



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



In the matter of:)
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-----) ISCR Case No. 12-02471
)
)
Applicant for security Clearance)

Appearances

For Government: Jeff Nagel, Esq., Department Counsel

For Applicant: *Pro se*

03/22/2019

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant did not mitigate the security concerns regarding his diagnosed Bipolar Affective Disorder. Eligibility for access to classified information is denied.

History of Case

On January 31, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken 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 Security Executive Agent, Directive 4, *National Security Adjudicative Guidelines* (SEAD) 4), effective June 8, 2017.

Applicant responded to the SOR on July 10, 2018, and requested a hearing. The case was assigned to me on January 9, 2019, and was scheduled for hearing on February 14, 2019. A hearing was convened as scheduled, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of three exhibits; Applicant relied on one witness (himself) and no exhibits. The transcript (Tr.) was received on February 26, 2019.

Procedural Issues

Before the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with an updated psychological evaluation. For good cause shown, Applicant was granted 14 days to supplement the record. Department Counsel was afforded two days to respond. Within the time permitted, Applicant submitted an email explanation from his facility security officer (FSO) of her understanding of Applicant's mental health condition, while crediting him with being a true patriot. Applicant's submission was admitted as AE A without objection.

Summary of Pleadings

Under Guideline I, Applicant allegedly (a) was diagnosed with Bipolar Affective Disorder in about February 2010 and failed to follow his prescribed treatment plan by discontinuing a prescribed medication and (b) was diagnosed with Bipolar I Disorder, severe, with anxious distress, with mood-congruent psychotic features, in full remission, in about January 2018, and with a prognosis considered to be guarded due to a lack of personal insight into his symptoms and his non-compliance with his primary care physician's recommendation that he reestablish care with a psychiatrist.

In his response to the SOR, Applicant admitted the allegations covered by SOR ¶ 1.a, but denied the allegations covered by SOR ¶ 1.b. He claimed to have discontinued his treatment in 2010 for two reasons: The medication was making him uncomfortable and he lacked confidence in his provider. He claimed that he found another provider, with the help of his primary provider, whom he was closer to and better connected with, who prescribed more soothing medication. He further claimed that this second doctor later shut down his practice due to a lawsuit.

Applicant claimed in his response that he went back to his primary provider for guidance in finding a new psychiatrist, and that he found a new psychiatrist who treated him for one session before moving on. He claimed that he has a new provider scheduled that he is scheduled to see in July 2018.

Applicant acknowledged having some physical ailments from sports, coaching, industry, and construction, and sometimes suffers from lower back pain in the L-5 area. He claimed that when he would cease using prescribed medication for his Bipolar disorder, his nerve inflammation would subside. And he claimed that he experienced difficulties connecting with his provider and convincing him of his reported experiences

with his medications. Applicant reported in his response that he suffered from Guillen-Barre Syndrome in 1984 that affected his ability to physically function.

Findings of Fact

Applicant is a 63-year-old janitor floor specialist who seeks a security clearance. Applicant's admitted allegations are adopted as relevant and material findings. Additional findings follow.

Background

Appellant married in August 1980 and has two adult children from this marriage. (GE 1) He attended an accredited college between 1974 and 1978, but did not earn a diploma. While an undergraduate student, he played varsity baseball. Applicant reported no military service.

Since July 2008, Applicant has worked for his current employer. (GE 1) Between March 2000 and December 2000, he worked for other employers. He has worked contemporaneously for another employer since May 2011 as an inventory control specialist, and between July 2008 and January 2011, he was self-employed. (GE 1)

Applicant's mental health history

Applicant presents with a lengthy history of mental health issues. (GEs 2-3) In February 2010, he was referred to a mental health provider to assess his mental health symptoms. (GE 2; Tr. 54) After taking personal information from Applicant, Dr. A (a licensed psychiatrist) entered an uncertain diagnosis, but suspected Bipolar Affective Disorder. (GE 2) At this time, Dr. A offered Applicant a trial of anti-psychotic medications (Lamictol and Lithium in various doses) and scheduled him for a return visit in March 2010. (GE 2) Dr. A's notes document that Applicant consulted with him on five occasions between February 2010 and April 2011. (GEs 2-3) While Applicant did not see Dr. A after his last visit in April 2011, he continued to take his prescribed medications for several months thereafter before he ceased altogether. (GEs 2-3; Tr. 32-34)

