



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
 [Redacted]) ISCR Case No. 18-01029
)
 Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Eric Leckie, Esq.

11/12/2019

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline I (Psychological Conditions). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on April 13, 2016. On June 10, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline I. The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016).

Applicant answered the SOR on July 6, 2019, denied all the allegations, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on August 16, 2019, and the case was assigned to me on August 21, 2019. On

September 5, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for September 24, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. DOHA received the transcript (Tr.) on October 2, 2019.

Findings of Fact

Applicant is a 31-year-old systems administrator employed by defense contractors since February 2016. He served on active duty in the U.S. Army from August 2006 to February 2015. His Army service included one tour of duty in Iraq and two in Afghanistan. He was deployed as an information technology (IT) specialist and was not involved in direct combat. (Tr. 19-20.) He was awarded the Army Commendation Medal three times, the Joint Service Achievement Medal, the Army Achievement Medal twice, and various service medals. (AX C.) He was discharged as a sergeant and received an honorable discharge. He has held a security clearance since February 2006.

Applicant married in November 2009, divorced in October 2011, remarried in March 2013, and divorced in April 2014. He has no children. He attended college classes from August 2007 to January 2012 and attended a technical institute from June 2015 to February 2016, but he did not receive a degree.

Applicant began having difficulty sleeping after he returned from deployment in 2011 or 2012. He attributed his sleep difficulty to jet lag and frequently switching shifts while deployed. He consulted with an Army psychiatrist, who prescribed a sleep medication.

In 2013, after Applicant was reassigned to another duty station, he received a prescription from a military clinic for a sleep medication. He used it for about two months and then stopped using it after he overslept, missed an appointment with his battalion commander, and received nonjudicial punishment for missing the appointment.

After Applicant was discharged from the Army, the Department of Veterans Affairs (VA) determined that he was not suffering from post-traumatic stress disorder (PTSD). (Tr. 20.) He testified that his only mental-health issues while on active duty were related to falling asleep, staying asleep, and getting to work on time. (Tr. 21.)

Applicant was employed by a local school district as a maintenance technician from January to September 2015. He left the job by mutual agreement after repeatedly oversleeping and coming to work late. He sought help from a VA mental-health clinic for his sleep issues. He testified that he was in a cycle in which his anxiety about falling asleep and waking up on time kept him awake. His inability to break the cycle caused him to be depressed. He consulted with a VA psychiatrist, who prescribed a medication that made him feel tired and lethargic during the day. He told the psychiatrist about the adverse effects of the medication and the psychiatrist asked him what he wanted to do about it. Applicant promptly requested an appointment with a psychologist instead of a

psychiatrist. For four or five months, he received counseling from a VA psychologist. He described the counseling as follows:

Sleep hygiene such as making sure you dim the lights, don't use electronics, maybe read, listen to music, things to take your mind off of being active until the last minutes before you fall sleep. Meditation, mindfulness. We spoke about issues in my past. Spoke about my military career. So, it was just putting everything out on the table instead of holding it all in.

Applicant testified that the counseling gave him "a whole regime of treating your body and mind in order to facilitate a better night's sleep." (Tr. 27, 43.) He found the counseling program helpful, and his anxiety and insomnia improved, even though he was not taking any medication. (Tr. 27, 43.)

In January 2017, Applicant again sought treatment from a VA mental-health clinic regarding anxiety and insomnia. He received more counseling about coping strategies, mindfulness exercises, and sleep strategies. He received a prescription for a sleep medication (Xanax), to be used on an "as needed" basis, and an over-the-counter medication (Melatonin). The Melatonin enhanced his ability to sleep, to the extent that he began using Xanax one night per week or less. After consulting with his mental-health provider, a psychiatric nurse practitioner, he stopped using the Xanax. (AX A.)

In July 2017, two men attempted to break into Applicant's home. Applicant was watching television in the evening when he heard footsteps in his enclosed back yard. His back yard was covered with rocks and gravel, which made movement noisy. (Tr. 31.) He retrieved his handgun from a night stand in the bedroom, peered through the curtains on the sliding glass door to the back yard, and observed two men wearing "hoodies" with bandanas covering their faces. He opened the door and fired three shots at the men, who ran away and climbed over a five-foot cinder-block wall. He shot one of the men in the foot. After the men fled, he called the police, who responded in 5-10 minutes. (Tr. 31-32.)

The injured man was later found in a hospital by the police and charged with burglary. Applicant was not charged with any offense. In June 2019, he was notified by the county attorney's office that the burglar was being tried in July and that he, listed as a victim, was invited to attend the trial. (AX D.)

