DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
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	)	
Applicant for Security Clearance	)	

Appearances

For Government: Carroll Connelley, Esq., Department Counsel
For Applicant: *Pro se*

06/14/2016

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for access to classified information. He provided sufficient evidence of reform and rehabilitation to explain and mitigate his misuse and abuse of painkillers and his illegal purchase of the same. He did not falsify his 2009 security clearance application by omitting his drug abuse because he was not then misusing or abusing the painkillers. Accordingly, this case is decided for Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 Format) on May 27, 2014.[1] About one year later on August 4, 2015, after reviewing the application and information gathered during a background

[1] Exhibit 1 (this document is commonly known as a security clearance application).

investigation, the Department of Defense (DOD)[2] sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information.[3] The SOR is similar to a complaint. It detailed the reasons for the action under the security guidelines known as Guideline H for drug involvement and Guideline E for personal conduct. Applicant answered the SOR on August 19, 2015, and requested a hearing.

The case was assigned to me on October 28, 2015. The hearing was held as scheduled on January 6, 2016. Department Counsel offered Exhibits 1–3, and they were admitted. Applicant testified on his own behalf, but called no witnesses and offered no documentary evidence. The hearing transcript (Tr.) was received on January 13, 2016. The record was kept open until January 27, 2016, to allow Applicant to submit documentation. He made a timely submission of two documents, and they are admitted as Exhibits A and B.

Findings of Fact

Applicant is a 33-year-old employee who is seeking to retain a security clearance previously granted to him. His educational background includes an associate's degree from a technical institute in 2002. He has since been employed as a technician for a company doing business in the defense industry. His first marriage ended in divorce in 2015. He has a five-year-old son with whom he shares custody with his former spouse.

Applicant suffered serious bodily injuries in a mountain-bike accident in 2006.[4] As a result, he was prescribed and took a daily dosage of pain killers during his period of hospitalization. Upon discharge from the hospital, he was prescribed Oxycodone as well as a muscle relaxer, which he used on an as-needed basis, although he preferred to control his pain with over-the-counter medication.

Applicant began misusing the prescribed painkillers in late 2010 or early 2011. His misuse coincided with his wife's pregnancy, which ended with the birth of their son in February 2011. His misuse continued over the next few years, and he used the painkillers for both pain and to self-medicate emotional issues associated with marital discord.

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[2] The SOR was issued by the DOD Consolidated Adjudications Facility, Fort Meade, Maryland. It is a separate and distinct organization from the Defense Office of Hearings and Appeals, which is part of the Defense Legal Services Agency, with headquarters in Arlington, Virginia.

[3] This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

[4] Tr. 33–34.

In 2013, Applicant met an old acquaintance at a party, and that person gave him an Oxycodone pill as Applicant had intense pain in his back and neck. The situation quickly spiraled out of control, resulting in Applicant making regular purchases ($15 to $30 per pill) and taking the painkillers on a daily basis. His "guess" is that he may have spent $10,000 buying the painkillers over a year's time.[5] His increased level of misuse of the painkillers was ongoing when he was involved in two adverse incidents in 2013.

In about April 2013, Applicant was suspended from work for eight or nine days due to spending excessive time on the Internet. Then in about August 2013, Applicant was arrested for driving under the influence of alcohol (DUI) and other related offenses. The criminal case was concluded in December 2013 with a disposition of probation before judgment (deferred adjudication) for the DUI offense and dismissal of the related offenses. The state court placed him on supervised probation for one year, which required him to maintain steady employment, abstain from alcohol and illegal drugs, and pay a fine and court costs. He admits that he had an unreported violation of his probation in early 2014 when, following an argument with his wife, he walked to a bar and had two beers. He did not report that incident to his probation officer because he was concerned about the consequences.

After the DUI arrest, Applicant took a 11-week alcohol education class. The class addressed both alcohol and drug use. During the class, Applicant "started getting the picture of what was going on" with his misuse of painkillers.[6] That led him to attempt to stop using the painkillers on his own, which was unsuccessful because he became ill. In time, with encouragement from a co-worker, he sought help through his company's employee-assistance program.

