



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



In the matter of:)
)
) ISCR Case No. 14-06894
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

07/10/2018

Decision

MURPHY, Braden M., Administrative Judge:

Applicant was diagnosed in 2012 with bipolar disorder. He briefly pursued treatment but did not follow through with it. His bipolar diagnosis was confirmed in September 2017, as a result of a psychological evaluation conducted during his background investigation. Applicant began psychiatric treatment for his condition in September 2017, and his treatment continues. However, Applicant’s treatment provider found that his condition is unstable and his prognosis is unknown. More time is needed for Applicant to demonstrate ongoing and consistent compliance with his treatment plan. Applicant did not provide sufficient evidence to mitigate the security concerns under Guideline I, psychological conditions. Applicant’s eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 23, 2013. On November 14, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline I, psychological

conditions. The action was taken under Executive Order (Exec. Or.) 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 *National Security Adjudicative Guidelines* (AG) effective within the DOD as of June 8, 2017.

Applicant answered the SOR on December 2017 and requested a hearing. The case was assigned to me on February 16, 2018. On March 23, 2018, a notice of hearing was issued scheduling the case for April 23, 2018. The hearing convened as scheduled. At the hearing, the Government submitted Government's Exhibits (GE) 1 through 4. Applicant testified and submitted Applicant's Exhibits (AE) A through F. All exhibits were admitted without objection. I left the record open until May 11, 2018, to allow Applicant the opportunity to submit additional evidence. Applicant timely submitted one document, which was marked as AE G and admitted without objection. The record closed on May 11, 2018. The transcript (Tr.) was received on May 7, 2018.

Findings of Fact

Applicant admitted SOR ¶ 1.a and denied SOR ¶ 1.b. I have incorporated his admission into the findings of fact. After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact.

Applicant is 41 years old. He and his wife have been together since 2012, and they married in May 2016. They have a two-year-old daughter. Since August 2013, Applicant has worked at a naval shipyard for a defense contractor. Applicant had a security clearance during a prior period of service in the U.S. Marine Corps, but does not currently have a clearance. Applicant needs a clearance so he can perform his current duties at the shipyard. Applicant provided documentation of his participation in several work-related apprenticeships and training programs. He also earned an associate's degree and is pursuing a bachelor's degree. (Tr. 9-10, 31-33, 38-44, 50-51; GE 1; AE D; AE E)

Applicant served on active duty in the U.S. Marine Corps from 1994 to 1998, and then in the Marine Corps Reserve from 1998 to 2000. He tested positive for marijuana on multiple occasions in the Marine Corps and he disclosed in his interview that he received a bad conduct discharge in 2000. (Tr. 45-46; GE 3 at 3-4) His marijuana use continued for about a year thereafter, and he later experimented with spice at some point between 2004 and 2012, when it was legal. (Tr. 45-46; GE 3 at 4) Applicant did not disclose any prior military service on his SCA. Nor did he disclose his bad conduct discharge. (GE 1 at 17)¹

¹ Applicant did not disclose his prior military service, or, by extension, his bad conduct discharge, on his SCA. This was not alleged in the SOR as a possible independent security concern under Guideline E (personal conduct). I have therefore not considered it as disqualifying conduct.

In March and April 2012, following the end of a long-term relationship, Applicant sought mental health counseling because he was feeling depressed. He was seen by a board-certified family nurse practitioner. He was diagnosed with bipolar II disorder. (Tr. 47-9; GE 2; GE 3) Applicant disclosed his mental health counseling on his SCA. (GE 1)

Appellant saw his medical provider three times in spring 2012. He was prescribed several antidepressants, and he testified that he began to feel better. Because he began to feel better, he stopped going to treatment, despite his provider's recommendations. (SOR ¶ 1.a) Applicant testified that at the time, he did not connect the fact that his mood had improved with the fact that he was on effective medication. (Tr. 47-50, 56-57; GE 1, GE 2)

In August 2015, DOD requested copies of Applicant's medical records for review. This was unsuccessful, as his treatment provider had left the practice. In May 2017, DOD requested that Applicant undergo a psychological evaluation by an approved clinical psychologist provided by the Government. (GE 2) Applicant had not been on any medication for his condition, or been in any treatment for it, since spring 2012. (Tr. 50-52)

