



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
REDACTED)	ISCR Case No. 10-01525
)	
Applicant for Security Clearance)	

Appearances

For Government: Kathryn D. MacKinnon, Esq., Deputy Chief Department Counsel
For Applicant: Mark S. Zaid, Esq.

03/16/2012

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant mitigated the Psychological Conditions concern. He suffered from three short-term bouts of depression in 2003, 2006, and 2009. He quickly overcame these bouts on his own and two were clearly related to outside stressors, including a divorce after 14 years of marriage. His depression is in remission and there is no indication of a current problem. He has properly handled classified information without issue since 1997. His employer is aware of his depression and does not question his judgment, reliability, and trustworthiness. Clearance is granted.

Statement of the Case

On July 20, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR), notifying Applicant that it was unable to find that it is clearly consistent with the national interest to grant his request for access to classified information due to the concern under Guideline I (Psychological Conditions).¹ Applicant responded on August 12, 2011, and requested a hearing.

¹ DOHA took this action acted under Executive Order 10865, Safeguarding Classified Information within Industry (February 20, 1960), as amended; Department of Defense Directive 5220.6, Defense

On September 30, 2011, Department Counsel indicated the Government was prepared to proceed with a hearing. After coordinating with the parties, I scheduled the hearing for November 17, 2011.² At hearing, Department Counsel offered Government Exhibits (GE) 1 through 5 in its case-in-chief. The exhibits were admitted into evidence without objection.³ Applicant offered Applicant's Exhibit (AE) A through G, which were also admitted without objection. The Government did not call any witnesses. Applicant testified and called several witnesses, including an expert in the field of forensic psychiatry. The transcript (Tr.) was received on November 29, 2011.

Findings of Fact

Applicant is a 51-year-old analyst working for a federal contractor. He worked as a professional musician for several years after graduating high school and before going to college. He received his undergraduate and doctorate degrees in physics in 1987 and 1996, respectively. He started working for his current employer in 1997. Applicant's performance reports reveal that he consistently exceeds his employer's expectations and has routinely received merit-based raises between five and fifteen percent. He was first granted a security clearance in 1997, and has never mishandled or otherwise compromised classified information.⁴

Applicant's current facility security officer (FSO) attested to the fact that he is a "security conscious employee," who has prevented co-workers from committing security violations.⁵ Applicant's former FSO, who has known him for over nine years, testified that Applicant would generally secure the sensitive compartmented information facility (SCIF) at the end of the work day, "locking up safes and ascertaining that the door was locked, setting alarms, and we never had any incidents."⁶ He is described by a friend who has known him since they were in their early 20s as a "rock," and by his former FSO as "conscientious" and "responsible."⁷

Applicant has suffered from bouts of depression at various points in his life. His earliest recollection is from high school, when his girlfriend was killed in a car accident.⁸

Industrial Personnel Security Clearance Review Program (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) implemented by the Department of Defense on September 1, 2006.

² I issued a prehearing order requiring the parties to "serve each other a copy of the exhibits they intended to offer" in advance of the hearing. Hearing Exhibit (HE) I.

³ GE 6 – 8 were not admitted. See HE 2, Evidentiary Ruling.

⁴ Tr. at 142-144, 147; GE 1; GE 2; AE A; AE B. See also Answer.

⁵ Answer, Letter from FSO, dated August 12, 2011. See also Answer at 1; Tr. at 163-164.

⁶ Tr. at 114, 123-124.

⁷ Tr. at 117, 132.

⁸ Tr. at 165; Answer. See also Tr. at 105-108.

Over the past decade, Applicant has suffered from depression on three separate occasions. In 2003, after a recent divorce from his wife of 14 years and a move out-of-state, Applicant “was feeling pretty down.” He had also recently purchased a three-bedroom home that led to some “buyer’s remorse.” He went to see his general practitioner, who immediately gave him a starter sample of an anti-depressant medication. Applicant had serious side effects from the medication and stopped using it. He came out of the depression on his own.⁹

Applicant had no further issues with depression until about May 2006, when he was “feeling really down” and again went to see his general practitioner. The doctor prescribed anti-depressant medication, but it again had negative side effects. Applicant’s doctor also gave him the contact information for a mental health professional. Applicant did not follow-up with the referral, because during his prior background investigation the Government agent had chastised him for disclosing that he had sought marriage counseling. The agent told Applicant that mental health counseling “doesn’t look good,” and he was better off just speaking to friends about any mental or emotional issues. Applicant again overcame his depression without medication or professional help. His job did not suffer, as his performance reports notes he exceeded expectations and received a merit-based raise of over five percent.¹⁰