With the help of his primary medical provider, Applicant engaged another mental health provider, who he was closer to and better connected with. Between Fall 2013 and January 2015, Applicant consulted with Dr. B (a licensed psychiatrist) on several occasions during this time frame. Dr. B prescribed a different medication: Depakote (100 mg). (GEs 2-3; Tr. 33-34, 61-62) He ceased seeing Dr. B after learning that Dr. B retired after being sued by a patient and losing his license in 2015. (GE 2; Tr. 62) Throughout most of 2015, Applicant continued to take his prescribed Depakote intermittently with the advice of another recommended mental health provider (Dr. C), whom Applicant consulted with on only one occasion in 2018. (Tr. 66) For over two years (2016-2018) Applicant did not consult with a mental health provider or take his prescribed Depakote or any other medications designed to address any experienced Bipolar symptoms on more than an intermittent basis. (GEs 2-3; Tr. 62-63, 66-67) Only

through the influence of his daughter did Applicant return to his medications intermittently. (Tr. 63-64)

In January 2018, Applicant was referred by the DOD CAF to Dr. D (a licensed psychiatrist) for a mental health evaluation. (GE 3) After taking psychiatric history from Applicant, Dr. D conducted a mental health examination of him. (GE 3) Results of Dr. D's personality assessment revealed that Applicant answered the questions in a manner where he was trying to portray himself in a positive light that was extreme, even for the evaluative nature of the interview. (GE 3; Tr. 38-39, 62-63) According to Dr. D's observations, Applicant minimized and denied common shortcomings or minor faults in a way that likely indicated he was in denial of these issues with little awareness of the negative impact that his actions had on himself or others. (GE 3) Because of Applicant's abnormally high level of minimizing and the defensive nature of his responses, Dr. D could not reliably extrapolate from his assessment any further details. (GE 3)

Based on his observations of Applicant, Dr. D ruled out Applicant experiencing any symptoms of mania. (GE 3) He did, however, draw historical diagnostic impressions of Applicant's experiencing manic episodes, amid reported concerns from Applicant's daughter about Applicant's disposition to decompensate quickly if he misses a medication dosage or is non-compliant with his medication regimen. (GE 3) Based on his diagnostic impressions of Applicant, Dr. D diagnosed him with Bipolar I Disorder, severe, with anxious distress, with mood-congruent psychotic features, in full remission. (GE 3)

Dr. D, in turn, assigned a prognosis of Applicant that the latter's viability to hold a security clearance is dependent on his ability to be fully compliant and stable on an effective medication regimen. (GE 3) Based on Dr. D's review and understanding of the available medical documentation, collateral information gained, and Applicant's own admission, it was clear to Dr. D that Applicant did not fully grasp the consequences of his previous episodes and that his compliance is due to family pressure rather than personal insight, awareness building, and a desire to prevent further episodes or the consequences that they cause. (GE 3)

Dr. D is on record in expressing particular concern about Applicant's past unwillingness to promptly follow up on his primary care provider's recommendation to reconnect with a psychiatrist, which, in Dr. D's judgment, calls into question his commitment to the treatment plan. Noting few safeguards in place to guarantee or accurately predict whether Applicant's current stability is sustainable, Dr. D determined that Applicant's judgment, reliability, and trustworthiness to safeguard or handle classified information is promising, but only if he is compliant with his medications. (GE 3)

Since his submitting to a psychological evaluation in January 2018, it remains to be seen how Applicant has complied with his medication regimen. The information he provided at his hearing is very limited and includes no documented notes or records of what medications he is currently taking and in what doses. While Applicant has engaged another psychiatrist (Dr. C) in July 2018 to help him manage his medications, to date,

he has seen this mental health provider only once and has not provided any evidence of a diagnosis, prescribed medications, or prognosis from Dr. C. that could help to assess Applicant's current condition and adherence to his prescribed medications. In the meantime, Applicant continues to self-medicate with Depakote. (Tr. 47-48)

Character references

Applicant is well-regarded by his facility security officer (FSO) who considers him a true patriot. (AE A) She expressed awareness of Applicant's medical condition and, in particular, two episodes she knows of where he "became a little unbalanced and both times he was put on short term disability by his doctor." (AE A) His FSO acknowledged that had she known what she knows now, she probably would not have wanted to take the risk and put him in for a security clearance. (AE A) No other character references were furnished by Applicant.

