



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



In the matter of:)
)
) ISCR Case No. 10-03233
)
)
Applicant for Security Clearance)

Appearances

For Government: William T. O'Neal, Esquire, Department Counsel
For Applicant: Ronald C. Sykstus, Esquire

July 27, 2011

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Statement of the Case

On July 20, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to renew a security clearance for his position with a defense contractor. His access to classified information was continued. In late 2009, an adverse information report concerning Applicant's conduct was forwarded by law enforcement sources to the appropriate security officials. After reviewing the results of an ensuing background investigation completed on February 21, 2010, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant two interrogatories to clarify or augment potentially disqualifying information. After reviewing the results of the background investigations and Applicant's responses to the Interrogatories, DOHA could not make the preliminary affirmative findings required to issue a security clearance. On November 24, 2010, DOHA issued a Statement of

Reasons (SOR) to Applicant detailing security concerns for personal conduct under Guideline E. These actions were taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective in the Department of Defense on September 1, 2006. Applicant acknowledged receipt of the SOR on November 30, 2010.

Applicant answered the SOR on December 8, 2010. He admitted the five allegations under Guideline E, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on January 24, 2011. The case was assigned to me on February 23, 2011. DOHA issued a Notice of Hearing on March 18, 2011, for a hearing on April 6, 2011. I convened the hearing as scheduled. The Government offered three exhibits, which I marked and admitted into the record without objections as Government exhibits (Gov. Ex.) 1 through 3. Applicant and seven witnesses testified on his behalf. Applicant offered six exhibits which I marked and admitted into the record without objection as Applicant Exhibits (App. Ex.) A through F. DOHA received the transcript of the hearing (Tr.) on April 26, 2011.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact. Applicant admitted the five allegations under personal conduct. His admissions are included in my findings of fact.

Applicant is a 36-year-old systems engineer. He graduated from high school in 1993 and worked for a US Army non-appropriated activity. He returned to college and earned an associates degree in computer information systems in 2003 and started working for a defense contractor as a systems engineer. He recently was hired by the government as a GS-12 systems engineer. Applicant first marriage ended in divorce. He married his present wife in 2005 and they have one child. Applicant has held a security clearance since August 2005. His wife works for a defense contractor. (Tr. 16-25; Gov. Ex. 1, e-QIP, dated July 20, 2007)

Applicant always had some problem with his knees. The pain became so severe that he went to his family doctor for treatment on March 4, 2009. His doctor had been his family doctor for a few years. He informed her of the pain and she prescribed Lortab¹ to ease the pain and referred him to an orthopedic specialist. The specialist sent him for tests and gave him a second prescription for Lortab consisting of 7.5 milligrams of hydrocodone and 350 miligrams of tylenol. The doctor recommended that Applicant have surgery on the knee. He had knee surgery on April 24, 2009. Prior to the operation, Applicant took approximately four Lortab per day as prescribed by his doctor. (Tr. 25-32)

¹ The name of the drug is spelled wrong in the SOR. The correct spelling is used in the decision.

Hydrocodone is in a group of drugs called narcotic pain reliever. Acetaminophen is a less potent pain reliever that increases the effects of hydrocodone. Hydrocodone may be habit-forming and should be used only by the person for whom it was prescribed. It must be taken exactly as prescribed by a physician. It must not be taken in larger amounts, used for longer than recommended by the physician, and should never be given to another person, especially someone who has a history of drug abuse or addiction. It can cause side effects that may impair thinking or reactions. (See Physician's Desk Reference, Medical Economics)

A few days after the surgery, Applicant returned to work using crutches for support. As he entered a classified work area, he tripped and severely twisted the knee that had been operated on. He was in considerable constant pain. He returned to the orthopedic surgeon, had the knee drained, and the doctor tried various medications and treatments, including continued use of Lortab, to ease the knee pain. His knee and pain did improve over time. Applicant would receive a prescription for the drug from his doctor with approximately a 14 day supply. There were no refills authorized. If he needed more pills, he had to call the doctor's office and receive a new prescription. Applicant estimates he received approximately 15 new prescriptions over the time he was taking the drug starting in March 2009. In June 2009, Applicant's doctor started to reduce his use of Lortab by reducing the number of pills he could take each day. Applicant experienced some side effects from the lower dosage of Lortab such as a lack of energy and a sick feeling all of the time. He could not eat well and lost weight. Since his wife had their first child about the same time, he also did not get much sleep because of the baby and the knee pain. (Tr. 32-34, 59-65)