Applicant dates his last misuse of painkillers to shortly before he was admitted to an intensive outpatient program at a clinic for addiction-treatment programs on March 14, 2014; he was discharged on May 19, 2015.[7] The course of treatment consisted of (1) detoxification and medication, (2) a rehabilitation phase, and (3) a continuing care phase, all of which Applicant completed. The rehabilitation phase consisted of participating in a total of 20 to 30 sessions over a period of two months. His use of alcohol, noted above, took place during this time, and he reported that incident to the program. The continuing care phase consisted of attending a weekly two-hour group therapy session for up to 70 sessions along with attending community-based self-help groups. He had no relapses during this phase. He attends a community-based self-help group occasionally, but not on a regular basis.[8] He generally does not drink alcohol, and

[5] Tr. 75–76.

[6] Tr. 58–59.

[7] Exhibit A (clinic discharge summary).

[8] Tr. 72–73.

the last time he did so was on New Year's Eve when he had a beer with dinner.[9] He no longer associates or has contact with the person from whom he bought the painkillers.[10]

Applicant believes that completing the addiction-treatment program was one of the best things he has ever done for himself.[11] He realized during the program he had been justifying his misuse of painkillers to cope with depression from his marital problems. He also concluded that he and his wife had to separate, which they did in September 2014, and they formally divorced in December 2015. He has no regrets in self-reporting to his company's employee–assistance program because before he did so, his situation had gotten out of control, and he had no tools to deal with his situation.[12] He also submitted a signed statement of intent with automatic revocation of clearance for any violation concerning illegal drug use or misuse of a legal drug.[13]

Applicant completed his current security clearance application in May 2014.[14] In doing so, he fully disclosed his April 2013 suspension from work, his August 2013 arrest for DUI, and his misuse and illegal purchase of painkillers. He provided more detail about his drug misconduct during his 2014 background investigation.[15] But he did not disclose any misuse or illegal purchase of painkillers in a previous security clearance application submitted in July 2009.[16] He explained that although he was using painkillers in 2009, his condition had not yet progressed to the point of misuse and abuse, which began in late 2010 or early 2011.

Law and Policies

It is well-established law that no one has a right to a security clearance.[17] As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the

[9] Tr. 60.

[10] Tr. 51-53.

[11] Tr. 41.

[12] Tr. 41–43.

[13] Exhibit B.

[14] Exhibit 1.

[15] Exhibit 2.

[16] Exhibit 3.

[17] *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

side of denials."[18] Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[19] An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[20]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[21] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[22] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[23] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[24] In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.[25] The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[26]

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.[27] Instead, it

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[18] 484 U.S. at 531.

[19] Directive, ¶ 3.2.

[20] Directive, ¶ 3.2.

[21] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[22] Directive, Enclosure 3, ¶ E3.1.14.

[23] Directive, Enclosure 3, ¶ E3.1.15.

[24] Directive, Enclosure 3, ¶ E3.1.15.

[25] *Egan*, 484 U.S. at 531.

[26] ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

[27] Executive Order 10865, § 7.

is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

The falsification allegation in SOR ¶ 2.a concerning Applicant's 2009 security clearance application is addressed first.[28] Personal conduct under Guideline E[29] is a concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly handle and safeguard classified information. The suitability of an applicant may be questioned or put into doubt when an applicant engages in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with the rules and regulations. And "of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process."[30]

Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement in official governmental matters is a concern. Deliberate means knowingly and willfully. In other words, the omission, concealment, or falsification must be done consciously and intentionally. An omission of relevant and material information, for example, is not deliberate if the person genuinely forgot about the matter, inadvertently overlooked it, misunderstood the question, thought the information did not need to be reported, or otherwise made an honest mistake.

Applicant denies the falsification allegation in SOR ¶ 2.a, which alleged that he deliberately failed to report his misuse and abuse of painkillers in his 2009 security clearance application. He has explained that he did not disclose such matters because his use of painkillers in 2009 was appropriate and did not rise to the level of misuse and abuse until sometime in late 2010 or early 2011. I have seen nothing in the record evidence to contradict Applicant's explanation. His explanation is not fanciful, disingenuous, or incredible on its face. I conclude that he did not falsify his 2009 security clearance application because there was no misuse or abuse of painkillers occurring at that time.

