

DATE: July 27, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-24512

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

David G. Jones, Esq.

The Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), dated August 3, 2004, which stated the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. The SOR was based on Guideline G (Alcohol Consumption). Administrative Judge Darlene Lokey Anderson issued an unfavorable security clearance decision, dated January 25, 2005.

Applicant appealed the Administrative Judge's unfavorable 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 the Administrative Judge erred by considering Applicant's depression when making her security clearance decision; and (2) whether the Administrative Judge erred by concluding the evidence failed to establish that Applicant's depression was being sufficiently controlled by medication so as to preclude the possibility of Applicant returning to his prior pattern of self-medicating with excessive amounts of alcohol. For the reasons that follow, the Board affirms 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. Whether the Administrative Judge erred by considering Applicant's depression when making her security clearance decision. The Administrative Judge found that Applicant suffered from depression beginning in 1967 and continuing until 1989 or 1990, at which time he sought psychiatric care and was prescribed medication. The Judge found that, despite the medication, Applicant's depression grew worse and he began to self-medicate by consuming increased amounts of alcohol. The Judge also found that Applicant stopped consuming alcohol in December 2003 and that, currently, Applicant's depression symptoms are adequately controlled with medications. The Judge concluded that, despite progress in treatment and abstaining from alcohol, the fact that Applicant suffered from depression that had not been controlled for any sustained period of time without the use of alcohol precluded her, without the additional passage of time, from making a favorable security clearance determination. On appeal, Applicant argues (a) he was not provided proper notice by DOHA that his depression would be the basis for the revocation of his security clearance and he was therefore denied an opportunity to prepare his defense; and (b) the Administrative Judge erred in expressly relying on the evidence about his depression in making her adverse security clearance determination. For the reasons that follow, the Board concludes that Applicant's claims lack merit. Applicant's two arguments may be addressed together.

Applicant argues that the SOR did not cite Guideline I (Emotional, Mental, and Personality Disorders) as a basis for denying Applicant a clearance, and therefore the Judge's consideration of the Applicant's history of depression was in violation of the notice requirements of Executive Order 10865 and the Directive. An applicant is entitled to receive reasonable notice of the allegations being made against him so that the applicant can have a meaningful opportunity to respond to the allegations. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 2. However, an SOR need not allege every piece of evidence that is relevant and material to evaluating an applicant's security eligibility. *See, e.g.*, ISCR Case No. 00-0030 (September 20, 2001) at p. 6. Furthermore, as long as there is fair notice to an applicant about the matters that are at issue in his case, and the applicant has a reasonable opportunity to respond, a security clearance

should be adjudicated on the merits of the relevant issues and should not be overly concerned with pleading technicalities. *See, e.g.*, ISCR Case No. 99-0710 (March 19, 2001) at p. 2. Finally, the Board has previously held that conduct (or in this instance, circumstances, such as a medical condition) not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; and (c) to consider whether a particular provision of the Adjudicative Guidelines is applicable. *See, e.g.*, ISCR Case No. 98-0582 (November 12, 1999) at p. 9.

In this case, the evidence pertaining to Applicant's depression was contained in Government Exhibits 3 through 8. Copies of these documents were provided to the Applicant prior to the hearing and the documents were admitted into evidence without any objection relating to lack of notice or mention of Applicant's condition of depression. ⁽¹⁾ Moreover, several of Applicant's own exhibits contained references to his depression. Thus, Applicant's claims of violation of his procedural due process rights and inability to prepare a defense are without foundation. Additionally, given the record evidence in this case, the Administrative Judge had a rational basis for finding that Applicant's excessive use of alcohol over a period of years was inextricably linked to his medical condition of depression. The Judge considered Applicant's depression for whatever light it cast upon Applicant's past and potential future alcohol consumption, which was an issue which was properly before her. Applicant complains that the Judge relied exclusively upon his depression as the sole basis for her adverse decision. After considering the whole of the Judge's decision, the Board concludes that the Judge did not make use of Applicant's history of depression as an independent or exclusive basis for her decision. Applicant's depression was a factor in the Judge's decision only to the extent that it affected her evaluation of his alcohol consumption, the quality of his rehabilitation, and the potential for future relapses. Considering all the circumstances, the Judge's reliance on evidence concerning Applicant's depression was not arbitrary, capricious, or contrary to law.

2. Whether the Administrative Judge erred by concluding the evidence failed to establish that Applicant's depression was being sufficiently controlled by medication so as to preclude the possibility of Applicant returning to his prior pattern of self-medicating with excessive amounts of alcohol. Applicant does not challenge the Administrative Judge's finding that his alcohol abuse was related to his self-medication of his depression. However, Applicant does challenge the Judge's conclusions that: (a) Applicant's depression had not been controlled for any sustained period of time without Applicant's use of alcohol; and (b) more time in rehabilitation was needed before a determination could be made that Applicant will not return to his prior pattern of alcohol abuse. Applicant argues that the only conclusion that can properly be drawn from the evidence is that Applicant's depression is now fully controlled and that there is no likely risk of relapse.

While acknowledging that Applicant's depression is currently under control, the Administrative Judge concluded that this current stability has not existed *for any sustained period* (emphasis added). The Judge's conclusion is sustainable in light by the record evidence in this case. Applicant's ability to argue in support of a more favorable interpretation of the record evidence does not demonstrate error on the part of the Judge.

Because Applicant has not demonstrated the Administrative Judge acted in a manner that is arbitrary, capricious, or contrary to law, Applicant is not entitled to have his case remanded to the Judge so that he can present additional evidence on his behalf.

Conclusion

Applicant has failed to meet his burden of demonstrating error on appeal. Therefore, the Administrative Judge's January 25, 2005 decision is affirmed.

Signed: Emilio Jaksetic

Emilio Jaksetic

Administrative Judge

Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett

Administrative Judge

Member, Appeal Board

Signed: William S. Fields

William S. Fields

Administrative Judge

Member, Appeal Board

1. Applicant did object to some of these exhibits, but only on the limited grounds that they contained hearsay statements of his ex-wife about his drinking habits.