DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 18-02085
	)	
Applicant for Security Clearance	)	
	)	

Appearances

For Government: Alison O'Connell, Esq. Department Counsel
For Applicant: Steven R. Freeman, Esq.

08/30/2019

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Decision

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MASON, Paul J., Administrative Judge:

Applicant has mitigated the security concerns arising from Guideline I (psychological conditions). Eligibility for security clearance access is granted.

Statement of the Case

On September 4, 2015, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to retain a security clearance required for a position with a defense contractor. The Department of Defense (DOD) could not make the affirmative findings required to continue his security clearance. DOD issued to Applicant a Statement of Reasons (SOR), dated August 29, 2018, detailing security concerns under psychological conditions (Guideline I). The action was taken under Executive Order (E.O.) 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) which became effective on June 8, 2017.

Applicant provided his notarized answer on September 18, 2018. He provided a supplemental answer on October 3, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 4, 2019, for a hearing on March 4, 2019. The hearing was held as scheduled. The Government's exhibits (GE) 1, 2, and 5 were entered into evidence without objection. Applicant's objections to GE 3 and GE 4 will be discussed below in Rulings on Evidence. Applicant's three exhibits (AE) A-C were entered into evidence without objection. The record in this case closed when DOHA received the hearing transcript (Tr.) on March 13, 2019.

Rulings on Evidence

Applicant objected to the medical opinions contained in GE 3 and GE 4. Specifically, he argued that the medical opinions within both exhibits, which are hearsay, deny him the right of confrontation and cross-examination as set forth in E3.1.22 of Directive 5220.6. Department Counsel responded that: (1) the medical records are admissible as an exception to the hearsay rule; (2) in the case of medical records, the Government is not required to have the author available for cross-examination; and (3) medical records, like police reports, are generally admissible in DOHA hearings.

I overruled Applicant's objection and admitted GE 3 and 4 into evidence. In administrative hearings, including security clearance adjudications, hearsay evidence is admissible and may constitute substantial evidence. *See*, ISCR Case No. 03-06770 at 4 (App. Bd. Sep. 9, 2004). E3.1.22 should be interpreted in the context of the other related paragraphs of the Directive rather in a manner that renders the other paragraphs meaningless. In DOHA hearings, the Federal Rules of Evidence (FRE) apply as a guide to promote the development of a full record. *See*, E3.1.19. Using FRE 803(6) as a guide, I conclude that both exhibits and opinions therein are admissible. There has been no showing that "the source of the information or the method of preparation indicate a lack of trustworthiness." The presence of hearsay in both exhibits does not prohibit their admission, but may affect their weight. (Tr. 13-16)

Findings of Fact

SOR 1.a alleges that Applicant was hospitalized from October to November 2014 on an emergency basis for depression and suicidal thoughts. He was diagnosed with Bipolar Disorder. Applicant admitted this allegation. SOR 1.b alleges that Applicant was diagnosed with Bipolar Disorder II in May 2018 in an evaluation conducted by the Department of Defense. Though the evaluator determined that the condition was in full remission, the evaluator opined that Applicant's lack of candor during the evaluation led him to conclude that Applicant would not likely seek treatment if his symptoms recurred. In his September 2018 answer, he denied this allegation. In his October 2018 answer, he indicated that he could neither admit nor deny the allegation because the Government psychologist did not disclose the diagnosis to him. The second reason is that Applicant denies that he was not candid during the examination and that he would not seek

treatment if his symptoms recurred. (GE 1; GE 3 at 25; GE 4; September 2018 response to SOR)

Applicant is 70 years old. He has been married for 46 years and has five adult-aged children. From 1969 until his honorable discharge in 1975, Applicant served in the U.S. Army on active duty and in the Reserve. In 1974, Applicant received an Associate's of Arts degree. In 1976, he received a Bachelor of Science degree in mechanical engineering. He received a professional engineer's license in 1983. He has held a security clearance since 1969. Applicant has been employed as an integration engineer for a defense contractor since 2004. From October 2014 through February 2015 (when he submitted his most recent e-QIP), Applicant was on medical leave. (GE 2 at 7-28; AE A; AE C at 5; Tr. 23-27, 28-34)

In 1983, Applicant began working for a pharmaceutical company as a project engineer. In 1984 or 1985, he started to become depressed and suicidal. This was the first time he could remember having depressive symptoms. He sought treatment during his employment at the company, though in 1984, he declined advice to seek treatment. In 1993, he terminated his employment with the company rather than comply with advice to seek treatment. Applicant started working on his relative's farm because his family was worth more to him than his job at the company. He worked there until 2004. Then, Applicant began working as an integration engineer for the predecessor of his current employer. He is still working for the same company at the same location at the present time. (GE 3 at 80; Tr. 35-40, 54-58) *See also*, AE C, attachment.

