

DATE: January 29, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-20110

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant presents with a history of prescription drug abuse stemming from his addiction to pain killers to address pain associated with his chronic kidney stone condition. Since 2002 he has relied on a substituted pain medication, which he takes in compliance with his prescription requirements and provides corroborated medical support that he can expect no judgment lapses for so long as he stays on his prescribed pain medication program. Applicant mitigates security concerns associated with his history of abuse of prescription drugs by demonstrating that he can avoid judgment deficits for so long as he stays with his pain medication program. Clearance is granted.

STATEMENT OF THE CASE

On July 24, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on August 11, 2003, and requested a hearing. The case was assigned to this Administrative Judge on September 12, 2003. Pursuant to notice of September 17, 2003, a hearing was scheduled for October 30, 2003, 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. A hearing was convened as scheduled. At hearing, the Government's case consisted of four exhibits; Applicant relied on one witness (himself) and one exhibit. The transcript (R.T.) of the was received on November 10, 2003.

PROCEDURAL ISSUES

Before the close of the hearing, Applicant requested leave to supplement the record with letters from his treating

providers. There being no objections from Deputy Chief Department Counsel, and good cause being shown, Applicant was afforded an additional 7 days to supplement the record. The Government, in turn, was afforded 3 days in which to respond. Within the time provided, Applicant supplemented the record with a cover letter and letters from each of treating providers (Drs. G and T). The three submissions are accepted without objection as Applicant's exhibit B.

SUMMARY OF PLEADINGS

Applicant is a 46-year old self-employed contractor who seeks a security clearance.

Under Guideline H, Applicant is alleged to have (a) had inpatient treatment at H Hospital in January 1999 for drug dependence (discharged in January 1999 with a diagnosis of prescription opiate dependence to Oxycontin), (b) begun using prescription narcotics in 1989 to help him with pain associated with kidney stones, and in 1998 to have become addicted to Vicoden (an opiate), as evidenced by his taking the drug daily (8 to 9 times a day over a 6 to 8 month period) despite a prescription that called for taking the medication only 3 times a day, and (c) indicated his continued use of Vicoden.

For his answer to the SOR, Applicant admitted to long suffering from chronic kidney stones and severe pain, in addition to extreme migraine headaches. He admitted to abusing prescription narcotics between 1989 and 1998, and to his continuing use of Vicoden (an opiate). Applicant claimed continued participation in aftercare, AA meetings and aftercare meetings on a weekly basis, through he has learned about his addiction as a disease with terrible consequences. He claimed to have weaned himself away from pain medications for the most part (requiring "breakthrough" medications such as Vicoden only when his pain breaks through the Duragesic (pain patch) medications he has been substituting with since September 2002 with considerable success.

FINDINGS OF FACT

The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Applicant began experiencing serious kidney stone problems in 1989. His problems were accompanied by extreme pain in the left flank area and migraine headaches. He was hospitalized on numerous occasions for treatment of his kidney stone condition and underwent 15 to 20 surgeries (lithotripsy and basket removal of stones) between 1989 and 1998 to break up the stones. During an average year, he would suffer 4 to 5 serious attacks.

To deal with the excruciating pain he experienced from his kidney stones, he was prescribed various pain medications (including Vicoden). He came to rely on these medications to relieve the pain from his kidney stone attacks and sought hospitalization only in the severest cases.

In 1998 and 1999, Applicant experienced especially acute kidney stone attacks. To better insulate himself from these severe attacks, Applicant stepped up his Vicoden usage to daily use, even when he was not experiencing pain. In the process of escalating his use of these pain killers, he developed an addiction for Vicoden. For a period of 6 to 8 months in 1998, he regularly ingested 8 to 9 Vicoden pills a day, despite his knowledge that his prescription called for only 3 pills a day (*see R.T.*, at 29). To obtain the additional Vicoden pills he needed, Applicant obtained prescriptions from three different providers (*see R.T.*, at 30-31), who did not know of his obtaining and filling multiple prescriptions. As a result of his increased use of Vicoden, he became addicted to this medication.

Applicant began seeing Dr. A in November 1998 for treatment of his kidney stone condition. When he informed Dr. A of the Vicoden pills he was ingesting daily to combat his pain, Dr. A advised him he was risking his life with this elevated level of prescription drug abuse. But when Applicant tried to cut back his use of prescription pain killers (which included both Vicoden and OxyContin), he became very sick and sought admission to H Hospital in January 1999 for detox and treatment of drug dependence.

Upon his admission to H Hospital, Applicant's medical history was taken. In the taken history, Applicant was characterized as a patient in denial of the excessive amounts of pain killers he had been taking to relieve his pain (primarily Oxycontin). His medical history indicated his past excessive use of alcohol (which he had obtained one to

two years previous). His medical history described him as physically disabled and extremely agitated upon his admission and in an active opiate withdrawal state (*see ex. 4*). Applicant's admission diagnosis was opiate withdrawal (active), prescription opiate dependence, and a history of alcohol and marijuana dependence. Applicant's treatment regimen during his 8-day stay at H Hospital included detox. He was assigned a fair to good prognosis on his discharge and urged to follow-up with his treating physician (Dr. M), enroll in a partial hospital program, and attend AA meetings.