In September 2017, Applicant was evaluated by a Ph.D. clinical psychologist for a determination if he "has any mental, emotional, or personality conditions that could impair judgment, reliability or trustworthiness." (GE 3 at 1) That evaluation confirmed Applicant's bipolar II diagnosis. The evaluator also confirmed that Applicant's condition "could result in episodes of impaired judgment, reliability or trustworthiness." (GE 3 at 1)

The evaluator noted that Applicant has a history of impulsivity, substance abuse, and mildly antisocial traits for much of his adult life. His substance abuse history includes abuse of marijuana, as noted above. Applicant was diagnosed during the evaluation with cannabis disorder, mild, in sustained remission. (GE 3 at 4)

The evaluator also noted Applicant's history of alcohol use and binge drinking. In recent years, his alcohol use has lessened. However, in fall 2017, he continued to consume alcohol at a rate of 12 beers a week. He occasionally consumed six or more drinks at a sitting. The evaluator recommended that Applicant eliminate or curtail his alcohol use given his history, and because "his occasional binge drinking is unhealthy." He was diagnosed with alcohol use disorder, mild, in sustained remission.² (GE 3 at 4)

The evaluator noted that the hypomanic episodes resulting from Applicant's condition "could easily be prevented with appropriate medication" and that Applicant was willing to pursue treatment. (GE 3 at 1) She also noted Applicant's history of alcohol and cannabis use disorders, both in sustained remission. She recommended that he eliminate all binge drinking for the sake of his security clearance and that he cut his overall alcohol

² Applicant's substance abuse history was not alleged in the SOR. However, that history was duly considered by the medical professionals as part of their analysis of Applicant's mental health. I have considered that history accordingly.

consumption to “half or less” of his current level “for the sake of his health and to make relapse less likely.” (GE 1 at 1)

The evaluator found that if Applicant complied with medication for his disorder as recommended, and eliminated binge drinking, “both of which he is willing and able to do,” then:

[Applicant] could well be found to have sufficient judgment, reliability, and trustworthiness for a security clearance in a future evaluation. However, he has not yet made these very necessary changes, and thus cannot be found to be of good judgment, reliability and trustworthiness at this time.³

The evaluator noted that Applicant was “willing to do whatever it takes” to maintain a clearance, to provide for his wife and young child, and to comply with appropriate psychiatric treatment. At the time, however, Applicant was not undergoing treatment for his condition. (SOR ¶ 1.b) (GE 3 at 2-4)

The evaluator concluded that Applicant’s prognosis was “Good, with treatment; [and] Poor, without treatment.” (GE 3 at 5) As she noted, “the key question is whether [Applicant] is likely to be able to maintain a pattern of good judgment, reliability, and trustworthiness, and under what conditions.” (GE 3 at 2) She found that Applicant’s reports of commitment to change and being a stable provider were credible. However, the evaluator also found that:

. . . unless [Applicant] receives appropriate treatment and follows through with it, he may not be able to keep his commitment if another hypomanic episode occurs. He has not followed through with such treatment in the past, and sustained adherence to treatment will be necessary to control his behavior. Therefore, [Applicant] entering treatment and consistently adhering to treatment is necessary for him to have the reliability and trustworthiness to safeguard classified materials.⁴

In reviewing the examiner’s report and noting that Applicant was willing to pursue treatment but had yet to actually do so, DOD psychological consultants concurred with her overall conclusions. (GE 3, GE 4)

Applicant’s evaluation occurred on September 19, 2017. He met with his evaluator for about eight hours. (Tr. 55) He testified that the evaluator told him that “whether or not I get the clearance . . . , if you start treatment you will feel better.” (Tr. 52) Applicant testified that this advice resonated with him, and he took it to heart. Two days later, on

³ GE 3 at 1.

⁴ GE 3 at 4.

September 21, 2017, he began seeing a clinical psychiatrist who was with an office recommended by the evaluator. (Tr. 36, 52-54, 59)

Applicant saw the psychiatrist every two weeks through October 2017, then once in November, 2017, twice in December 2017, and monthly since then, through April 2018, the month of the hearing. (AE A) Sessions are ongoing. (Tr. 37-38) Applicant's provider diagnosed him with: 1) bipolar I disorder, most recent episode depressed, severe, without psychotic features; and 2) generalized anxiety disorder. She prescribed certain medications. (AE A; Tr. 59)

Applicant testified that on occasion, his doctor will adjust his medication. He said he meets with his doctor for about 30 minutes, but only for medication management. He takes his medication as directed. He testified that, since he has been in treatment, his mood has improved, and he feels good, though he has occasional anxiety. Applicant acknowledged at hearing that he needs the medication. (Tr. 37, 59-61)