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and many of the conditions that could mitigate security concerns. These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. “[S]ecurity-clearance determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein

Psychological Conditions

The Concern. 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., a 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.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. “[S]ecurity-clearance determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). Because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Analysis

Applicant is a civilian janitor floor specialist who seeks a security clearance. Security concerns are raised over his past history of diagnosed Bipolar Affective Disorder in 2010 and Bipolar 1 Disorder with anxious distress with mood-congruent psychotic features in 2018.

Psychological condition concerns

Since 2010, Applicant has undergone several mental health evaluation for Bipolar-related issues with licensed mental health providers: three self-referred (Drs. A-B and D), and one directed by Applicant’s command (Dr. C). Applicant’s evaluators all reached similar conclusions with their respective diagnoses and prognoses and are fully reconcilable. All three psychiatric evaluators found indicia of Bipolar traits of longstanding duration in their assessments of Applicant.

In their coverage of Applicant’s background history, Drs. A-B and D found evidence of a defect in judgment and reliability in Appellant’s case history without considering him unsuitable for holding a security clearance, providing he complied with his medication regimens prescribed by his treating mental health providers. See *DSM-V*. For obvious reasons, any loss of mental grasp and judgment in times of stress places the affected person at some risk to overreactions to stimuli and consequential misjudgments and cannot be discounted.

For Applicant, his potential for relapse of symptoms (e.g., mood swings) associated with his Bipolar Disorder with attendant risks of judgment lapses (even if not sufficiently developed along any of the *DSM-5* classification categories to warrant clearly identifiable and calibrated stressors) can create hypothetical potential in the opinion of his evaluators for exposing him to security risks to inadvertently compromise classified materials in his custody or control, consistent with the requirements of the *DSM-V*. Based on the recent assessments of Drs. A-C, two disqualifying conditions covered by the psychological conditions guideline are applicable to Appellant’s situation: DC ¶¶ 28(a), “behavior that casts doubt on an individual’s judgment, reliability, or trustworthiness, not covered under any other guideline and that may indicate an emotional, mental, or personalty condition, including, but not limited to, irresponsible, violent, self-harm, suicidal, paranoid, manipulative, impulsive, chronic, lying, deceitful, exploitative, or bizarre behaviors”: 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.”

Based on the reconciled assessments of Applicant’s recent evaluators (Drs. A-C), Applicant may claim some benefits of one of the potentially available mitigating conditions covered by Guideline. MC ¶ 29(b), “the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional,” is partially applicable to Applicant’s situation.

Without more evidence of follow-up treatment and counseling to ensure Applicant’s compliance with the medication regimens prescribed for him by Dr. B, and possibly Dr. D, full application of any of the potentially available mitigating conditions is reserved pending updates of his mental health evaluations. To date, Applicant has not provided any evaluation updates from Dr. D or any other licensed psychiatrist. Nor has he provided probative reassurances of his continued compliance with prescribed medication regimens. Without confirmation of Applicant’s continuing compliance with his prescribed medication regimen, safe predictions cannot be made about his ability to withstand recurrent Bipolar symptoms that can adversely affect his judgment, reliability, and trustworthiness.

Whole-person assessment

Based on a whole-person assessment of Applicant’s current judgment, reliability, and trustworthiness, taking into account all of Applicant’s developed personal histories, diagnostic impressions reach by his professional evaluators, diagnoses, assessments, and prognoses compiled by the mental health professionals who evaluated Applicant, Applicant cannot be reliably predicted at this time to be able to sustain the medication compliance that is required to maintain his diagnosed Bipolar condition in remission.

Applicant is well regarded by his FSO who characterized him as a true patriot. But despite the high praise she extended to him, she could not state with conviction that his current condition could not affect his judgment reliability, and trustworthiness. Psychological condition concerns are not mitigated.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE I (PSYCHOLOGICAL CONDITIONS): AGAINST APPLICANT

Subparagraphs 1.a-1.b:

Against Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge