



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



In the matter of:)
)
) ISCR Case No. 22-00401
)
Applicant for Security Clearance)

Appearances

For Government: Erin P. Thompson, Esq., Department Counsel
For Applicant: *Pro se*

03/08/2023

Decision

Dorsey, Benjamin R., Administrative Judge:

Applicant did not mitigate the drug involvement and substance misuse or the criminal conduct security concerns. She mitigated the use of information technology security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On August 2, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, drug involvement and substance misuse, Guideline J, criminal conduct, and Guideline M, use of information technology. On August 9, 2022, Applicant responded to the SOR and requested a decision based on the written record in lieu of a hearing.

The Government's written case was submitted on December 19, 2022. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. In its FORM, the Government withdrew the allegation listed in SOR ¶ 1.b, under Guideline H, related to misuse of a prescription drug while holding a security clearance. Applicant received the FORM on December 28, 2022. She

responded on an unspecified date with a narrative consisting of two pages (FORM Response). The case was assigned to me on February 15, 2023. The Government exhibits included in the FORM (Items 1-5) and the FORM Response are admitted in evidence without objection.

Findings of Fact

Applicant is a 37-year-old employee of a defense contractor for whom she has worked since March 2021. She earned a high school diploma in 2003 and has taken community college courses without earning a degree. She has never married and has no children. (Items 3, 5, 8)

Beginning in about 2001, Applicant had upwards of six knee surgeries to repair or replace menisci and her anterior cruciate ligament in her left knee. When none of these surgeries proved successful, Applicant had knee replacement surgery in about 2011. Despite the knee replacement, she continued to experience pain in her knee. For several years, she was legally taking the prescription opioid Tramadol with a prescription for pain relief related to her knee. However, in about July 2014, she quit before she was fired from her job with a government agency. She lost her insurance and her prescription for Tramadol lapsed. She was still experiencing pain and thought she needed the Tramadol, so she used it illegally, without the requisite prescription, from about August 2014 until about February 2015. She claimed that she still had a valid prescription for the Tramadol and merely refilled her prescriptions more often than her doctor authorized. There is no documentation to this effect in the record. Regardless, she admitted using Tramadol in a manner inconsistent with her doctor's prescription. From about May 2015 until about the middle of November 2015, a medical doctor again prescribed her Tramadol for pain relief. She claimed that she continued to experience pain in her left knee until a surgical repair of a portion of her artificial knee in about September 2022. However, she has not used opioids since sometime in 2016. (Items 2-4; FORM Response)

While Applicant claimed that she did not use opioids for pain management, she illegally used "medical" marijuana edibles with varying frequency for pain management from about October 2020 to the present. She thought using medical marijuana was a better alternative to opioids for managing her pain. In April 2022, she obtained a certification from a family nurse practitioner for the use of cannabis products in State A where she resides. She claimed she thought marijuana use was "legal" in State A until she had her security interview in May 2021. Despite her understanding of marijuana's illegality, she continued to use it and obtained the certificate for the use of cannabis products after her security interview. She claimed that, on an unspecified date, she made her current employer aware of her marijuana use and decided to stop using it. There is no evidence in the record to corroborate this claim. Conversely, she has also claimed that she will stop using marijuana once she obtains a clearance, which implies that she continues to use it. (Items 2, 3, 4; FORM Response)

From about December 2014 until about February 2015, Applicant fraudulently obtained prescriptions for Tramadol. She also fraudulently obtained at least 150 doses

of Tramadol. She obtained these prescriptions and dosages by calling pharmacies posing as an acquaintance who is a registered nurse. Applicant knew the acquaintance's "NPI" number and used it during her phone calls with pharmacies to mislead the pharmacies into believing the prescription was valid. In February 2015, a pharmacist suspected her prescription to be fraudulently obtained and called the police while Applicant was waiting to pick up her refill. A police officer confronted Applicant, and she admitted the prescription fraud. She was arrested and charged with five counts of prescription fraud, a class 6 felony. In May 2015, she entered into a plea agreement whereby she pleaded guilty to all five felony counts. She was sentenced to two years of probation, was ordered to attend drug counseling, had her driver's license suspended for 30 months, and was ordered to pay fees. As part of her plea agreement, her guilty plea on the five felony counts was suspended for a year and all five were reduced to misdemeanors when she completed the other requirements of her plea agreement on June 15, 2017. It is unclear whether she has continued to attend drug counseling after June 2017. (Items 2-5; FORM Response)