Applicant’s last bout with depression occurred in approximately May 2009. He had just “finished working on the main (classified) project” and was looking forward to returning to State A. At the request of his employer, he had delayed returning to State A for a year to finish the project. His employer then asked him to stay on to work on an unrelated, unclassified project. He stayed and found the work dissatisfying, because it did not relate to his field and other difficulties working in the unclassified arena. He was unhappy with his job and decided to take some time off from work to contemplate his future, without seeking prior approval for leave. He did not report to work for about two weeks. Applicant acknowledges that this was a poor decision on his part.

Applicant’s supervisors contacted his former FSO, who contacted Applicant to find out how he was doing. It was decided that he would take some time off from work to allow him time to sell his house and transfer to State A, where his employer has its main offices. Applicant’s supervisors and former FSO did not question Applicant’s reliability as a result of this one lapse in judgment. He was not reprimanded or disciplined in any manner for this incident. He again quickly recovered from this last bout of depression. After selling his home, Applicant discovered that it had some environmental issues that he was previously unaware of that may have contributed to his depression. He has not suffered from depression since this last incident in 2009, even in the face of the difficult challenges that he has faced over the past three years.¹¹

⁹ Tr. at 145-147, 178-179, 184-187. See also Tr. at 22-27, 98-101.

¹⁰ Tr. at 150-151, 154-155, 187; AE B; Answer. See also GE 2; GE 3; AE E; Tr. at 22-27, 98-101.

¹¹ Tr. at 151-153, 174, 187-190; GE 2; Answer.

In October 2009, as part of his periodic reinvestigation, Applicant submitted his current security clearance application. He disclosed the treatment he received for depression from his general practitioner. In December 2009, he fully discussed the treatment and absence from work with a Government agent.¹²

In November 2010, Applicant responded to a DOHA interrogatory that, in part, asked him to release his medical records. He voluntarily agreed to do so.¹³ He also agreed to undergo a psychological evaluation. In March 2011, Applicant met with Dr. M, a clinical psychologist, who conducted an evaluation that lasted approximately 45 minutes. Dr. M spent a significant amount of time during the evaluation focused on Applicant's shyness. Dr. M, who had supposedly reviewed Applicant's records, was surprised when Applicant told him that he had been previously married.¹⁴ Dr. M diagnosed Applicant with major depressive disorder, which was recurrent based on "at least two major depressive episodes, the last one occurring in 2009."¹⁵ Dr. M also diagnosed Applicant with a number of issues surrounding his shyness and uncomfortableness with his physical appearance.¹⁶ Dr. M found that Applicant's "prognosis is guarded as major depressive episodes may reemerge in the future" and "if not treated may make him vulnerable to poor judgment."¹⁷ Dr. M did not give an opinion as to whether Applicant's condition affects his ability to safeguard classified information.

In November 2011, Applicant was re-evaluated by Dr. H, a forensic psychiatrist. Dr. H has years of training and practical experience in the field of psychiatry, including serving as chief of psychiatry and neurology for a large military installation. He was a professor of psychiatry for 30 years at a well-known university, and has been in private practice since 1979. He has conducted numerous fitness for duty evaluations.¹⁸ Dr. H reviewed Dr. M's report, Applicant's medical records, and other pertinent documents prior to Applicant's evaluation. The evaluation lasted over two hours and focused on Applicant's depression from his earliest childhood memories to the present.¹⁹ Dr. H

¹² GE 1; GE 2; Tr. at 179-180.

¹³ GE 2.

¹⁴ Tr. at 157-161, 179-183.

¹⁵ GE 4. But see Tr. at 46-49 (critique of Dr. M's findings by Applicant's expert).

¹⁶ Department Counsel stipulated that the only issue under Guideline I that the Government was concerned about was the diagnosis of major depressive disorder, not any other diagnoses or issues set forth in GE 4 and the SOR. Tr. at 54-55, 212.

¹⁷ GE 4.

¹⁸ Tr. at 19-21. Compare AE F (Dr. H's CV), with, GE 5 (Dr. M's CV, which notes he was licensed as a clinical psychologist less than a year before conducting the evaluation in this case).