Applicant did not inform either his family doctor or the specialist that he was experiencing side effects from the reduced number of Lortab. He admits that he received proper medical advice but he did not follow the directions of his doctor. Instead, Applicant consulted a web site on how to obtain Lortab over the internet without a prescription. That web site provided detailed instructions on how to purchase online, pay for the order, and accept delivery. The directions were to use an address other than a home address, not send money or a credit card number, but use a fictitious Western Union money order number. In July 2009, Applicant submitted an order to a web site for Lortab. The only dosage of the drug he could order was for a higher dosage pill containing 10 milligrams hydrocodone and 500 milligrams tylenol. He did not have a prescription for the additional drugs or for that level of dosage. He still had a valid prescription from his doctor to order in the normal way. When he ordered over the internet as instructed in the original web site, Applicant provided an address for a vacant house a block from his house, and a false Western Union money order number. The cost of the drug at his pharmacy was approximately \$30 for the 14 day supply. The price for the drug over the internet was \$500. Applicant was provided a United Parcel Service (UPS) tracking number so he could track the shipment. Applicant monitored the vacant house and the tracking number. When the delivery was left at the house, he picked up the package containing approximately 30 Lortab pills. (Tr. 34-35, 59-67, 78-79)

Later in July, Applicant used the same procedure and ordered more Lortab. When the package was delivered to the vacant house, it contained only a Mexican telephone book. Applicant placed another order in September 2009 using the same procedures, and received a UPS tracking number. This time when he checked the tracking number, he was advised to call UPS. He called UPS from his office phone on a military installation and was told him that he had to go to a certain location to pick up the package. Realizing that he was doing something illegal by ordering drugs over the internet, using a fake Western Union money gram number, and having the drugs delivered to a vacant house, Applicant decided not to retrieve the package. However, Applicant's calls to UPS were monitored by law enforcement. Three law enforcement personnel came to the military installation and took Applicant to the police station. He was questioned but released. The police initially thought he was a drug dealer, but after learning Applicant purchased the drug for his own use, released him. No criminal charges are pending. At the time Applicant was placing these orders and taking more pills than prescribed, he held a security clearance. (Tr. 34-40, 67-72)

Applicant realized he was doing something wrong by ordering drugs over the internet but he continued to do it. He received adequate medical advice, he just decided not to follow that advice. After leaving the police station, Applicant realized he was addicted to Lortab. He requested assistance from his company's Employee Assistance Program (EAP). The counselor at the program advised him to go home, tell his wife what he had done, and see his family doctor. That night, Applicant told his wife and the next day he told his family doctor about his addiction to Lortab. His doctor was concerned about withdrawing him from the drug because of other health issues. She sent him to a substance abuse facility for withdrawal. Applicant went to that facility the same day but they did not have room to admit him, Immediately, Applicant went to another recommended facility. At the second facility, he was provided a prescription to manage the side effects of withdrawal from Lortab and advised to see a specialist. He called that specialist but the specialist was no longer taking new patients. He kept his family doctor apprised of each activity. (Tr. 40-43, 72-73, 80-81)

A few days later he was able to get an appointment with a different specialist. This specialist prescribed a new drug, to assist him in stopping the addiction to Lortab. While this doctor could prescribe the drug, he had difficulty with the pharmacy accepting the prescription. Applicant returned to his family doctor who directed him to a doctor in her practice that could prescribe the medication. He signed a commitment letter with this doctor that he would not seek other drugs, the drugs were for his personal use, and he would not sell the drug. When he started to take the new prescribed medication, he flushed the remaining Lortab down the toilet. His prescription was for only a two week supply with no refill. He had to return to the doctor's office to receive a new prescription every few weeks. He used the medication from September 2009 until February 2010 when he was released by the doctor. His family doctor also advised him to attend a substance abuse program provided by a local church. (Tr. 40-46, 73-78; App. Ex. G, Doctor's Letter, dated March 30, 2011)

Applicant attended the substance abuse program at the church. The program consisted of one group meeting a week. He attended this program from September 2009 until January 2010 when he was released from treatment by his doctor. The last Lortab he took was on September 25, 2009. He has made all of his doctors and pharmacists aware of his addiction to Lortab. (Tr. 46-51)

