



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



In the matter of:)	
)	
)	ISCR Case No. 12-01132
)	
Applicant for Security Clearance)	

Appearances

For Government: Adrienne Strzelczyk, Esquire, Department Counsel
For Applicant: *Pro se*

11/21/2015

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is denied.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on April 27, 2011. He signed the e-QIP on May 2, 2011. The Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) on March 31, 2015, detailing security concerns under Guideline I, psychological conditions, and Guideline E, personal conduct. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented on September 1, 2006.

Applicant received the SOR on April 14, 2015, and he answered it on April 15, 2015. The Government, through Department Counsel, notified Applicant by letter dated June 1, 2015 that it had requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). (Hearing Exhibit 1) Department Counsel was prepared to proceed on July 2, 2015, and I received the case assignment on August 25, 2015. DOHA issued a Notice of Hearing on September 3, 2015, and I convened the hearing as scheduled on September 29, 2015. The Government offered exhibits (GE) marked as GE 1 through GE 8, which were received and admitted into evidence without objection. Applicant testified. He did not submit any exhibits. The record closed on September 29, 2015. DOHA received the hearing transcript (Tr.) on October 7, 2015.

Procedural

Notice

Applicant is not sure when he received the hearing notice, and the record lacked any information as to when he received notice of the date, time and place of the hearing. I advised Applicant of his right under ¶ E3.1.8. of the Directive to receive the notice at least 15 days before the hearing. Applicant affirmatively waived this right under the Directive. (Tr. 19.)

Due Process

At the beginning of the hearing, Applicant asked for an immediate decision on whether he would have a security clearance or not. He also stated that he did not want a security clearance, and that he did not want to handle classified information. Applicant appeared not to understand the reason for the hearing or his rights after being sent the Directive. To protect his due process rights, Department Counsel conducted a *voir dire* of Applicant's understanding of his rights. During the *voir dire*, Applicant advised that he believed that his job required a public trust determination. He understood that such a determination also required a process and that if he withdrew his application, he would not be granted a public trust determination or a security clearance. He again indicated that he did not want to handle classified information. He advised that he worked in an area where classified information was located and that was the reason he needed a security clearance or public trust determination. At the conclusion of the *voir dire* questioning, I was satisfied Applicant had sufficient understanding of the issues and process to proceed with the hearing. He agreed to proceed with the hearing.¹

Findings of Fact

In his Answer to the SOR, Applicant admitted all the factual allegations in the SOR. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

¹Tr. 7-14.

Applicant, who is 37 years old, works as a web developer for a DOD contractor. He described his job as working with requirements then translating the requirements into a computer application. He began working with his current employer in April 2011, but he is in a different position than his initial job.²

Applicant was born in Vietnam. He immigrated to the United States in 1989 with his family. He became a United States citizen in 1999. He is single. He currently lives with his mother and brother. His mother does not work, but his brother does. Applicant graduated from a major university in May 2004 with a bachelor's degree in computer science.³

Psychological Issues

When he completed his 2011 e-QIP, Applicant acknowledged that he had received mental health treatment from September 2005 until October 2005. He signed a release allowing the Government to obtain a copy of his mental health record. This record indicated that Applicant was admitted to a local hospital on September 4, 2005 from the emergency room where he showed signs of disorientation, confusion, and disorganization. He also experienced auditory hallucinations. His admission diagnosis was acute psychotic disorder. The physicians treated him with anti-psychotic and anti-depressant medications. He was released from the hospital on September 12, 2005 with medication and transferred to a partial hospital program for followup treatment. His discharge diagnosis was adjustment disorder with behavior and mood disturbance, rule out an acute psychotic reaction not otherwise specified.⁴

Applicant was admitted for psychiatric treatment at a hospital on July 26, 2007 for bipolar disorder after "a bout of manic episodes with extreme agitated energy filled behavior" and auditory hallucinations. The hospital treating physician indicated an awareness of Applicant's previous admission and advised that Applicant had done well with his follow-up care. During this admission, Applicant attempted to throw himself out a window. The treating physician viewed this conduct as an attempted suicide. The physician treated Applicant with medications, and the hospital released him when he stabilized. His discharge diagnosis was major mood disorder, bipolar with mixed manic and depressive state.⁵

In January 2011, Applicant sustained injuries in an automobile accident. When the police arrived, Applicant became combative and tried to reach for a police officer's gun. The police subdued him with a taser. According to the hospital record, Applicant was not coherent upon his arrival at the hospital emergency room because of his

²GE 1; Tr. 29-30.

³GE 1; GE 2; GE 5; Tr. 30-31.