¹⁹ Tr. at 22, 183; AE E.

testified and defended his opinion at hearing, including through the use of detailed notes that he kept and used to refresh his recollection of Applicant's evaluation.²⁰

Dr. H also diagnosed Applicant with major depressive disorder but, in contrast to Dr. M, he found that the disorder was in remission. Dr. H also found, in contrast to Dr. M, that Applicant's history supported a finding of only a single episode of major depression in 2006, because no outside factors caused Applicant's depression. He further explained that Applicant's sadness in 2003 and 2009 were triggered by, or were related to outside factors, divorce in 2003 and job dissatisfaction in 2009. He diagnosed these two incidents of sadness as an adjustment disorder with depressed mood. Dr. H noted that there is a possibility that Applicant would suffer a major depressive episode in the future. However, Dr. H testified that there are effective treatments for major depressive disorder, and he is confident Applicant would seek professional assistance if he were to have a relapse.²¹ Applicant candidly testified that he would seek professional help if he were to feel depressed in the future and follow the advice of the mental health professional.²²

Dr. H opined that Applicant is not currently depressed.²³ He further opined to a "reasonable degree of medical certainty" that Applicant does not have a condition that indicates a defect in judgment, reliability, or ability to properly safeguard classified information.²⁴

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available,

²⁰ Contrast with AE G (Dr. H had no notes or other records related to Applicant's initial evaluation other than his two-page report).

²¹ Tr. at 22-39, 43-46, 51, 59-61, 70, 73, 98-105; AE E.

²² Tr. at 155-157, 162-163.

²³ Tr. at 26-27, 33.

²⁴ AE E, ¶ 5. See also Tr. at 26-27,

reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” Directive ¶ E3.1.15.²⁵ An applicant has the ultimate burden of persuasion to obtain a favorable security decision. In resolving this ultimate question, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b).

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. “A clearance adjudication is an applicant’s opportunity to demonstrate that, prior to being awarded a clearance, he (or she) actually possesses the judgment, reliability, and trustworthiness essential to a fiduciary relationship with this country.”²⁶

The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline I, Psychological Conditions

The security concern for Psychological Conditions is set out in AG ¶ 27:

Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified mental health professional (e.g., clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this guideline. No negative inference

²⁵ ISCR Case No. 11-00391 (App. Bd. Dec. 1, 2011) (“Once an applicant’s SOR admissions and/or the Government’s evidence raise a security concern, the burden of persuasion shifts to the applicant to mitigate the concern.”).

²⁶ ISCR Case No. 10-09986 at 3 (App. Bd. Dec. 15, 2011).

concerning the standards in this Guideline may be raised solely on the basis of seeking mental health counseling.

The guideline notes the following disqualifying conditions under AG ¶ 28:

(a) behavior that casts doubt on an individual's judgment, reliability, or trustworthiness that is not covered under any other guideline, including but not limited to emotionally unstable, irresponsible, dysfunctional, violent, paranoid, or bizarre behavior;

(b) an opinion by a duly qualified mental health professional that the individual has a condition not covered under any other guideline that may impair judgment, reliability, or trustworthiness; and

(c) the individual has failed to follow treatment advice related to a diagnosed emotional, mental, or personality condition, e.g., failure to take prescribed medication.

Dr. M's diagnosis that Applicant suffers from major depressive disorder and opinion that such condition *may* reemerge in the future, which *may* make Applicant vulnerable to poor judgment, establishes AG ¶ 28(b).²⁷ However, I do not find that Applicant's condition actually impairs his judgment, reliability, or trustworthiness. More importantly, his condition does not impair his ability to properly safeguard classified information. His last episode of depression was in 2009 and it is in remission. He has handled classified information since 1997 without incident, including routinely securing a SCIF without issue. His security awareness has helped prevent the commission of security breaches by others. His work performance has been exemplary. No one at his work, to include his current and former FSOs, questions his judgment, reliability, or trustworthiness; nor his ability to properly handle classified information.

In weighing the expert opinions of Dr. M and Dr. H, I gave more weight to Dr. H's opinion. Dr. H's opinion was fully consistent with the record evidence. He did not serve as the proverbial "hired gun." Instead, he reviewed the evidence in the case, performed a full psychological evaluation, and then gave an unbiased diagnosis that Applicant suffered from major depressive disorder in remission. He went on to explain his diagnosis, as well as his opinion that Applicant's condition did not impair his judgment, reliability, or trustworthiness. Dr. H also fully explained his opinion that Applicant does not currently suffer from depression or other condition that could impact his ability to safeguard classified information. I found his testimony straightforward, credible, and consistent with the other facts adduced at hearing.