Turning next to the allegations in SOR ¶¶ 1.a and 1.b, Applicant's misuse and illegal purchase of painkillers over a period of years is disqualifying under Guideline H.[31] Here, the record evidence shows he engaged in drug abuse by using a legal drug in a

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[28] The allegation in SOR ¶ 2.b is simply a cross-allegation to the drug misconduct allegations in SOR ¶¶ 1.a and 1.b. The judgment concerns associated with the drug misconduct are sufficiently covered under Guideline H and are not discussed separately.

[29] AG ¶¶ 15, 16, and 17 (setting forth the concern and the disqualifying and mitigating conditions).

[30] AG ¶ 15.

[31] AG ¶¶ 25(a), (c), and (g).

manner that deviated from approved medical direction. He did so to the point of becoming addicted to opiates. He also resorted to buying the painkillers from the street. In addition, his drug misconduct occurred after being granted a security clearance several years ago, which is a serious matter. Overall, it's clear that Applicant had a terrible year in 2013.

There are four mitigating conditions to consider under Guideline H. First, the mitigating condition in AG ¶ 26(a) applies because Applicant's drug misconduct happened under such circumstances that it is unlikely to recur. The basis for his drug misconduct was an addiction to painkillers (although he also did so to self-medicate his depression) that he was unable to overcome on his own. Those circumstances no longer exist. He successfully completed an addiction-treatment program, and his marital problems were resolved with the separation and divorce.

Second, the mitigating condition in AG ¶ 26(b) applies because Applicant has demonstrated a clear intention not to abuse any drugs in the future. His intent is demonstrated by the mature decision he made to self-report his drug misconduct to his company's employee-assistance program, successfully completing the addiction-treatment program during 2014–2015, his abstinence from misusing or abusing painkillers for a period of nearly two years, and his signed statement of intent.

Third, the mitigating condition in AG ¶ 26(c) applies, in part, because Applicant's misuse and abuse of painkillers stemmed from the serious injuries he suffered in the 2006 mountain-bike accident, and the abuse has since ended. This is a significant circumstance to keep in mind. It is quite unlikely that Applicant would have engaged in the drug misconduct at issue but for the mountain-bike accident, which was an unplanned, unwanted, and unexpected event. He does not receive full credit under the mitigating condition, however, because his misuse and abuse of painkillers went too far when he used the painkillers to self-medicate emotional issues as well as buying the painkillers from an illegal source.

Fourth, the mitigating condition in AG ¶ 26(d) applies, in part, because Applicant successfully completed the addition-treatment program during 2014–2015, which included detoxification, a two-month period of intensive rehabilitation, and a phase of continuing care. Likewise, there has been no recurrence of misuse or abuse of painkillers. He does not receive full credit under the mitigating condition, however, because the clinic's discharge-summary record does not reflect a favorable prognosis from a duly qualified medical professional.[32] On the other had, the record does not reflect an unfavorable prognosis either.

In addition to the formal mitigating conditions, since Applicant is currently eligible for access to classified information,[33] he receives credit for (1) voluntarily reporting the

[32] Exhibit A.

[33] AG ¶ 2(e)(1)–(6).

information about his drug misconduct, both to his company's employee-assistance program and in his 2014 security clearance application; (2) being truthful and complete in responding to questions during the security clearance process; (3) seeking professional assistance by admitting himself to the addiction-treatment program; (4) successfully resolving his misuse and abuse of painkillers by completing the addiction-treatment program as well as a period of abstinence of nearly two years; and (5) demonstrating positive changes in behavior, the most notable of which is an increased level of insight, awareness, and understanding of his behavior and emotional well-being.

Based on the record evidence as a whole, I am persuaded that the likelihood of recurrence of Applicant's drug misconduct is acceptably low. Further, I have no concerns or doubts about his current judgment, reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I considered the whole-person concept.[34] I also weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa.* Accordingly, I conclude he met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline H:	For Applicant
Subparagraphs 1.a–1.b:	For Applicant
Paragraph 2, Guideline E:	For Applicant
Subparagraphs 2.a–2.b:	For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for access to classified information.

Michael H. Leonard
Administrative Judge

[34] AG ¶ 2(a)(1)–(9).