⁴GE 1; GE 8; Tr. 31-32, 38-39.

⁵GE 4; GE 8.

psychosis. Tests performed showed no alcohol or illegal drugs in his system. His diagnosis was psychosis, and he was transferred to another hospital for mental health treatment. The records from the second hospital are not in evidence.⁶

Applicant was involved in another car accident in June 2014. He exhibited erratic behavior, including getting into a woman's car and touching her inappropriately. The police arrested him, charged him with battery, and took him to the hospital. He recalled spending time in a detention center. Neither the police report nor the hospital records from this incident are in evidence. Applicant is a poor historian on the facts of the accident.⁷

Applicant agreed to an independent mental health evaluation requested by the DOD CAF, which took place on December 22, 2014. The evaluating psychiatrist reviewed the 2005 and 2007 hospital admission and treatment records and the emergency room records from the January 2011 automobile accident. Applicant provided him the information about the 2014 automobile accident. The psychiatrist met with Applicant. Applicant denied any anxiety or depression. The psychiatrist found Applicant's affect inappropriate for the conversation and noted that Applicant did not exhibit any delusional statements nor auditory or visual hallucinations. Applicant's thought process was goal directed and logical. Applicant showed partial insight into his bipolar disorder as he could talk about his manic behavior, but did not have any insight into his depressive behavior nor did Applicant have an appreciation of the seriousness of his inappropriate disruptive behavior. The psychiatrist indicated that Applicant showed poor judgment during his evaluation because his responses to questions about his manic behavior showed little insight and understanding of his behavior, and because his responses suggest he may be giving unreliable information. The psychiatrist diagnosed Applicant with bipolar I disorder, most recent episode manic, and opined that Applicant's disorder could impair his judgment, reliability and trustworthiness. Applicant's prognosis is guarded. Applicant's medications include paxil, seroquel, and clonazepam.⁸

At the hearing, Applicant acknowledged that he has been treated for bipolar disorder and that he has been hospitalized at least three times for treatment of his disorder since 2005. He advised that his psychiatrist prescribed one medication for emotions, one for calm (anxiety), and one for psychosis. Applicant, however, takes his medication when he thinks he needs it, rather than every day as his psychiatrist told him. At the hearing, he stated that he had not taken his medication for three to four months. Applicant does not feel his psychiatrist is helping him, so he is not receiving regular therapy. He seeks medical attention when he wants his medication. He viewed the independent evaluation as a medical appointment for medication. Applicant understands that his bipolar disorder cannot be cured. He acknowledged that during

⁶GE 6; Tr. 38-39, 41.

⁷GE 3.

⁸GE 3; Tr. 34.

episodes with his illness, he mixes up reality and dreaming. When what he describes as “barriers” “goes down”, he is sedated at the hospital to allow him to sleep. He stated that he recognizes when his bipolar “hits him” and states that during this time he cannot distinguish between real and unreal.⁹

Personal Conduct

When Applicant completed his e-QIP in April 2011, he listed his hospitalization in 2005, but he did not list his subsequent hospitalizations for mental health treatment. He explained that he transferred the information from his previous security clearance application to the 2011 e-QIP. He did not review the questions or provide updated information. In response to a question about why he did not list his January 2011 hospitalization, Applicant stated that he could not remember the dates so he did not list this information.¹⁰

Applicant acknowledged on his 2011 e-QIP that he left a job in May 2009 following a work disagreement about a project development. When he met with the Office of Personnel Management (OPM) investigator in December 2011, he acknowledged that he was fired from this job because the project did not meet the expectations of the client. Applicant felt the reason the project did not meet the expectations of the client was because it was underfunded. When he met with another OPM investigator in August 2013, Applicant again stated these facts as the reason for being fired. Although the record lacks any specific evidence that Applicant’s firing in May 2009 was for failing to follow supervisory instructions, he admitted these facts in his response to the SOR.¹¹

When he met with the OPM investigator in 2013, Applicant disclosed that he had received negative evaluations at a job he worked between August 2009 and April 2011. He indicated that his supervisor found that he was not performing up to standards because he failed to complete the work in a specific program. Applicant disagreed with the supervisor’s evaluation because the client did not require the work to be performed in this program. Applicant eventually resigned the position. The record lacks any evidence that he was asked to resign or resigned before he was fired. Applicant did not list this information on his e-QIP because he used the information on his previous security clearance application without updating the information.¹²

Applicant acknowledged that he played video games on his work computer in the past. He no longer plays video games on his work computer. Instead, he uses his phone when he has free time. Applicant explained that he accessed gaming websites

⁹Tr. 32-33, 39-41, 44-46.

¹⁰Tr. 34-35.

