



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 22-01386
)
Applicant for Security Clearance)

Appearances

For Government: Patricia Lynch-Epps, Esq., Department Counsel
For Applicant: *Pro se*
12/13/2022

Decision

MASON, Paul J., Administrative Judge:

Applicant is 41 years old and has been employed by a defense contractor since 2007. He has had drug problems since 2008. Though he used good judgment in seeking and participating in a successful treatment program in September 2017 for using prescription medications without a prescription, he has taken no action to curb or eliminate his marijuana use. Applicant has not overcome the security concerns that remain under the guideline for drug involvement and substance misuse. Eligibility for a security clearance is denied.

Statement of Case

On November 30, 2019, Applicant certified and signed an Electronic Questionnaires for Investigations Processing (e-QIP, Item 3) to obtain a security clearance required for employment with a defense contractor. On January 10 and January 14, 2021, Applicant provided personal summary interviews (PSIs, Item 4) to an investigator from the Office Personnel Management (OPM). After examining the background investigation, the Defense Counterintelligence Security Agency (DCSA) Consolidated Adjudications Services (CAS) could not make the affirmative findings necessary to issue a security clearance. On August 19, 2022, DOD issued a Statement

of Reasons (SOR) to Applicant detailing security concerns under drug involvement and substance misuse (Guideline H). The action was taken pursuant to 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 Security Executive Agent Directive 4, establishing in Appendix A the National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position (AGs), made effective in the DOD on June 8, 2017.

On August 23, 2022, Applicant furnished an answer to the SOR. He decided to have his case decided administratively on the written record in lieu of a hearing. On September 9, 2022, the Government sent a copy of its File of Relevant Material (FORM), the Government's evidence in support of the allegations in the SOR, to Applicant. He received the Form on September 21, 2022. Department Counsel advised him that he could make objections, submit evidence in rebuttal, extenuation or mitigation, to clarify the contents of the PSI. He was provided 30 days after receipt of the FORM to submit a response. DOHA received no response by the deadline date of October 21, 2022. I was assigned the case on December 1, 2022.

Findings of Fact

Applicant admitted the three allegations listed in the SOR, with explanations. He admitted using marijuana from 2009 to July 2022, including use of the drug after completing and certifying an e-QIP on November 30, 2021. (SOR ¶ 1.a) He observed that use of the drug was legal in his state. He understands that marijuana use is not permitted while possessing a security clearance. He has not used the drug since his vacation in July 2022. Applicant stated that his doctor condoned use of the drug to ease depression and anger issues that led to Applicant's opiate addiction. The word "condone" means forgive. I find the more appropriate word in the context of Applicant's answer to this allegation is that his doctor "advocated" the use of marijuana to improve or diminish Applicant's depression and anger issues.

Applicant indicated that testing positive for marijuana in September 2009, leading to his general discharge under honorable conditions United States Army National Guard (in December 2009, was a regrettable event in his life. (SOR 1.b) Until his discharge, Applicant characterized his performance as top-notch.

Applicant admitted using the prescription medications Percocet, Vicodin, and OxyContin, not prescribed to him, from about May 2008 to September 2017. He has received treatment since November 2017 for a condition diagnosed as opiate dependence. Though Applicant's life was chaotic during the period of dependence, his job performance exceeded expectations. He considers himself very honest and patriotic like his two grandfathers who served in foreign wars. (SOR ¶ 1.c)

Applicant is 41 years old. He was married from June 1996 to October 2010. He served in the United States Army (USA) Air National Guard (ANG) from June 1999 to December 2009, when he received a general discharge under honorable conditions because he tested positive for marijuana in a September 2009 urinalysis. Following his discharge, he purchased a home in April 2014. He has been living with his girlfriend since September 2017, and has a two-year-old son from this relationship. Since July 2007, Applicant has been employed as a master technician for a defense contractor. (Item 3 at 6-18; Item 4 at 1)

Applicant described his purchase and use of narcotics and prescription medications not prescribed to him between May 2008 and September 2017. He indicated that he never had a security clearance, but the ANG processed security clearance paperwork. He did not know the outcome of the processing. (Item 1 at 23-28)

On August 9, 2022, Applicant swore that he read the January 10, 2022 PSI and attested to its accuracy. Regarding the January 14, 2022 PSI with Applicant, the investigator faxed two specific releases related to Applicant's treatment. He signed and returned the releases. Applicant swore that the additional information he provided in response to the interrogatories was true and correct. His signature, which appears on the last page of the interrogatories, is dated August 8, 2022. (Item 4 at 1-11) (Item 4 at 9)