²⁷ Applicant's decision not to go to work for about two weeks in 2009 is the type of irresponsible behavior exhibiting poor judgment encompassed by AG ¶ 28(a). However, I did not apply this disqualifying condition because this conduct was not alleged in the SOR. I have considered it in assessing Applicant's case in mitigation. See *generally* ISCR Case No. 10-00922 at 3 (App. Bd. Nov. 3, 2011) ("It is appropriate for a Judge to consider conduct and matters not alleged in the SOR for such limited purposes as evaluating a claim of extenuation, mitigation or changed circumstances, and when weighing relevant and material information under the whole person concept.").

Applicant's failure to take the medication prescribed by his general practitioner – albeit understandable in light of the negative side effects – raises AG ¶ 28(c).

As Applicant's history of depression raises a concern under Guideline I, he bears the burden of mitigating the concern. Under AG ¶ 29 the following mitigating conditions were potentially raised by the evidence and warrant further discussion:

(a) the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;

(c) recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation;

(d) the past emotional instability was a temporary condition (e.g., one caused by a death, illness, or marital breakup), the situation has been resolved, and the individual no longer shows indications of emotional instability; and

(e) there is no indication of a current problem.

Dr. H testified that Applicant's condition is readily controllable with effective treatment, and Applicant candidly testified that he would follow the advice of a mental health profession if he were to feel depressed in the future. However, Applicant's past history of not following through with the medical advice of his doctors undercuts to a certain degree the application of AG ¶ 29(a) in this case.

Similarly, AG ¶ 29(b) is not fully applicable in this case. Although the Government stipulated that Dr. H was an expert in the field of forensic psychiatry and he persuasively opined that Applicant's condition is in remission, he was not employed or approved by the Government and conceded that there was a possibility that Applicant's condition could recur in the future.

Applicant's depression in 2003 and 2009 were caused by temporary, external stressors that have since passed, and Applicant no longer shows any sign of emotional or mental instability. Although Applicant's depression in 2003 and 2009 were due to temporary, external stressors, such does not make it any less disconcerting from a security perspective than his depressive episode in 2006. However, all three bouts of depression were short lived and Applicant was able to overcome them. Applicant's depression has never once affected his ability to handle or properly safeguard classified information. His depression is in remission and there is no indication of a current problem. More importantly, through this process, Applicant now realizes that if he is faced with a bout of depression in the future that he can safely seek appropriate help

and will do so. AG ¶ 29(d) and (e) apply. Applicant met his burden of persuasion and mitigated the psychological conditions concern.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).²⁸ I incorporate my Guideline I analysis herein and note some additional whole-person factors. Although Applicant was concerned about seeking mental health counseling due to the incorrect advice he previously received, he has been candid about his condition and the medical help he sought to treat it from the outset of his reinvestigation. He has voluntarily turned over his medical records and subjected himself to two separate psychological examinations due to concerns raised by his history of depression. This is the type of honesty and level of cooperation one would expect of an individual entrusted with this nation's secrets.

I had an opportunity to observe Applicant's demeanor as he testified and asked him questions. I found him credible. This finding is wholly consistent with those who have known him for years and attest to his reliability, trustworthiness, and honesty. Applicant now recognizes that seeking help for a mental health issue does not preclude an individual from being granted a security clearance and, in light of his testimony and honesty throughout the process, I have full faith that he would seek appropriate help if needed in the future.

Applicant's depression has never once affected his ability to properly safeguard classified information. Security clearance adjudications are predicative judgments, where an applicant's past history is the best indicator of future conduct. Although Applicant has periodically suffered from depression, he established that he has a history of properly safeguarding classified information and there is no reason to doubt his ability to do so going forward. Overall, the record evidence leaves me with no questions or doubts about his eligibility and suitability for a security clearance.

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline I (Psychological Conditions): **FOR APPLICANT**

Subparagraphs 1.a and 1.b: **For Applicant**

²⁸ (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Conclusion

In light of the record evidence and for the foregoing reasons, it is clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is granted.

Francisco Mendez
Administrative Judge