¹¹GE 1; GE 2; GE 5; Tr. 37, 48.

¹²GE 2; Tr. 37-38, 49, 51.

when he lacked work with the intent to do “research as gaming sites were more innovative” and as a way to take his mind off of work-related problems. Playing games helped him to think clearer. He acknowledged that his employer did not approve of his actions.¹³

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 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, 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” An 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 an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

¹³Tr. 36, 52.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline I, Psychological Conditions

AG ¶ 27 expresses the security concern pertaining to psychological conditions:

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

AG ¶ 28 describes conditions that could raise a security concern and may be disqualifying:

- (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.

Applicant admitted that he suffers from bipolar disorder and that when his illness “hits him”, he cannot distinguish between real and fantasy. In the last 10 years, Applicant has been hospitalized at least three times for mental health treatment. Less than a year ago, he was evaluated by a mental health professional, who diagnosed a bipolar I disorder and opined that Applicant’s condition could impair his judgment, reliability and trustworthiness. By his own admission, Applicant has declined to take his medication as required and had not done so for three or four months prior to the hearing. The Government has established a security concern under AG ¶¶ 28(a), 28(b), and 28(c).

AG ¶ 29 provides conditions that could mitigate security concerns:

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

(b) the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional;

(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 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.

I have reviewed the above mitigating conditions, and I conclude that none apply because while Applicant's mental health condition is treatable and manageable, he is not in treatment, and his condition is not under control as he is refusing to take his medications and to participate in treatment. Because of his mental health problems, he lacks sufficient insight and self-awareness to decide when medication is necessary without ongoing therapy.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment

qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources; and

(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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

For AG ¶ 16(a) to apply, Applicant's omission must be deliberate. The Government established that Applicant omitted material facts from his April 2011 e-QIP, when he failed to list his 2007 and 2011 hospitalizations for treatment of a mental health condition, and he failed to acknowledge that he left a job in 2009 under adverse circumstances. In his response to the SOR, he admitted the facts of allegations 2.a and 2.d. At the hearing, he explained how he completed his e-QIP. In reviewing his testimony, it is unclear if he understood that his admissions included intentional falsification. Because his understanding is unclear, I will review the allegation as a denial. When the allegation of falsification is controverted, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is

direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.¹⁴

Applicant acknowledged at the hearing that he did not list the 2011 hospital admission because he did not know the dates. Applicant understands that he was treated at the hospital three times for his bipolar disorder, but he could not remember dates. He chose not to indicate that he had been hospitalized after 2005. Even though he is a poor historian, he knew he had been in the hospital after 2005 and intentionally chose not to list this information. A security concern has been established by SOR allegation 2.a.

Applicant's failure to treat his departure from his job in 2011 as adverse circumstances does not rise to the level of intentional conduct. He considers his departure to be the result of a disagreement over his evaluation and as a decision by him to seek other employment which treated him more favorably. He did not express a view that he left because of his performance. The evidence is insufficient to establish a security concern under SOR allegation 2.d as to SOR allegations 2.b and 2.c.

Applicant violated company rules by playing video games at work. Applicant acknowledged that he lost his job in 2009 for failing to follow his supervisor's directions on a work project. A security concern has been established under AG ¶¶ 16(d)(2) and 16(d)(3) and 16(e).

The personal conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 17(a) through ¶ 17(g), and the following are potentially applicable:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (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
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant did not make a prompt, good-faith effort to correct his intentional omission of his history of medical treatment after 2005. He has not mitigated his falsification of his 2011 e-QIP. Applicant acknowledged that he had a bipolar disorder, but he is not compliant with his medication or any treatment plan. His medical condition impacts his ability to understand his conduct at work and elsewhere as shown by the

¹⁴See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

loss of jobs in 2009 and 2011. He stopped using his work computers to visit gaming websites, but he continues to use his phone to access these websites when he is at work. His overall conduct and attitude about his work shows little understanding of his problems and indicates a lack of interest in changing his conduct. He has not mitigated the security concerns about his personal conduct.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all relevant circumstances. The 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 eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has a bachelor's degree in computer science and has worked for more than 10 years as a web designer. He has been diagnosed with bipolar I disorder, which impacts his ability to make good decisions and change his conduct and attitude. He has decided not to take his medications, a poor decision which will most likely result in additional hospitalizations in the future. Applicant lacks the insight and judgment necessary to comply with the rules and regulations for holding a security clearance and managing classified or sensitive information.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security and trustworthiness concerns arising from his psychological condition and personal conduct under Guidelines I and E..

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 I:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for a security clearance is denied.

MARY E. HENRY
Administrative Judge