Applicant and his former wife rented an apartment and subleased part of it to a high school friend who helped with the rent. The high school friend brought in one of his friends who also stayed at the apartment. In June 1997, Applicant and his wife went on vacation. The second person in the apartment was staying by himself so he purchased some marijuana to sell from the apartment. When Applicant and his wife returned from vacation, he was apprehended. He was charged with the sale of marijuana since his name was on the apartment lease. The charge was reduced to a misdemeanor for possession of marijuana. At the time, Applicant was scheduled for overseas assignment by his defense contractor employer. He was to be paid a significant salary. Applicant wanted to take the overseas job because he and his wife needed the money. He was advised by his attorney to plead guilty since the offense of possession of marijuana was a misdemeanor and the guilty pleas would resolve the issue. Applicant pled guilty. He was advised at the time by his facility security officer (FSO) that the possession of marijuana offense would be a security clearance issue for him. He has always included this offense in response to questions on his security clearance applications. The issue was adjudicated in 2003. He initially had difficulty receiving a clearance but eventually he was cleared. He received at least one more favorable clearance decision since then. (Tr. 48-59)

A Government employee testified that she worked for the company Applicant initially worked for over 15 years. She was a team lead and the person who hired Applicant. She saw him almost every day on the job for a number of years. Applicant was an excellent employee and has an excellent reputation for dependability and ethical conduct. She has held a security clearance for many years. She is aware of the Government's security clearance concerns. This does not alter her opinion of Applicant and she would still hire him. (Tr. 84-90)

A witness who was one of Applicant's co-workers and also a college professor in computer security testified that she initially worked with Applicant. Later when she was promoted, she hired Applicant to work in her department. Applicant was working for her in her department when he had knee surgery in summer 2009. She is aware of the Government's security concerns and it does not affect her opinion of his security worthiness. Applicant was open with her when he worked for her about his addiction to Lortab after the knee surgery. She believes he is trustworthy, reliable, and has good judgment. (Tr. 90-98)

A co-worker, who is also a pastor, testified that he and Applicant worked together for approximately a year. He saw Applicant on a daily basis. Applicant's work reputation was one of dedication to the job, and meeting requirements and responsibilities. He is aware of the security clearance concerns and does not see a problem with Applicant's

security worthiness. He has no problems working with Applicant. As a pastor, he sees Applicant as a dedicated husband and focused father. As a person with substance abuse counseling experience, he believes Applicant has a good prognosis. He values and trusts his judgment and honesty. (Tr. 98-106)

Another co-worker testified that she has worked with Applicant since about 2005. She would see him daily. Applicant was very serious about carefully handling classified information. She is aware of the security concerns. She was surprised about his addiction to Lortab, but she would still work with him. She does not think he would do it again. She considers him to be trustworthy and reliable. (Tr. 106-112)

A government employee testified that he worked with Applicant when they both worked for the defense contractor starting in 2006. He worked with Applicant when he had his knee surgery in 2009. He described Applicant as ethical and hardworking. He knew Applicant was in pain after his knee surgery. He is aware of the security concerns, and he has no issues with Applicant having access to classified information. He never saw any issue with Applicant's handling of classified information. He would be pleased to continue working with Applicant. (Tr. 112-121)

An associate pastor from Applicant's church testified he has known Applicant for about two years and his family for several years before that. He is aware of Applicant's problems with Lortab since Applicant came to him for assistance and pastoral advice in the fall of 2009. Applicant knew he had a terrible problem and he wanted advice as to how to manage his problem. Applicant did not appear to have an addictive personality so he suggested that Applicant work with the church's addiction recovery program. This is the same recovery program suggested to Applicant by his doctor. He knows that Applicant attended the program and dealt with his problem very effectively. He believes Applicant's problem with Lortab was an isolated incident. (Tr. 121-128)

Applicant's wife testified that she has been a Government employee for approximately three years and holds a security clearance. Before his knee surgery, Applicant had terrible knee pain. After his surgery, his pain continued and his knee swelled from physical therapy. At home her husband was fine and she had no idea he had an addiction problem. She knew he was taking the medication but did not know there was a problem. He told her one day he was addicted to the pain pills so both of them went to see their family doctor. When Applicant was advised to cut back on the number of pills he took, he seemed earnest in his efforts. It was not easy but he followed the doctor's directions. He earnestly attended the recovery program at church. She has no concerns about him slipping back into an addiction. She was aware of Applicant's previous issue with a security clearance because of a marijuana possession conviction. She knows that he is aware that similar conduct could cause him a security issue. (Tr. 128-141)

Applicant introduced his performance appraisals from 2005 until 2010. The appraisals were uniformly excellent. (App. Ex. B through F, various dates) Applicant

also presented a certificate provided to his team for being the Team of the Month in October 2010. (App. Ex. A, dated October 29, 2010)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative 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, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

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. 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 protect or protect classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline E, Personal Conduct

A security concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. (AG ¶ 15) Personal conduct is always a security concern because it asks the central question does the person's past conduct justify confidence the person can be entrusted to properly safeguard classified information.