Applicant voluntarily entered inpatient treatment (for the first time) in October 2014 at the hospital identified in SOR 1.a. During his hospitalization for suicidal thoughts and depression over the next three weeks, he met with a psychologist regularly and was prescribed medication. Though he could not remember informing the medical staff that he had two contradictory personalities or that he was a prophet, he did recall telling them he had the power to move storms, but had not moved any in over three years. At his discharge, he was diagnosed with bipolar disorder. After his discharge in November 2014, he received outpatient treatment, including medication. He has had no subsequent treatment or medication since July 2015. He has not had a relapse of his condition since his November 2014 discharge. (GE 3 at 80; Tr. 40-43, 48, 65-69, 70)

Other than the inpatient treatment in October 2014, Applicant recalled seeking outpatient psychological and psychiatric counseling, electroconvulsive therapy, and psychotropic medication periodically over the years since 1985. The consults and medications would work temporarily. When the treatment worked, he enjoyed life and was not depressed. When the treatment stopped working, Applicant's symptoms returned and he discontinued treatment. Sometimes the side effects of the prescribed medication were worse than the mental condition itself. (Tr. 51-52, 59-61) *See also*, AE C, attachment.

A Government psychologist (Dr. D) was asked by the DOD CAF to evaluate Applicant for the purpose of determining whether Applicant's reliability or judgment posed

a threat to his proper handling of classified information grounded on the belief that he may have a condition or diagnosis which, if left untreated, may disqualify him from security clearance eligibility. In May 2018, Dr. D conducted an online evaluation at Applicant's home. The evaluation included a clinical interview. The online evaluation, which was conducted using Applicant's computer and his cell phone, made Applicant uncomfortable because he did not believe he could trust the Government psychologist. In addition, he did not want to experience the emotional pain associated with talking about his past psychological history, and even though the government psychologist explained to him that not talking about the history could have an adverse impact on his security clearance application. (Tr. 43-47)

Dr. D prepared and submitted a "DOD CAF EVALUATION" in May 2018. The sources for Dr. D's ultimate opinions were an online administered clinical interview of Applicant, a review of his medical records and a personal assessment inventory (PAI). The evaluation included an interview with Applicant's wife who informed Dr. D that Applicant was much better currently and had worked through his issues. Dr. D noted that Applicant was unwilling to discuss triggers and causes of his depression. He denied discussing the dynamics of his historically depressive events and would reply to the doctor's questions into his psychological history with statements instead of answers to the questions. One such statement was citing his core issues without explaining what those core issues were. Another statement he used to field several of Dr. D's questions was replying that he did not remember his psychological history. During Applicant's discussion of his treatment history to Dr. D, Applicant indicated he had seen many psychiatrists and psychologists over a 30-year period, but was not currently in treatment. Dr. D did not indicate how long Applicant had not been participating in treatment. (GE 4 at 1-3)

In the mental status examination of his May 2018 evaluation, Dr. D did not observe any signs of agitation. There was no consistent evidence of a loosening of associations and his long-term memory was not considered intact. Applicant denied psychotic symptoms and visual hallucinations. Dr. D observed no evidence of "paranoia or ideas of reference, although direct questions about this topic were deflected." There was no evidence of mania. The PAI results disclosed that there was no psychopathology that would be considered serious or damaging. The clinical interview and PAI indicated a lack of current psychological symptoms that would disqualify him from possessing a security clearance. Dr. D's diagnosis, based on Applicant's previous psychiatric history of Bipolar Disorder diagnosed during the SOR 1.a hospitalization, was Hx (based on previous history): Bipolar Disorder, in full remission. (GE 4 at 3-4)

In the prognosis section of his evaluation, Dr. D opined that Applicant's refusal to provide a forthright discussion into his mental health history showed a lack of judgment, particularly because the potential negative impact on Applicant's employment would usually persuade an uncooperative applicant to reveal the requested information. If, according to Dr. D, Applicant has a mental condition, then it likely will never be treated.

