

Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested the case be decided on the written record. On April 20, 2007, after considering the record, Administrative Judge Elizabeth M. Matchinski denied Applicant's request for a security clearance. Applicant timely appealed pursuant to the Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge's adverse security clearance decision is arbitrary, capricious, or contrary to law.

Applicant argues that the Judge's adverse clearance decision should be reversed because (a) the Judge's conclusions are inconsistent and contain errors,¹ and (b) the Judge misapplied the disqualifying and mitigating conditions. The Board does not find Applicant's argument persuasive.

In support of his argument, Applicant offers new evidence in the form of additional explanations about his circumstances which address a number of concerns noted by the Judge in her decision. The Board may not consider this new evidence on appeal. *See* Directive ¶ E3.1.29. Its submission does not demonstrate error on the part of the Judge. *See, e.g.,* ISCR Case No. 06-00184 at 2 (App. Bd. Jul. 24, 2007).

The Board's review of a Judge's findings is limited to determining if they are supported by substantial evidence—such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion in light of all the contrary evidence in the record. Directive ¶ E3.1.32.1. “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, (1966).

We have considered the challenged material findings in light of the record and conclude that they are based on substantial evidence. To the extent that there is error in the Judge's findings, we conclude that it is harmless. Applicant has not met his burden of demonstrating that the Judge's material findings with respect to his circumstances of security concern do not reflect a reasonable or plausible interpretation of the record evidence. Considering the record evidence as a whole, the Judge's material findings of security concern are sustainable.

“[T]here is a strong presumption against granting a security clearance.” *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Once the government presents evidence raising security concerns, the burden shifts to the applicant to establish mitigation. Directive ¶ E3.1.15. The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole. *See, e.g.,* ISCR Case No. 01-14740 at 7 (App. Bd. Jan.15, 2003). Thus, the presence of some mitigating evidence does not alone compel the Judge to make a favorable clearance

¹For example, Applicant argues that the Judge erred in her finding that as a technical advisor to the Taiwanese Department of Transportation, Applicant had provided advice as to “electromagnetic systems requirements” and “electromagnetic capabilities,” when in fact he had provided advice as to “electromagnetic emission requirements” and “electromagnetic compatibilities or environmental compliance.”

decision. As the trier of fact, the Judge has to weigh the evidence as a whole and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*. An applicant's disagreement with the Judge's weighing of the evidence, or an ability to argue for a different interpretation of the evidence, is not sufficient to demonstrate the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law.

Applicant elected to have his case decided upon the written record—a circumstance which deprived the Judge of an opportunity to question the Applicant about her concerns and evaluate his credibility in the context of a hearing. In response to the government's File of Relevant Material (FORM), Applicant did not submit any documentary exhibits or witness statements, other than his own statement. Applicant has not met his burden of demonstrating that the Judge erred in concluding that the Guideline B allegations had not been mitigated—given the record in this case. Although Applicant strongly disagrees with the Judge's decision, he has not established that it is arbitrary, capricious, or contrary to law. *See* Directive ¶ E3.1.32.3.

In her decision, the Judge weighed the mitigating evidence offered by Applicant against the seriousness of the disqualifying circumstances, and considered the possible application of relevant mitigating factors. She reasonably explained why the evidence which the Applicant had presented in mitigation was insufficient to overcome the government's security concerns. The favorable record evidence cited by Applicant is not sufficient to demonstrate the Judge's decision is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-17714 at 3 (App. Bd. Jul. 3, 2007). The Board does not review a case *de novo*. Given the record that was before her, the Judge's ultimate unfavorable clearance decision is sustainable.

Order

The decision of the Judge denying Applicant a clearance is AFFIRMED.

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board