Applicant ordered a drug for which he did not have a prescription over the internet on three occasions. He used an address for a vacant house for delivery and provided a false money order for payment. He received the drug on only the first occasion. He also pled and was found guilty of marijuana possession in 1997. These facts raise Personal Conduct Disqualifying Condition (PC DC) AG ¶ 16(c) (credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information); and AG ¶ 16(e) (personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing,).

Applicant was prescribed a drug by his doctor for knee pain. When the doctor tried to cut his dosage, he did not tell the doctor he was experiencing side effects from the lesser dosage. Instead, Applicant ordered more pills without a prescription over the internet. He used false information to have the drugs delivered to a vacant house and to avoid having to pay for them. This type of conduct is covered under different security guideline provisions and shows questionable judgment, untrustworthiness, lack of candor, and an unwillingness to comply with rules and regulations. His personal, professional, and community standing would be affected if his conduct was known. Applicant admitted and the Government established SOR allegations 1.a through 1.e.

The Government produced sufficient evidence to establish the disqualifying conditions as required in AG ¶¶ 16(c), and 16(e). The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns under financial considerations. An applicant has the burden to refute an established allegation or prove a mitigating condition, and the burden to prove or disprove it never shifts to the Government. Applicant raised conditions that may mitigate the security concern

I have considered Personal Conduct Mitigating Condition (PC MC) AG ¶ 17(c) (the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that is unlikely to recur and does not

cast doubt on the individual's reliability, trustworthiness, or good judgment); and AG ¶17(d) (the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur); and AG ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress). These mitigating conditions apply.

Applicant was addicted to Lortab. When his doctor tried to cut his dosage, instead of discussing his addiction problem and side effects of withdrawal with the doctor, he turned to the internet and ordered more of the drug without a prescription. He used a vacant house for delivery and provided a false money order number. He tried this three times, succeeding only once. Applicant's actions were ill-advised, showed poor judgment, and a lack of candor, leading to concerns about his untrustworthiness and reliability. Applicant knew at the time such conduct could create security problems because of a past incident of marijuana possession that affected his security clearance approval. His addiction problem arose from receiving medically prescribed drugs for knee pain. However, when Applicant was confronted by law enforcement about his activities in ordering illegal drugs over the internet, he immediately turned to the medical professionals and sought help for his addiction. He followed their medical advice and was weaned from the drug. He also attended a substance abuse program. His problem of ignoring medical advice and purchasing pills over the internet is unlikely to recur. He was released from medical care for substance abuse and the substance abuse program in January 2010, over 18 months ago. His last use of the illegal drug was almost two years ago in September 2009. Applicant took positive steps to resolve his problem when confronted with the issue by law enforcement. He immediately sought help for his problem. These positive steps relieved the issue of vulnerability and manipulation and eliminated the stressors causing inappropriate behavior. Applicant by his rehabilitation efforts mitigated the security concerns for personal conduct.

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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.

Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered the testimony of his supervisors, friends, and fellow employees concerning his reputation for honesty, candor, reliability, judgment, and trustworthiness. I considered his reputation as an excellent employee and his record of accomplishments. Applicant was prescribed a narcotic drug by his physician to ease his knee pain. When the doctor tried to reduce the dosage, Applicant ordered the narcotic drug over the internet without a valid physician's prescription three times from June through September 2009. He ordered the drug for his own use to ease pain and not for the distribution or sale of the drug to others. His actions were reckless and irresponsible and showed poor judgment, lack of candor, and untrustworthiness. However, he realized his inappropriate actions when questioned by law enforcement. He immediately sought help for his addiction to the drug from his family physician. He followed the medical advice to stop the addiction and attended a substance abuse program. His last use of the drug was in September 2009. By February 2010, he was no longer addicted and was released from the substance abuse program and medical care for addiction. He continues to see his family physician who is aware of his prior addiction. He mitigated the security concerns by following medical advice, successfully completing a substance abuse program, and not abusing drugs for almost two years. His actions in rehabilitation indicate that he will properly handle, manage, and safeguard classified information. The record evidence leaves me without questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the personal conduct security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraphs 1.a - 1.e:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

THOMAS M. CREAN
Administrative Judge