KEYWORD: Guideline G; Guideline H

DIGEST: The Judge's challenged finding regarding applicant's alcohol consumption is supported by substantial record evidence. Medical records have indicia of reliability such that they fall within exceptions to the hearsay rule. Applicant waived any privilege that might have pertained to the records. Adverse decision affirmed.

CASENO: 02-25196.a1

DATE: 07/10/2007

DATE: July 10, 2007

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

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Richard A. Stevens, Esq., Department Counsel

FOR APPLICANT
George E. Rippel, Jr., Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On April 28, 2005, DOHA issued a statement of reasons advising Applicant of the basis for that decision–security concerns raised under Guideline G (Alcohol Consumption) and Guideline

H (Drug Involvement) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a decision on the written record. On November 15, 2006, after considering the record, Administrative Judge Jacqueline T. Williams denied Applicant's request for a security clearance. Applicant filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant has raised the following issues on appeal: whether some of the Judge's findings are supported by substantial record evidence; and whether the Judge's decision that the security concerns had not been mitigated was arbitrary, capricious, or contrary to law. Finding no error, we affirm.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following pertinent findings of fact:

Applicant is an employee of a defense contractor who has held a security clearance since 1977. Applicant has consumed alcohol, "at times to excess and to the point of intoxication, to include one pint of vodka daily," from 1966 until 2002. On various occasions from October 6, 1991, to at least April 12, 2004, Applicant received medical treatment for a diagnosis of "alcoholism in partial remission." In September 1994, Applicant's employer recommended that he attend the Employee and Family Assistance Program (EFAP) due to his having missed work due to alcohol abuse. From November 1994 until March 2002, Applicant received both inpatient and outpatient alcohol treatment.

From 1999 to at least 2001, Applicant used cocaine, varying from twice a week to once a month. From July 24, 2001 until August 1, 2001, Applicant was treated for cocaine dependency. "The record evidence is contrary to Applicant's denial of cocaine use. Based on the above mentioned diagnosis, Applicant used cocaine and was untruthful in his denial."

Applicant has attended Alcoholics Anonymous (AA) with varying frequency from 1994 until 2001 and again in April 2002. The file contains a letter from Applicant's sponsor, attesting to his progress in dealing with alcoholism. However, the letter does not reflect that the sponsor was aware of Applicant's problem with cocaine.

B. Discussion

The Appeal Board's review of the Judge's findings of fact 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.

Applicant challenges the Judge's finding that he has consumed a pint of vodka daily since 1966. However, Item 11, which consists of extracts of Applicant's medical records, contains the following statement at page 3: "[Applicant] is a 48 year old . . . male, with a past history significant for alcohol abuse . . . who was brought into the emergency room last evening[1] because he was too weak to walk. He has been drinking one pint of vodka a day for 35 years . . ." Item 10, a discharge summary describing a subsequent hospitalization for alcohol and cocaine dependency,[2] states at page 2: "The patient . . . started drinking at age 13." Therefore, we conclude that the Judge's finding is based upon substantial record evidence.

Applicant also challenges the Judge's statements (1) that he has not taken responsibility for his cocaine use and (2) that he has denied cocaine use. This use is reflected in Item 8, Applicant's interview with the Defense Security Service (DSS) investigator.[3] In that interview Applicant admitted that he had used cocaine "ranging from twice a week to once every other month" from 1991 until July 2001. Applicant's cocaine problem is also reflected in Item 10, which states, "[Applicant] reports having alcohol and cocaine abuse." The Judge's statement about (1) is located in the Conclusions section of the decision and appears to be based on the Judge's interpretation of Applicant Exhibit C, a memo from Applicant's AA sponsor. In that memo, the sponsor lauds Applicant's efforts to remain free of alcohol: "[Applicant] has developed a passion for the sober way of life." The Judge noted that the statement does not reflect that Applicant's sponsor was aware of the cocaine abuse, which suggests that Applicant was minimizing his cocaine problem in his response to the FORM.

Regarding (2), Item 11, prepared upon Applicant's admission for inpatient alcohol abuse treatment, describes various social factors that bore upon Applicant's medical condition. It states at page 4: "No history of illicit drug use." It could reasonably be inferred that this statement came from Applicant. As the date of admission was April 24, 2001, and as Applicant has elsewhere acknowledged that he was a frequent user of cocaine from 1999 to 2001, the Judge could reasonably have concluded that Applicant was being untruthful as to his drug activity. The documents referenced above reasonably support the Judge's observation that Applicant has not sufficiently taken responsibility for his cocaine use and that he has in fact denied such use. Accordingly, we conclude that the Judge's findings are based upon substantial evidence. Even if there was error in these findings, such error would be harmless, given the record evidence as a whole. *See* ISCR Case No. 01-23362 (App. Bd. June 5, 2006); ISCR Case No. 03-09915 (App. Bd. Dec. 16, 2004); ISCR Case No. 01-11192 (App. Bd. Aug. 26, 2002).

