

KEYWORD: Guideline H; Guideline E

DIGEST: There is no presumption of error below. An unchallenged finding need not be reviewed. An adverse conclusion under a single guideline is sufficient for an adverse decision. Adverse decision affirmed.

CASENO: 08-10644.a1

DATE: 05/28/2010

DATE: May 28, 2010

In Re:)	
)	
-----)	ISCR Case No. 08-10644
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

John Bayard Glendon, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esq., Stephanie N. Mendez, Esq.

The Defense Office of Hearings and Appeals (DOHA) declined to grant Applicant a security clearance. On June 2, 2009, DOHA issued a statement of reasons (SOR) advising Applicant of the

basis for that decision—security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On February 25, 2010, after the hearing, Administrative Judge Robert J. Tuidor denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issues on appeal: whether the Judge failed to consider all of the record evidence and whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law in that he failed properly to apply the Guideline H mitigating conditions. For the reasons set forth below, we affirm.

The Judge found that Applicant used marijuana during two periods of his life: from 1976 to 1983 and again from 1998 to 2007. The latter use occurred while Applicant held a security clearance. Additionally, in 2007, another government agency denied Applicant access to Sensitive Compartmented Information (SCI) due to his prior drug use.

Applicant contends that the Judge did not consider numerous documents, including character letters and a psychological evaluation, which he submitted in his own behalf. However, the Judge admitted these documents into evidence (Tr. at 12). Furthermore, he summarized them in his Findings of Fact and discussed them in the Analysis portion of the Decision, in which he concluded that Applicant had mitigated two of the four Guideline E allegations. Applicant has failed to rebut the presumption that the Judge considered all the evidence. *See, e.g.*, ISCR Case No. 07-00196 at 3 (App. Bd. Feb. 20, 2009); ISCR Case No. 07-00553 at 2 (App. Bd. May 23, 2008). Although Applicant disagrees with the weight which the Judge assigned to this evidence, the record does not support a conclusion that he weighed the evidence in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-21819 at 2 (App. Bd. Aug. 13, 2009); ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

It is well settled that (1) there is no presumption of error below, (2) where the Judge entered formal findings against Applicant under a Guideline and Applicant failed to raise a challenge to the findings and conclusions under that Guideline, the findings and conclusions need not be reviewed, and (3) an adverse conclusion under a single guideline is sufficient for an adverse decision. *See, e.g.*, ISCR Case No. 00-0051 at 3 (App. Bd. Jul. 23, 2001); ISCR Case. No. 02-04005 at 3, fn. 1 (App. Bd. Dec. 31, 2003); ISCR Case No. 02-28502 at 2 (App. Bd. Mar. 26, 2004) and ISCR Case No. 97-0016 at 3 (App. Bd. Dec. 31, 1997). In the case presently under review, Applicant’s appeal brief focuses on the Guideline H security concerns. Department Counsel, in his reply brief, correctly observes: “It is important to note that Applicant has not challenged on appeal, either explicitly or implicitly, the Administrative Judge’s adverse conclusions under Guideline E and the whole-person concept . . . The failure to do so constitutes a waiver of any possible issues on these matters on appeal.” Department Counsel Reply Brief at 7, n. 25.

Applicant contends that the Judge erred in his application of the Guideline H mitigating conditions. The Judge extended some favorable consideration to Applicant’s having submitted a

signed statement of intent not to use drugs in the future.¹ However, he noted other evidence that was less favorable. This includes evidence that Applicant returned to marijuana use in 1998 after having abstained for many years and that his second period of use occurred while he held a security clearance. Applicant contends that the Judge erred in his treatment of the psychological report, insofar as the Judge stated that the report did not contain a favorable prognosis regarding future drug use. Applicant argues that the report did indeed contain such a prognosis and that it should have been considered in light of Guideline H Mitigating Condition 26(b).² We have examined this report and find no error with the manner in which the Judge treated it.³ Viewed in light of the record as a whole, the Judge’s analysis of the Guideline H mitigating conditions was not in error.

In light of the foregoing, we conclude that the Judge’s adverse security clearance decision is sustainable under the standard set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Order

The Judge’s adverse security clearance decision is AFFIRMED.

Signed: Michael Y. Ra’anan

Michael Y. Ra’anan
Administrative Judge
Chairperson, Appeal Board

Signed: William S. Fields

William S. Fields
Administrative Judge

¹See Directive ¶ E2.26(b): “a demonstrated intent not to abuse any drugs in the future, such as . . . a signed statement of intent with automatic revocation of clearance for any violation[.]”

²Directive ¶ E2.26(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.”

³The report does not relate a course of treatment for substance abuse or dependency. Rather, it is a letter from a psychiatrist describing his interviews with Applicant, tests he performed, etc. In the concluding paragraph, the psychiatrist stated that Applicant “is a fine human being, who is dedicated to his work, ethic, principle, and his family.” He stated that Applicant regrets his mistakes and is willing to submit to further testing if necessary. Insofar as the report contained no diagnosis of an illness, the Judge did not err in observing that it lacked a prognosis. See Cambridge International Dictionary of English, definition of “prognosis”: “[D]octor’s judgment of the likely or expected development of a disease[.]”

Member, Appeal Board

Signed: James E. Moody

James E. Moody

Administrative Judge

Member, Appeal Board