasonable basis for the Judge to conclude Applicant has been given a favorable prognosis.⁽¹⁰⁾ Indeed, on appeal, Applicant acknowledges that the reports from his current treating physicians "did not provide a forecast or prognosis with respect to Applicant's possible future medication abuse."⁽¹¹⁾ Moreover, given the record evidence of Applicant's history of abusing prescription pain medication (including a diagnosis of prescription opiate dependence) and Applicant's failure to present medical documentation to corroborate his statements about his use of prescription pain medication, Applicant's testimony does not provide a sufficient basis for the Judge's application of Drug Involvement Mitigating Condition 4. Even if the Judge concluded that Applicant was a credible witness, such a favorable credibility determination is no substitute for medical evidence corroborating Applicant's statements about his medical condition and his ability to comply with his regimen of prescription pain medication.⁽¹²⁾ Given the record evidence of Applicant's history of abusing prescription pain medication to the point of diagnosed dependence, it was arbitrary and capricious for the Judge to rely on Applicant's uncorroborated, second-hand, lay testimony about the medical opinion of Applicant's pain management specialist.

(c) Drug Involvement Mitigating Condition 3. Department Counsel contends the Administrative Judge misapplied Drug

Involvement Mitigating Condition 3⁽¹³⁾ because: (i) the medical reports from Applicant's treating physicians provide no support for application of that mitigating condition; and (ii) the record evidence of Applicant's history of abusing prescription pain medication undercuts his uncorroborated testimony about his current use of prescription pain medication. This contention has merit.

The medical reports from Applicant's treating physicians (Applicant Exhibit B) provide no meaningful support for the Administrative Judge's application of Drug Involvement Mitigating Condition 3. Given Applicant's history of abusing prescription pain medication, the absence of medical evidence corroborating Applicant's statements is very significant because the record evidence shows Applicant will continue to require prescription pain medication for the foreseeable future,⁽¹⁴⁾ and because Applicant gave testimony about his use of prescription pain medication that was not consistent with an April 16, 2002 letter from a physician who had treated him.

Given the totality of the record evidence in this case, the Administrative Judge had a rational basis for concluding that Applicant's history of abusing prescription pain medication raised security concerns. In light of the evidence about Applicant's history of abusing prescription pain medication, Applicant had the burden of "presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."⁽¹⁵⁾ The totality of the errors identified by Department Counsel persuades the Board that the Judge failed to articulate a sustainable basis for his conclusion that Applicant had satisfied his burden of persuasion.

3. Whether Applicant can be granted a probationary or conditional security clearance. On appeal, Applicant argues that the Administrative Judge's favorable security clearance decision should be affirmed. Because of the various errors identified by Department Counsel, the Judge's decision cannot be affirmed. Applicant asks, in the alternative, that he be allowed a probationary period to allow him to demonstrate he is using prescription pain medication in a proper, nonabusive manner.⁽¹⁶⁾ Under the Directive, there is no authority to grant a probationary or conditional security clearance.⁽¹⁷⁾

Conclusion

Department Counsel has demonstrated harmful error below that warrants reversal. Accordingly, pursuant to Directive, Additional Procedural Guidance, Item E3.1.33.3, the Board reverses the Administrative Judge's favorable security clearance decision.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billet

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin

Administrative Judge

Member, Appeal Board

1. On appeal, Applicant has sought to present new evidence for consideration by the Board. The Board cannot consider new evidence on appeal. *See* Directive, Additional Procedural Guidance, Item E3.1.29. During the proceedings below Applicant had ample opportunity to present evidence for the Administrative Judge to consider in his case. Furthermore, a party does not have a right to keep the record open continuously to supplement the record evidence. *See, e.g.*, ISCR Case No. 01-21274 (January 8, 2004) at p. 3.
2. Department Counsel refers to findings in the Conclusion section of the Administrative Judge's decision. The Board will treat a finding of fact as a finding of fact regardless of where it appears in the Administrative Judge's decision. *See, e.g.*, ISCR Case No. 02-02052 (April 8, 2003) at p. 2 n.1.
3. Whether there is sufficient record evidence to support an Administrative Judge's findings of fact is a question of law, not a question of fact. *See, e.g.*, ISCR Case No. 98-0370 (January 28, 1999) at p. 2.
4. Reply Brief at p. 3.
5. Given the record evidence in this case, the Administrative Judge's expressed concern was well-founded.
6. "Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence" (Directive, Adjudicative Guidelines, Item E2.A8.1.2.3).
7. *See* Directive, Section 6.3; Adjudicative Guidelines, Item E2.1; Additional Procedural Guidance, Item E3.1.25.
8. *See, e.g.*, ISCR Case No. 97-0825 (January 7, 1999) at p. 3.
9. "Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.4).
10. On appeal, Applicant refers to the evidence of his "favorable self-prognosis and positive outlook regarding medication abuse in the future" (Reply Brief at p. 4) and his testimony that he has no intention of abusing his prescription medication again (Reply Brief at p 5). Applicant's personal belief, however sincere, is no substitute for medical evidence concerning his prognosis.
11. Reply Brief at p. 5.
12. The Board has repeatedly held that a credibility determination is not a substitute for record evidence. *See, e.g.*, ISCR Case No. 01-26893 (October 16, 2002) at p. 7; ISCR Case No. 97-0356 (April 21, 1998) at p. 3; DISCR Case No. 91-1344 (April 6, 1993) at p. 5 n.3.
13. "A demonstrated intent not to abuse any drugs in the future" (Directive, Adjudicative Guidelines, Item E2.A8.1.3.3).
14. Applicant asserts that the fact he receives prescription pain medication is not grounds for an adverse security clearance decision (Reply Brief at p. 5). Department Counsel is not seeking to have Applicant's access to classified information denied or revoked because he receives prescription pain medication. Rather, Department Counsel's case below and its arguments on appeal are based on the contention that there is record evidence that Applicant has abused prescription pain medication to the point of dependence, and Applicant has failed to meet his burden of persuasion under Directive, Additional Procedural Guidance, Item E3.1.15 of demonstrating that he is not likely to abuse prescription pain medication in the future.
15. Directive, Additional Procedural Guidance, Item E3.1.15.
16. Reply Brief at p. 6.

17. *See, e.g.*, ISCR Case No. 01-22311 (April 4, 2003) at p. 6.