Based on Applicant's resistance to treatment, Dr. D was unable to recommend Applicant for a security clearance. (GE 4 at 3-4; AE C, attachment)

In December 2018, Applicant was evaluated by a psychiatrist (Dr. E) at the request of Applicant's attorney. (The qualifications of Dr. E to testify in forensic psychiatry were stipulated by the parties.) Applicant was very cooperative with Dr. E because the face-to-face contact nurtured Applicant's trust in the doctor. (Tr. 48-49, 77-78)

Dr. E prepared and submitted an evaluation of Applicant in December 2018. The basis for his opinion were DOD records, inpatient medical records from the SOR 1.a hospitalization, Dr. D's evaluation, and Applicant's seven-page statement chronicling his psychiatric treatment. Dr. E conducted a four-hour face-to face clinical interview with Applicant. He administered a PAI that was interpreted by a Ph.D (field not identified). Dr. E also interviewed Applicant's wife for 30 minutes, and reviewed the SOR. (AE C at 1, and attachment; Tr. 80-82)

According to Dr. E's evaluation, Applicant suffered from depression from the middle 1980s through 2015. Applicant's depression was characterized by loss of energy, loss of interest in activities, and difficulty with focus. Before Applicant's hospitalization in October 2014 (SOR 1.a), he had electroconvulsive surgery. Since 2015, he has had no clinically significant depression. Applicant never had a problem with alcohol although he drank more when he was in a depressed mood. Applicant's wife informed Dr. E that Applicant has been psychologically stable since 2015, with no serious depression or mania. Applicant's mental status exam revealed coherent speech with no abnormalities in speech. His affective responses disclosed "no current evidence of depression, anxiety, hypomania, mania or inappropriate affect." Applicant indicated that he feels sad sometimes, but has not had severe depression in more than three years. Dr. E observed no attention or concentration problems and Applicant denied sleep and eating problems. Overall, Dr. E found intact Applicant's cognitive functioning with no mood problems or psychosis. Drs. D and E found no evidence of psychopathology in their review of the PAI results. (AE C at 2-8)

Following his complete examination of all the information presented concerning Applicant, Dr. E found that Applicant was cooperative in discussing all areas of his psychiatric history. His decision to refuse medical treatment was not caused by a "'resistance to treatment'" as expressed by Dr. D, but a lack of continuous improvement, or reaching the conclusion that the treatment did not work. Dr. E's diagnosis of Applicant was recurrent major depression in full remission. Dr. E believed that based on Applicant's clinical interview and his wife's observations, his condition had been in remission for at least three years. Unlike Dr. D, Dr. E did not believe Applicant had a condition or diagnosis that would impact his reliability or judgment in a manner that could present a threat for mishandling classified information. Dr. E indicated "I found nothing to suggest that [Applicant's] current condition would impair his ability to be reliable, trustworthy, of good conduct and character, honest, with integrity and loyal to the United States." Dr. E determined that Applicant would comply with security regulations. Dr. E believes that

Applicant's condition is treatable. Because of the statistical likelihood of a recurrence of a major depressive episode in the future, Dr. E recommended a psychiatrist monitor Applicant regularly. (AE C at 9-10; Tr. 85, 92-97)

At the hearing, Dr. E was asked to comment on statements made by Applicant during his hospitalization in October 2014. (SOR 1.a) Those statements included hitting himself in the head with a hammer, stating he was a prophet, and having the power to move storms. Dr. E explained those events were psychotic symptoms, which are delusional or false beliefs, and occur with individuals who have a bipolar disorder in a manic state. When those delusions or false beliefs go into remission, the false beliefs disappear. If Applicant had reported those delusions or false beliefs, Dr. E may have changed his diagnosis to schizoaffective personality disorder, depending on the persistence of the delusion or false belief. If the belief was transient and not fixed, then Dr. E would consider a schizotypal disorder where the individual is not psychotic, but they have an odd belief that is not a delusion. In Dr. E's opinion, a power to move storms in the context of a normal mood that was not revealed in the medical records or Applicant's mental examination, could support a diagnosis of schizotypal personality disorder. (Tr. 85-89)

Dr. E considered the October 2014 (SOR 1.a) bipolar diagnosis was actually an episode of agitated depression that was more consistent with a 30-year history of depressive symptoms. Even though a schizotypal personality disorder may be more difficult to treat, a peculiar belief (in the context of a normal mood) may not need treatment. Dr. E believes that Applicant's wife will ensure that Applicant pursues treatment in the future as he has done in the past. (Tr. 100-108)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. These guidelines, which are not inflexible rules of law, should be applied with common sense and the general factors of the whole-person concept. The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. The protection of the national security is the paramount consideration. AG ¶ 2(d) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . . ." The applicant has the ultimate burden of persuasion in seeking a favorable security decision.