About a week after the attempted burglary, Applicant was home alone around midnight when he was awakened by a loud noise caused when a large board that he had used to secure the slider after the burglary attempt fell to the floor. Fearing another burglary or retribution for shooting the previous burglar, Applicant donned a body-armor vest, picked up his shotgun, turned on all the lights, checked the house, found no one present, and returned to his bedroom. About five minutes later, Applicant's roommate came home and saw Applicant sitting on his bed, wearing body armor and holding a shotgun. (Tr. 33-34.) A psychologist conducting a psychiatric evaluation requested by the DOD CAF in March 2019 evaluation stated, "He reported [to her] that he went into his closet and called the police." (GX 2 at 5.) Applicant did not mention calling the police in

his interview with a security investigator in September 2017 or his testimony at the hearing.

After the attempted burglary, Applicant again sought help from the local VA hospital for anxiety and sleep deprivation. He was given a holistic treatment plan that included exercises to be conducted before going to bed, proper sleep hygiene, improved diet and exercise, and a sleep-aid medication.

In August 2017, Applicant was being considered for an assignment in Iraq, and he consulted with his VA care provider, a psychiatric nurse practitioner, seeking a medical waiver that would allow him to accept the assignment. The VA provider determined that he had no limitations or psychological impairments. She noted that his mood was stable, he was no longer depressed, and his insomnia was being controlled with medications. Her evaluation was approved by a clinical nurse specialist and a medical doctor assigned to the military command that Applicant would be supporting in Iraq. (AX A.) Applicant was deployed to Iraq from October 2017 to December 2018. (AX B; SOR Answer at 2.) He had no issues with sleep or depression, and he testified that he was promoted twice while in Iraq. (Tr. 39.)

In March 2019, the DOD CAF referred Applicant's case for a psychological evaluation. The psychologist who evaluated Applicant noted that he had two brief and rather volatile marriages, that he has limited involvement with four older half-siblings, that he was sexually abused by his maternal grandfather and sexually assaulted by a former male friend, that he has "distant peer relationships," and that he has found it difficult to reestablish connections with former friends. She noted that he was unemployed when his last contract ended in December 2018 and that he was hoping for a new contract in April 2019. (He is still sponsored by the same employer but apparently was between contracts when he was interviewed by the psychologist.) She did not mention or discuss the fact that Applicant had recently completed a 15-month deployment to a hostile-fire area without incident.

The psychologist diagnosed Applicant with chronic PTSD and a recurrent major depressive disorder. None of the military and VA medical professionals who had previously treated Applicant from 2012 to 2017 had diagnosed him with PTSD. She commented:

The risk of future depressive episodes and difficulties with insomnia and PTSD symptoms seem likely in the context of [Applicant's] continued social isolation and unemployment. By wielding a weapon in his home, [Applicant] has evidenced erratic behavior which could have reasonably led to unintentionally harming or killing himself or bystanders; there, his judgment appears to be questionable. Further, he reported no currently (sic) involvement in outpatient therapy or psychiatric medication management. As such, it appears that [Applicant] is not currently involved in sufficient counseling or other medical treatment to address his existing psychological conditions or mitigate the aforementioned behavior of concern.

The psychologist concluded that Applicant's "current, untreated psychiatric symptoms may impact his judgment, reliability, or trustworthiness concerning classified information. Additionally, the risk to judgment and reliability of any future mental health problems is likely. His prognosis is guarded at this time." (GX 2.) The psychologist's evaluation triggered the SOR.

At the hearing, Applicant testified that he was not experiencing depression. His anxiety was limited to concern about his security clearance. He was not taking any medications or receiving counseling. He testified that if his symptoms reappeared he would know how to respond to them proactively. (Tr. 42.)

Applicant has never been directed to undergo counseling or treatment. In every case, he self-referred when he experienced anxiety, insomnia, or depression. (Tr. 43.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline I, Psychological Conditions

The record in this case includes the conflicting diagnoses of two sets of medical professionals, both from medical professionals employed by the U.S. Government. The first diagnosis is from the VA mental-health clinic that treated Applicant for January to August 2017 and the military doctor who cleared him for deployment to Iraq. The second is from the psychologist employed to conduct the March 2019 evaluation requested by the DOD CAF. The SOR is based on the March 2019 evaluation.

SOR ¶ 1.a alleges that Applicant reported to the psychologist in March 2019 that he had been prescribed various drugs for insomnia and depressive symptoms and that on each occasion he had stopped using the drugs “for reasons other than a doctor’s advice.”

SOR ¶ 1.b alleges that in July 2017, Appellant, while in his home, feared that he was in danger from an earlier event, so he donned a bulletproof vest and grabbed his shotgun, but there was no one in his home and he was not in danger. It further alleges that the psychologist who evaluated Applicant in March 2017 “deemed this action to be erratic, described it as an exhibition of poor judgment, and attributed it to post-traumatic stress disorder.”

SOR ¶ 1.c alleges that the psychologist who conducted the evaluation in March 2019 diagnosed him with chronic PTSD and recurrent major depressive disorder; found

that his current, untreated psychiatric symptoms may impact his judgment, reliability or trustworthiness concerning classified information; and found that “the risk to judgment and reliability of any future mental health problems is likely.” Her prognosis was “guarded.”