Following his January 1999 discharge from H Hospital, Applicant continued with his prescribed aftercare program and attended AA meetings. His kidney stone problem did not abate, however, and he continued to experience painful attacks. His treating physician (Dr. A) continued to prescribe Vicoden following his discharge. Applicant has continued to take Vicoden, only at reduced levels (*see ex. 2*). He did cease taking OxyContin following his admission to H Hospital (*see R.T.*, at 35-36).

In September 2002, Applicant submitted to a lithotripsy (blast) surgery to address an acute kidney stone attack. From his pain management specialist (Dr. P), Applicant learned of a pain patch called Duragesic (*see R.T.*, at 24). Dr. P assured Applicant that this Duragesic medication would not in any way cause adverse medical effects or produce errors of judgment. After researching Duragesic and making several inquiries of his pain management physician (Dr. P), Applicant received permission from Dr. P to try the pain patches for his chronic pain. These patches provide continuous delivery (transdermically through the skin) of Fentanyl, an opicoid analgesic. For the most part, these pain patches block the pain. Occasionally, though, the pain will break through the Duragesic medication. When this happens, he requires medications to deal with the excess pain. When he needs pain killing supplements, he now relies on prescribed OxyIre from Dr. P, and no longer Vicoden (*see R.T.*, at 40). Still, through his use of these Duragesics, he has been able to drastically reduce his pain pill requirements. Further, Applicant has been able to abstain from alcohol and other addictive drugs and substances.

Recently (in July 2003), Applicant underwent another of his many lithotripsy surgeries to shatter and break up a large stone in his left kidney. Applicant's urologist (Dr. A) indicates Applicant has a large stone in his right kidney as well that will require lithotripsy in the near future.

Both Drs. A and P confirm in their most recent assessments (*see ex. B*) that Applicant has a diagnosed chronic kidney stone condition can be expected to persist indefinitely. Dr. P expresses confidence, though, that while Applicant's prognosis remains guarded and will necessitate pain medication indefinitely to staunch the pain associated with his kidney stones, he can be expected to remain stable and able to perform his daily duties for so long as he stays on his medication. (*see ex. B*).

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

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

Drug Involvement

The Concern: Improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

Disqualifying Conditions:

DC 1 Any drug use.

DC 2 Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.

Mitigating Conditions:

MC 3 A demonstrated intent not to abuse any drugs in the future.

MC 4 Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for 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 common sense 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. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons 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 showing of material bearing, 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, consideration must take account of 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 burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSION

Applicant comes to these proceedings with a history of prescription drug abuse that raises security concerns over his judgment, reliability and trustworthiness required to access him to classified information.

While not established to be abusive to the point of addiction, inferences were drawn that Applicant used pain medication at times in excess of prescription limits during a four-year stretch of his military tour (*i.e.*, between 1998 and 2002). Applicant's exhibited practice of consulting multiple military and civilian medical facilities to obtain prescription medications (in admitted excess) between 1998 and 2002 was abusive and raised security concerns about his ability to comply with his medical prescriptions. Through his substituted use of Duragesics (beginning in September 2002) to control his pain associated with his chronic kidney stone attacks (which show no signs of subsiding) he has been to avoid any reliance on Vicoden. His pain management specialist (Dr. P) expresses confidence in Applicant's ability to avoid prescription drug abuse through his new medication regimen. Dr. P's prognosis also encompasses assurances that Applicant can continue to perform his assigned duties without risk of judgment lapses for so long as he remains in his prescribed medication.

So while Applicant's abusive use of prescription drugs during the 1992-1995 time frame is sufficient to invoke two of the disqualifying conditions of the Adjudicative Guidelines for drugs (*i.e.*, DC 1 (any drug abuse) and DC 2 (illegal drug possession)), both his positive prognosis and elapsed time in avoidance of over use of prescribed pain killers (over five years) warrant safe predictions that he is not likely to abuse his prescription drugs in the foreseeable future. These safe assessments enable him mitigate the Government's security concerns.

Based on his own testimony and the medical reports of his treatment providers, Applicant may invoke MC 3

(demonstrated intent not to abuse any drugs in the future and MC 4 (satisfactory completion of a drug treatment program). Considering all of the developed evidence of record, Applicant convinces he is absolved of risks of recurrent abuse of prescription drugs and judgment lapses associated with such abuses. Favorable conclusions warrant with respect to Sub-paragraphs 1.a through 1.c of Guideline H.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE H (DRUG INVOLVEMENT): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is granted.

Roger C. Wesley

Administrative Judge