Analysis

Psychological Conditions

The security concern for psychological conditions is set forth 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 potential disqualifying conditions under AG ¶ 28 are:

> (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;
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> (b) an opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness;
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> (c) voluntary or involuntary inpatient hospitalization;
>
> (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.

The Government has presented sufficient evidence under AG ¶¶ 28(a), 28(b) and 28(c). Dr. D (Government psychiatrist) diagnosed Applicant with Hx (based on previous history): Bipolar Disorder II, in full remission. Applicant admitted and Dr. E reported that Applicant received treatment dating to the middle 1980s for depression. Applicant was voluntarily hospitalized from October to November 2014 for bipolar

disorder. AG ¶ 28(d) does not apply because there is insufficient evidence of a failure to follow a prescribed treatment plan. Applicant stopped treatment in July 2015 because he did not believe the treatment and medications were improving his mental condition. Dr. D noted that Applicant was not in treatment when he evaluated him.

The potential mitigating conditions under AG ¶ 29 are:

> (a) the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;
>
> (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;
>
> (d) the past psychological/psychiatric condition was temporary, the situation has been resolved, and the individual no longer shows indications of emotional instability; and
>
> (e) there is no indication of a current problem.

The record provides ample evidence that Applicant received outpatient treatment from numerous psychiatrists and psychologists over a 30-year period. When the treatment worked, Applicant's life improved. When the treatment did not work, Applicant's depression would return and he discontinued treatment, particularly with the unpleasant side effects of some of the prescribed medication. Dr. E indicated that Applicant's condition is treatable and he would seek treatment should he have a florid episode in the future. Applicant receives some mitigation under AG ¶ 29(a).

Both Dr. D (Government psychologist) and Dr. E believed that there were no psychological symptoms that would affect Applicant's ability to hold a security clearance. However, Dr. D interpreted Applicant's refusal to discuss his psychiatric history and response to treatment as a lack in judgment and supporting Dr. D's decision not to recommend Applicant for a security clearance.

I believe that Applicant was not comfortable providing a psychological evaluation to Dr. D using a computer and a cell phone, and did not trust Dr. D as a result. Talking to Dr. D about his psychological history and the numerous consults with psychiatrists and psychologists distressed Applicant.

Dr. E found Applicant to be open and willing to discuss all items in his psychiatric history. In Dr. E's opinion, for the past three years, Applicant's mental condition has been in full remission. Although there was a statistical chance for recurrence of a major depressive episode in the future, regular monitoring by a

medical health professional was recommended. Applicant's condition is treatable and he will obtain treatment should he need it. AG ¶¶ 29(c) and 29(e) apply.

Whole-Person Concept

I have examined the evidence under the specific guideline (financial considerations) in the context of the nine general factors of the whole-person concept 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for access to classified information must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole-person concept.

Applicant is a 70-year-old mature adult, who has been married for 46 years and has five adult-aged children. He served honorably in the U.S. Army. He has worked as an integration engineer for his employer since about 2004.

Applicant has suffered from depression since the middle 1980s. In the next 30 years, he sought outpatient treatment from many psychiatrists and psychologists. During an episode in October 2014, he voluntarily entered inpatient hospitalization to try another type of treatment for the first time. Following his discharge in November 2014, Applicant participated in outpatient aftercare until July 2015, when the treatment stopped working as it had many times in past.

In May 2018, Dr. D diagnosed Applicant with a mental condition (by mental history) in full remission. In December 2018, Dr. E diagnosed Applicant with a different mental condition in full remission based on a 30-year history of depressive episodes. Based on Applicant's candor that he demonstrated to Dr. E for his evaluative report and his credible testimony that he will seek treatment should his symptoms recur, I conclude that Applicant has mitigated the security concerns arising from the guideline for psychological conditions.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline I:	FOR APPLICANT
Subparagraphs 1.a, 1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Eligibility for access to classified information is granted.

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Paul J. Mason
Administrative Judge