From about 2007 until 2014, Applicant held a security clearance while she either worked as a contractor for a government agency or directly for the same government agency. In about December 2013, she failed to properly escort individuals in her workspace for whom she was responsible, because she was using social media. Her supervisor revoked her access to the information-technology (IT) system that allowed her to access social media at work. Applicant wanted to continue to access social media at work, so, in contravention of the government's rules for accessing its IT systems, she used another employee's (her mother's) access information to access the government IT system. Her mother told her that she should not use her mother's access information, but Applicant thought it was not a big deal. In about July 2014, the government agency for whom she worked determined that she was inappropriately accessing its IT system with another individual's access information and gave her the option of resigning or being fired. She resigned. She lost her security clearance because of this conduct and blames her actions on a "severe error in judgment." (Items 2-4; FORM Response)

To show her rehabilitation and worthiness to hold a security clearance, Applicant cites to the years that have passed without using opioids, engaging in criminal conduct, or engaging in workplace misconduct. She claimed that she has learned from her mistakes and now possesses the requisite judgment, reliability, and trustworthiness to hold a security clearance. She claimed that the level of trust that her current employer places in her is evidence of this change. (Item 2; FORM Response)

Policies

This case is adjudicated under Executive Order (EO) 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.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as 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(b) 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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement and Substance Misuse

The security concern for drug involvement and substance misuse is set out 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.

The guideline notes several conditions that could raise security concerns under AG ¶ 25. The following are potentially applicable in this case:

- (a) any substance misuse (see above definition); and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant illegally used the opioid Tramadol without a valid prescription from July 2014 until February 2015. She illegally used marijuana with varying frequency beginning in October 2020, and she failed to provide sufficient evidence that she has stopped using it. The above disqualifying conditions are applicable.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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.

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; 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.

Applicant has not met her burden of providing sufficient evidence to show that her illegal drug use has ceased. She failed to sufficiently establish a pattern of abstinence. AG ¶ 26(a) and AG ¶ 26(b) do not apply.

Applicant eventually illegally used Tramadol after legally using it for years for her chronic knee condition. Her use of Tramadol ceased in about 2016. While she had a prescription for marijuana beginning in April 2022 for pain relief for the same chronic injury, marijuana use is illegal under federal law. She used marijuana for over a year prior to her prescription and has not provided sufficient evidence to show that her marijuana use has ended. AG ¶ 26(c) applies to her use of Tramadol but not to her use of marijuana and therefore partially applies.

Applicant completed a court-ordered drug treatment program as part of her sentence for prescription drug fraud. However, she began illegally using marijuana after she completed this program and has not presented evidence of a favorable prognosis by a qualified medical professional. AG ¶ 26(d) does not apply. None of the mitigating factors fully apply. The drug involvement and substance misuse security concerns are not mitigated, except as indicated above regarding her use of Tramadol.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

In February 2015, Applicant pleaded guilty to five counts of felony prescription fraud after she illegally obtained Tramadol prescriptions and dosages by posing as a registered nurse. There is sufficient evidence of criminal conduct as she pleaded guilty

to all five counts and admitted to the criminal conduct in her plea agreement. The evidence is sufficient to raise the above disqualifying condition.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

While Applicant last engaged in prescription fraud in early 2015, she engaged in criminal conduct again by illegally using marijuana beginning in October 2020. The evidence is unclear whether she has stopped using marijuana. She claimed that she did not realize that marijuana use is illegal under federal law, but she admitted she continued to use marijuana after she understood its illegality. As she engaged in criminal activity beginning in October 2020, and continues to do so, she failed to show that the criminal activity is unlikely to recur or that there is evidence of successful rehabilitation. None of the mitigating factors apply. The criminal conduct security concerns are not mitigated.

Guideline M, Use of Information Technology

The security concern for use of information technology is set out in AG ¶ 39:

Failure to comply with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology includes any computer-based, mobile or wireless device used to create, store, access, process, manipulate, protect, or move information. This includes any component, whether integrated into a larger system or not, such as hardware, software, or firmware, used to enable or facilitate these operations.

AG ¶ 40 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

(a) unauthorized entry into any information technology system; and

(e) unauthorized use of any information technology system.

In 2014, after having her authorization revoked, Applicant repeatedly accessed and made use of a government IT system using another individual's access information. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 41. The following is potentially applicable:

(a) so much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

It has been about seven and one-half years since Applicant made unauthorized access of an IT system. There is no bright-line rule for what amount of time without recurrence constitutes "so much time." While acknowledging the severity of the misconduct, I find that almost 20 percent of Applicant's life without recurrence is sufficient to show that her prior misuse of information technology no longer casts doubt on her reliability, trustworthiness, and good judgment. AG ¶ 41(a) applies. Applicant has mitigated the Guideline M security concerns.

Whole-Person Concept

Under the whole-person concept, the 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. The 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.

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. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H, J, and M in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude she did not mitigate the drug involvement and substance misuse, and criminal conduct security concerns. She mitigated the use of information technology security concerns.

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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Withdrawn
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline M:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Benjamin R. Dorsey
Administrative Judge