SOR ¶ 1.a – Applicant used marijuana once or twice a week from 2009 to the January 8, 2022. He ingested the drug from either a pipe or a vaporizer. He uses the drug to relax when he is at home. Until purchase of the drug became legal in a state nearby (State X), he would purchase it from drug sellers or acquaintances. He travels to State X to purchase the drug legally, and uses it in State Y, where recreational possession and use of marijuana is legal. Applicant omitted the marijuana use from his November 2021 e-QIP because it was an oversight. (Item 4 at 6-7, 10)

Applicant's marijuana use has not produced any legal or disciplinary action, except for the discharge in December 2009. After the OPM investigator informed Applicant in January 2022 that recreational use of marijuana was not legal at the federal level, and could affect his security clearance application, Applicant indicated that he would stop immediately. There is no indication that he stopped. Rather, he stated in August 2022 interrogatory answers that his last use of the drug was on July 30, 2022, and he had no marijuana in his possession. In his August 2022 answer to the SOR, he stated he would stop if granted a security clearance. (Item 4 at 6-7, 10; August 2022 answer to SOR)

SOR ¶ 1.b - Applicant was in the ANG in September 2009. Regulations required drills of one weekend a month and two weeks a year. In September 2009, his supervisor directed him to undergo a random drug test required under ANG drug screening policy. Applicant complied. About two weeks later, his captain informed him that he would receive a general discharge under honorable conditions because he

tested positive for marijuana. He knew that his marijuana use could result in his discharge from the ANG, but was not thinking about the long-term consequences of illegal drug use. Applicant has never been subject to a courts-martial or other disciplinary action. (Item 4 at 4-5)

SOR ¶ 1.c - Applicant stated that he began using Percocet, Vicodin, and OxyContin in May 2008 to “escape from life’s problems and to self-medicate himself.” (Item 4 at 5) He purchased the prescription medications from drug sellers or acquaintances that he could not recall and in amounts that he could not remember. He used the drugs alone at home or with one or two friends that he could not remember. Occasionally he would not use the drugs for periods of up to one year. The Applicant had no adverse reaction to the drugs, but his addictive use was a pivotal factor in his divorce, loss of friends, and significant loss of money due to his addiction. He used the medications until September 2017, when he voluntarily sought treatment. (Item 4 at 5)

After a couple of unsuccessful attempts, Applicant discovered an effective treatment regimen with a substance abuse counselor in September 2017. (SOR ¶ 1.c) The treatment consisted of group counseling one to three times a week in hour-long sessions. The counselor persuaded Applicant to become more conscientious about his treatment. He has taken no opiates since September 2017, when he began taking Sub Oxone daily prescribed by the doctor who was collaborating with the counselor at the time. Sub Oxone is a prescription drug that decreases the user’s dependence on opiates. Applicant stopped his treatment with the substance abuse counselor but continued his Sub Oxone prescription and opiate addiction treatment with another doctor who could prescribe Sub Oxone to him which the substance abuse counselor could not. Since 2017, Applicant has received treatment from the doctor once a month, then once every six weeks. He claims that he has never been diagnosed by a medical professional with opiate dependence or addiction. Rather, he has always self-diagnosed his addiction. Given the treatment and medication he has received since September 2017, it seems to me that regardless of his self-diagnosis, his treating doctor has essentially confirmed his opiate dependence. In January 2022, he believed his addiction was under control and he has continued to receive treatment. He is determined not to use opiates in the future. (Item 4 at 5-6)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines, which should be applied with common sense and the general factors of the whole-person concept. All available and reliable information about the person, past and present, favorable and unfavorable, should be carefully reviewed before rendering 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

Drug Involvement and Substance Misuse

The security concern under the Drug Involvement/Substance Abuse Guideline is set forth in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

In my analysis of this case, I have taken administrative notice of a memorandum issued by the Director of National Intelligence on October 28, 2014, explaining compliance with federal laws prohibiting marijuana use. The memorandum indicates that no state can sanction violations of the Controlled Substances Act that identifies marijuana as a Schedule I controlled drug. Second, changes in state law (including the laws of the District of Columbia) regarding marijuana use do not alter the national security adjudicative guidelines. Third, a person's disregard for the federal law relating to use, sale, or manufacture of marijuana remains germane to eligibility decisions for sensitive national security positions.

AG ¶ 25. Conditions that could raise a security concern and may be disqualifying include:

- (a) any substance misuse (see above definition);
- (b) testing positive for illegal drug;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia;

- (f) any illegal drug use while granted access to classified information or holding a sensitive position; and
- (g) expressed intent to continue drug involvement and substance abuse, or failure to clearly and convincingly commit to discontinue such use.