SOR ¶ 1.a is not established. With the exception of the anti-anxiety medication prescribed by a VA psychiatrist in 2015, all the medications, which were sleep aids, were prescribed to be used as needed. When Applicant experienced adverse effects from the anti-anxiety medication in 2015, he informed the psychiatrist of his concerns and sought alternative treatment from a VA psychologist.

SOR ¶ 1.b is based on the March 2019 evaluation of the second event in July 2017, when Applicant thought that he was about to be burglarized a second time. The psychologist apparently had no concerns about Applicant’s use of deadly force in response to the attempted burglary, but she described Applicant’s response to the second incident as “erratic and an exhibition of poor judgment because it could have resulted in harm to himself or others.” I find that this conclusion is unsupported by the evidence. Applicant was awakened by a loud noise consistent with someone breaking in through the sliding door. He responded by turning on the lights, donning a body-armor vest, grabbing his shotgun, checking the house, and returning to his bedroom after determining that there was nobody in the house. As a seven-year Army veteran, he was well-trained in the safe use of a weapon. His conduct was not “erratic,” nor was it unnecessarily dangerous.

SOR ¶ 1.b also adopts the psychologist’s conclusion that Applicant’s conduct was attributed to PTSD. She does not articulate the factual basis for this conclusion. He was found to not have PTSD when he was discharged from the Army. He was seen by military and VA medical professionals in 2012, 2013, and 2017, and none of them raised the possibility of PTSD. The diagnosis of PTSD was based on a single meeting with the psychologist who conducted the March 2019 evaluation, and it is inconsistent with the evaluations of the VA medical personnel who treated Applicant for eight months before his recent deployment to Iraq.

SOR ¶ 1.c is established by the March 2019 evaluation and the evidence of Applicant’s treatment for depression at the VA mental-health clinic.

The concern under this guideline is set out in AG ¶ 27:

Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. 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 guideline and an opinion, including prognosis, should be sought. No

negative inference concerning the standards in this guideline may be raised solely on the basis of mental health counseling.

The following disqualifying conditions under this guideline may be applicable:

AG ¶ 28(a): behavior that casts doubt on an individual's judgment, stability, reliability, or trustworthiness, not covered under any other guideline and that may indicate an emotional, mental, or personality condition, including, but not limited to, irresponsible, violent, self-harm, suicidal, paranoid, manipulative, impulsive, chronic lying, deceitful, exploitative, or bizarre behaviors;

AG ¶ 28(b): an opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness; and

AG ¶ 28(d): failure to follow a prescribed treatment plan related to a diagnosed psychological/psychiatric condition that may impair judgment, stability, reliability, or trustworthiness, including, but not limited to, failure to take prescribed medication or failure to attend required counseling sessions.

AG ¶ 28(a) is not established, because there is no evidence of behavior that casts doubt on Applicant's current judgment, stability, reliability, or trustworthiness. AG ¶ 28(b) is raised by the March 2019 evaluation. AG ¶ 28(d) is not established because there is no evidence that medical approval was required to terminate the use of sleep aids, and Applicant took prompt steps to seek alternative medical treatment when the anti-anxiety medication prescribed in 2015 produced adverse effects.

The following conditions are potentially applicable:

AG ¶ 29(a): the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;

AG ¶ 29(c): recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by, the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation;

AG ¶ 29(d): the past psychological/psychiatric condition was temporary, the situation has been resolved, and the individual no longer shows indications of emotional instability; and

AG ¶ 29(e): there is no indication of a current problem.

AG ¶¶ 29(a) and 29(c) are established by the evidence from the VA mental-health clinic staff and the approval of Applicant's medical waiver for deployment to Iraq.

AG ¶ 29(d) is not fully established. Applicant's insomnia and the resulting anxiety and depression are not temporary conditions, but they are in remission. Applicant successfully completed a 15-month deployment to a hostile-fire area and has exhibited no indications of emotional instability since his return.

AG ¶ 29(e) is established. Applicant successfully completed a 15-month deployment to Iraq without incident. The March 2019 evaluation concludes that there is a current problem, but it is contradicted by the VA evaluation, the approval of Applicant's medical waiver, and his successful completion of a stressful and demanding deployment. For the reasons set out above, I found the VA evaluation more persuasive than the March 2019 evaluation.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guideline I in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Applicant's testimony at the hearing was calm, candid, sincere, and persuasive. He served honorably for seven years in the U.S. Army, including three deployments to combat zones. He has held a security clearance since 2006. He has acted responsibly to overcome his problems with anxiety, insomnia, and depression. In every instance, he self-referred himself for treatment, and he has reached the point where he is using the strategies he has been taught to cope with his problems without medication.

After weighing the disqualifying and mitigating conditions under Guideline I, and evaluating all the evidence in the context of the whole person, I conclude Applicant has

mitigated the security concerns raised by his history of anxiety, insomnia, and depression. He has refuted the allegation that he has PTSD.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Guideline I, Psychological Conditions: FOR APPLICANT

Subparagraphs 1.a-1.c: For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge