

KEYWORD: Guideline J

DIGEST: Applicant’s denial of a criminal state of mind was not consistent with his plea of guilty to a charge of Medicare fraud. In light of this and the other contrary evidence in the record, the Judge’s favorable conclusion as to mitigation is not sustainable. Favorable decision reversed.

CASENO: 08-03620.a1

DATE: 05/06/2009

DATE: May 6, 2009

In Re:)	
)	
-----)	ISCR Case No. 08-03620
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

James F. Duffy, Esq., Department Counsel

FOR APPLICANT

Pro Se

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On August 12, 2008, DOHA issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline J (Criminal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 23, 2009, after the hearing, Administrative Judge Paul J. Mason granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge’s application

of the pertinent mitigating conditions was error and whether the Judge's whole-person analysis was error. Finding error, we reverse.

Whether the Record Supports the Judge's Factual Findings

A. Facts

The Judge made the following pertinent findings of fact: Applicant is a psychologist. He served with the U.S. Army, retiring in the late 1990s. After his retirement he worked for three different companies. He worked for three because he was not certain as to how long any one contract would last. Applicant was not able to manage the administrative requirements of his position as a psychologist, especially preparing paperwork for submission to Medicare for payment. He determined that the submissions he made contained "billing errors," (Decision at 3) *i.e.*, claims for services not rendered. Beginning in the early 2000s, he experienced numerous health problems, including bladder and eye infections; a stroke, and a degenerative spine and joint disorder. As a result of a federal investigation into the billing errors between 2000 and 2004, he was indicted. Subsequently he pled guilty to one count of felony health care fraud (18 U.S.C. § 1347). The court sentenced Applicant to five months confinement, followed by three years supervised release to probation; restitution of \$63,332.12 to Medicare; and a special assessment fine of \$100.

Applicant enjoys an excellent reputation for the quality of his job performance, as evidenced by the testimony of several witnesses at his hearing as well as by written letters of reference. However, his supporting evidence also states that Applicant is disorganized and does not always keep adequate records. He is also susceptible to stress.

B. Discussion

The Appeal Board's review of the Judge's findings of facts is limited to determining if they are supported by substantial evidence—"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same 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). In evaluating the Judge's findings, we defer to the Judge's credibility determinations. Directive ¶ E3.1.32.1.

Department Counsel's brief contends that the Judge's favorable decision did not consider significant contrary record evidence. The Board will address this contention in the discussion below.

Whether the Record Supports the Judge's Ultimate Conclusions

A Judge is required to "examine the relevant data and articulate a satisfactory explanation for" the decision, "including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43

(1983)(quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). “The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of the national security.’” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Appeal Board may reverse the Judge’s decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law. Directive ¶¶ E3.1.32.3 and E3.1.33.3.

Once a concern arises regarding an Applicant’s security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* 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. 05-03635 at 3 (App. Bd. Dec. 20, 2006).

In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. In deciding whether the Judge's rulings or conclusions are contrary to law, the Board will consider whether they are contrary to provisions of Executive Order 10865, the Directive, or other applicable federal law. *See* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

In holding in Applicant’s favor, the Judge relied upon the length of time which had elapsed between the last criminal conduct and the close of the record; stress that Applicant experienced in performing three jobs; and his excellent work record, to include psychological counseling for families of deceased service members. While these were matters the Judge was bound to consider, Department Counsel argues persuasively that the favorable decision is undermined by contrary record evidence. For example, although Applicant pled guilty to defrauding the Federal Government, thereby admitting each element of the offense,¹ including its knowing and willful nature, his presentation at the hearing included repeated denials that his conduct was deceitful.

¹Government Exhibit 5, Criminal Docket, states that Applicant was prosecuted for Health Care Fraud, a violation of 18 U.S.C. 1347. This statute reads as follows: “Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice (1) to defraud any health care benefit program; or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items or services, shall be fined . . . or imprisoned[.]” *See also* Government Exhibit 3, Plea Agreement: “[Applicant] admits that he is in fact guilty of the offense charged in the indictment and acknowledges that he has been advised and does fully understand the nature of the charges to which the plea is offered[.]”