Applicant began using marijuana in 2009 at a frequency of one or two times weekly, and continued using at that frequency until at least July 30, 2022. While in the ANG in September 2009, he received a random drug urinalysis and tested positive for marijuana. In December 2009, he received a general discharge under honorable conditions. He continued using the drug after he submitted an e-QIP in November 2021. During his January 2022 PSI, the OPM investigator advised Applicant that recreational marijuana use was not legal at the federal level, and could affect Applicant's security clearance application. He informed the investigator that he would immediately stop using marijuana. His last use of the drug was during a vacation in July 2022. AG ¶¶ 25 (a), (b), and (c) apply. The DOHA Appeal Board has held that drug involvement following the completion of a security clearance application raises serious concerns about an applicant's judgment and willingness to follow the rules, specifically when the applicant has been placed on notice of the consequences of drug use. See ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017; ISCR Case No. 15-01905 at 2 (App. Bd. Apr. 19, 2017). Based on these Appeal Board holdings, AG ¶ 25(f) also applies to Applicant's continued use of marijuana following his November 2021 e-QIP, after he stated he would stop in his January 2022 PSI, and at least until his vacation in July 2022, as he indicated in his August 2022 answer to the SOR. AG ¶ 25(g) applies because of the contradictory positions taken by Applicant concerning his failure to abstain from future marijuana use.

Applicant used the prescription medications Percocet, Vicodin, and OxyContin, not prescribed to him, from May 2008 to the beginning of treatment in September 2017. He used the medications alone or with one or two friends. He purchased the drugs from drug sellers or acquaintances. While Applicant emphasized that he had no adverse reaction to the opiates, he realized that that the drugs played a large part in his divorce in 2010, the loss of his friends, and the loss of a large amount of money used to purchase the medications. AG ¶¶ 25(a) and 25(c) apply to Applicant's use and purchase of prescription medications not prescribed to him.

AG ¶ 26. Conditions that could mitigate security concerns include:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this

problem, and has established a pattern of abstinence, including, but not limited to:

- 1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used; and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility; and

(d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

AG ¶ 26(a) has limited application. Applicant's purchase and use of marijuana and prescription medications cannot be viewed separately, because his use of both drugs overlapped and were ingested to relieve anxiety of one kind or another.

AG ¶¶ 26(b) and 26(d) mitigates Applicant's purchase and use of prescription medications that were not prescribed to him. After failing to matriculate in two drug treatment programs, he did not give up. Instead, he began receiving effective treatment from a substance abuse counselor in September 2017. During the course of regular counseling, the counselor successfully persuaded Applicant to take his treatment seriously. Along with the counseling, the counselor's collaborating doctor prescribed Sub Oxone to Applicant on a daily basis. Since September 2017, Applicant has been regularly taking the prescribed medication and regularly consulting the prescribing doctor. He has repeatedly indicated that he has not used any unprescribed medication since September 2017, and is determined not to use them in the future. In sum, Applicant's nine-year period of addiction to prescription medications that were not prescribed to him is sufficiently mitigated by five years of abstinence combined with a strong recovery program.

However, Applicant has not mitigated his marijuana use and purchases. After he began using marijuana in 2009, he tested positive for the drug while he was in the ANG in September 2009, leading to his General discharge in December 2009. He knew when he was tested that his drug use could result in his discharge from the ANG.

In his January 2022 PSI, after the OPM investigator advised him that marijuana use was illegal at the federal level, he stated that he would stop immediately. In his August 2022 response to interrogatories, he indicated his last use of the drug was during his vacation in July 2022. In his August 23, 2022 answer to the SOR, he

indicated he would not use marijuana in the future if he were granted a security clearance.

Regarding AG ¶ 26(b)'s application to Applicant's marijuana use, Applicant has furnished insufficient evidence of severing ties with drug users. He has not supplied enough evidence to show that he has transitioned to an environment where marijuana is not used. Finally, he has not provided a signed sworn statement underscoring an intention to abstain in the future or risk revocation of security clearance eligibility. Given his recent contradictory positions about marijuana use in the future, Applicant has not submitted sufficient mitigating evidence under AG ¶¶ 25(a) and (b). AG ¶ 25 (d) is unavailable to mitigate because Applicant's drug treatment was designed to eradicate his misuse of prescribed medications.

Whole-Person Concept

I have examined the evidence under the guideline for drug involvement/substance misuse 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 has illegally used marijuana since 2009. He was discharged from the military in December 2009 because of his marijuana use. He has consistently used the drug until July 2022. The fact that his doctor advocates his marijuana use because of mental issues does not excuse or sanction his use for security clearance purposes. The proper safeguarding classified information is a 24-hour obligation regardless of whether an applicant is at work or away from work. Based on Applicant's lengthy history of illegal marijuana use and the lack of persuasive evidence that that he intends to cease using the drug in the future, Applicant has not mitigated the drug involvement and substance misuse guideline.

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 H:	AGAINST APPLICANT
Subparagraphs 1.a, 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national security interest of the United States to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is denied.

Paul J. Mason
Administrative Judge