Applicant also takes issue with the Judge's decision to consider certain documents submitted by the government. First, he challenges the admission of his interview with the DSS agent on the grounds that it violated his right against self incrimination under the Fifth Amendment of the Constitution. However, this was not a custodial interrogation within the meaning of *Miranda v.*

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[1]April 24, 2001.

[2]Applicant was admitted for inpatient treatment for alcohol and cocaine dependency on July 24, 2001.

[3]This document is entitled "Certified Results of Interview" and summarizes Applicant's statements to the investigator. The document contains the following: "This summary was prepared by the undersigned on 22 Apr 02 and accurately reflects the information provided during the interview." The document bears the signature of the special agent who conducted the interview with Applicant.

Arizona, 384 U.S. 436 (1966). Interviews in security clearance cases do not involve custodial interrogations by law enforcement officers. ISCR Case No. 94-0722 at 5 (App. Bd. Sept. 28, 1995). Because DOHA proceedings are civil, not criminal, in nature, the procedural protections available to defendants in criminal proceedings are not applicable. *See, e.g.,* ISCR Case No. 96-0127 at 2 (App. Bd. July 29, 1997); ISCR Case No. 95-0818 at 6 (App. Bd. Jan. 31, 1997). There is no basis to conclude that Applicant's statement to the investigator was other than voluntary. Accordingly, the Judge did not err in considering Item 8.

Applicant also challenged the admission of Item 8, as well as of Items 9 - 13, on hearsay grounds. He also contends that Items 9 - 13, which are portions of his medical records, were admitted in violation of the doctor patient privilege.[4]

These documents' hearsay character do not impair their admissibility in this case, for they had reasonable indicia of reliability or otherwise fell within exceptions to the hearsay rule. Item 8 was a detailed summary of Applicant's admissions, given under circumstances in which Applicant was required to cooperate and be truthful. It was consistent with other evidence in the record, and certified as true by the agent. The medical records are a type of evidence routinely admitted in trials and administrative proceedings, on the view that " people are motivated to tell the truth to a physician who is going to diagnose or treat them." Paul Rothstein, *Federal Rules of Evidence (Third Edition)* at 553 (2007). The Federal Rules of Evidence serve only as a guide in DOHA hearings. Directive ¶ E3.1.19. They may be relaxed in order to allow the parties to develop a full record. The DOHA process encourages Judges to err on the side of initially admitting evidence into the record and then to consider a party's objections when deciding what, if any, weight to give to that evidence. Because DOHA proceedings are conducted before impartial, professional fact finders, there is less concern about the potential prejudicial effect of specific items of evidence than there is in judicial proceedings conducted before a lay jury. *See, e.g.*, ISCR Case No. 04-11571 at 2-3 (App. Bd. Feb. 8, 2007).

Concerning the alleged privileged nature of the medical documents, Item 14, a memo from Applicant's attorney to Department Counsel, states that Applicant "has authorized me, on his behalf, to consent to the release of any medical information or medical treatment records deemed relevant and material" to his case. Therefore, any privilege or right of privacy which Applicant might otherwise seek to invoke has been waived for purposes of this adjudication. Accordingly, we conclude that, given the record in this case, the Judge did not err in admitting the documents into evidence. Furthermore, the weight which she assigned to the documents was not arbitrary, capricious, nor contrary to law. *See, e.g.*, ISCR Case No. 98-0619 (App. Bd. Sept. 10, 1999).

Whether the Record Supports the Judge's Ultimate Conclusions

A Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choices 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

[4]Applicant's brief on appeal addresses, somewhat summarily, issues he raised in more detail in his response to the FORM. We have read these documents together, therefore, in addressing the appellate issues in this case.

of national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Appeal Board may reverse the Judge's decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

"[T]here is a strong presumption against granting a security clearance." *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied,* 499 U.S. 905 (1991). Once the government presents evidence raising security 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* ISCR Case No. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

Given the Judge's findings in this case, there is no basis to conclude that she erred in her analysis of possible mitigating conditions or that her whole-person analysis was flawed. Given the extent of Applicant's struggle with substance abuse, the Judge made a reasonable conclusion that Applicant had failed in his burden of persuasion. This is especially true in light of Applicant's having requested an administrative determination, which deprived the Judge of an opportunity to evaluate the credibility of his statements in the context of a hearing. We hold that the decision is not arbitrary, capricious, or contrary to law.

Order

The Judge's decision denying Applicant a security clearance is AFFIRMED.

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

Signed: William S. Fields
William S. Fields
Administrative Judge
Member, Appeal Board

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