Rather, he attributed the behavior that led to his conviction to poor record keeping, stress, etc.² Although the Judge found that Applicant's case raised Guideline J security concerns, he does appear to have relied on this explanation in evaluating Applicant's case for mitigation.³ The Judge does not explain why he finds this to be plausible, given record evidence that Applicant submitted Medicare claims for, *inter alia*, providing psychological services to persons who, at the time of the alleged treatment, were deceased.⁴ Applicant's denial of a criminal *mens rea* could be interpreted by a reasonable person as merely self serving. When considered in light of other record evidence that (1) Applicant submitted false claims repeatedly over a four-year period; (2) he obtained over \$63,000 from Medicare as result of these claims; (3) he was still on probation at the close of the record; and (4) he had not finished making restitution at the close of the record, this denial significantly undermines the Judge's conclusion that Applicant has demonstrated rehabilitation.

Even if Applicant had completed his sentence, his denial of criminal intent would significantly undercut his claims of rehabilitation. It is inconsistent to contend that one has demonstrated positive behavioral changes from a previous pattern of deceit while at the same time denying that deceit ever occurred. Moreover, the record does not demonstrate a connection between, on one hand, the stress Applicant claimed to have experienced as result of illness and overwork and, on the other, the misconduct for which he was convicted. As a matter of common sense, repeated submissions of false claims for payment, committed over a four-year period, are unlikely to have resulted from inattention or confusion. In addition, there is a paucity of record evidence in support of Applicant's claim that his alleged stressors would have diminished or impaired his capacity for specific intent. The record does not support a conclusion that these stressors amounted to pressure or coercion resulting in less culpability for the commission of a series of knowing and willful acts. The record, viewed as a whole, does not support a conclusion that Applicant has met his burden of persuasion under the *Egan* standard. The Judge's decision, viewed in its entirety, is contrary to the weight of the record evidence and is not sustainable.

²See Tr. at 98: "Because I was so busy I allowed things to get very disjointed. I still have to take responsibility for that; I put that in motion. I can't say that I'm not guilty of that, because I am. I didn't have the criminal intent"; Tr. at 107: ". . . I just want you to understand this, that was the hardest thing I ever had to do, go into a court and say something that, basically . . . was saying I had the intent, which I never had intent to do." Compare with Applicant's Reply Brief, submitted after the close of the record in response to the Government's Appeal Brief. Although generally denying intent, the Brief does state that "my systemic, though occasional submission for services that I had clearly not provided resulted in unforgivable acts in which I was reimbursed beyond what I was entitled to. As a result, I violated a sacred trust with my Government that I served practically all my life." See also Applicants Exhibits A2,C1, C3, D, D2, and D9, which each offer an "administrative burden" defense to the criminal allegations.

³See, e.g., Decision at 3: "Applicant was unable to manage the administrative requirements (paperwork) of [his] employers, primarily the Medicare paperwork for the nursing homes . . . He tried to correct mistakes he discovered, but the paperwork overwhelmed him . . . He first determined there were billing errors . . . but never asked for help or advice." The Judge analogized Applicant's confusion regarding paperwork to pressure or coercion. Decision at 7. See Directive ¶ E2.32(b), which mitigates Criminal Conduct security concerns when "the person was pressured or coerced into committing the act . . ."

⁴Government Exhibit 2, Interrogatories, includes a summary of Applicant's subject interview. "Investigators . . . found that sometimes a patient was billed but on the date billed [the] were not there or were already deceased." See also Tr. at 109: "I had billing errors that went in for people that . . . were deceased."

Order

The Judge's favorable security clearance decision is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Jeffrey D. Billett

Jeffrey D. Billett
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board