Applicant submitted a March 29, 2018 letter from a licensed clinical social worker (LCSW) noting that he had been attending therapy sessions "on a consistent basis" since August 28, 2017. Sessions are for one hour, about once a month, and are ongoing. (Tr. 37-38, 61-62) The LCSW noted that Applicant:

. . . has presented [as] psychiatrically stable and he complies with treatment recommendations. He works full time at [his employer] and is married with a family. [Applicant] does not appear to be a threat to himself or anyone else.⁵

Applicant also testified that he is "motivated to do whatever I need to do to get the clearance," including submitting regular reports from his treatment providers to verify that he is in treatment and is compliant with it. (Tr. 42) He acknowledged at hearing that the DOD evaluator's assessment of his drinking pattern in September 2017 was correct. At that time, he would have about twelve drinks a week and a few times a year, he would have six or more drinks at a sitting. Since then, Applicant has curtailed his drinking, to one or two drinks at a sitting when he goes out for dinner. Some of his medication should not be mixed with alcohol, so drinking sometimes makes him sick. He denied engaging in binge drinking currently. (Tr. 40-42) Applicant said he last used marijuana in about 2002, though he tried spice more recently (at some point between 2004 and 2012), as noted in the DOD evaluation. (Tr. 34)

The psychiatrist's letter did not address whether or not Applicant had a favorable prognosis. Because the letter (AE A) was silent as to that question, I left the record open to give Applicant the opportunity to submit an updated letter from his psychiatrist addressing it, if appropriate. (Tr. 61-66)

⁵ AE B.

Applicant's psychiatrist provided an updated letter, dated May 1, 2018. (AE G) Treatment is ongoing, as are changes to Applicant's medications. She stated:

[Applicant] and I have been working very hard to stabilize his Bipolar disorder, and anxiety symptoms. While his symptoms are not stable, my hope is that with continued close monitoring and consistent appointments, we will be able to control and manage his symptoms in the near future.

* * *

I am unable to write a statement of favorable prognosis on [Applicant's] behalf at this time because that is unknown. However, I would like to assure you that [Applicant] and I will continue to work very hard to make that happen. I hope this information is helpful in your clearing [Applicant] for his current job.⁶

The manager of the apprentice school at Applicant's employer noted that Applicant has maintained above-average shop grades and academic grades. His above-average performance places Applicant in position to participate in advanced programming and leadership training. (AE C) An associate professor at the community college where Applicant studies praised his work experience, trustworthiness, and overall suitability for a clearance. Applicant graduated with honors from the associate degree program. (AE D)

Applicant's wife vouched for her husband's good moral character, generosity, kindness, integrity, and work ethic. He is an excellent husband and a good father to their daughter. (AE F)

Policies

It is well established that no one has a right to a security clearance.⁷ As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials."⁸

The adjudicative 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 adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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

⁶ AE G.

⁷ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance").

⁸ 484 U.S. at 531.

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 national security eligibility will be resolved in favor of the national security.”

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, and has the ultimate burden of persuasion as to 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 that an applicant may deliberately or inadvertently fail to 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.

Analysis

Guideline I: Psychological Conditions

The security concern for psychological conditions is set forth 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 and an opinion, including prognosis, should be sought. No negative inference concerning the standards in this guideline may be raised solely on the basis of mental health counseling.

The guideline notes several conditions that could raise security concerns under AG ¶ 28. The following are potentially applicable in this case:

- (b) an opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness; and

- (d) failure to follow a prescribed treatment plan related to a diagnosed psychological/psychiatric condition that may impair judgment, stability,

reliability, or trustworthiness, including, but not limited to, failure to take prescribed medication or failure to attend required counseling sessions.

Applicant was diagnosed with bipolar II disorder in 2012 by a board-certified family nurse practitioner. For a brief period, he was on medication and under treatment. However, he unilaterally stopped taking the medication and going to treatment when he began to feel better. AG ¶ 28(d) applies.

In September 2017, Applicant was evaluated by a Ph.D. clinical psychologist and diagnosed with bipolar I disorder, most recent episode depressed, severe, without psychotic features; and generalized anxiety disorder. Applicant's bipolar disorder is a condition that may impair judgment, stability, reliability, or trustworthiness. AG ¶ 28(b) applies.

Conditions that could mitigate psychological conditions security concerns are provided under AG ¶ 29. The following are potentially applicable:

(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 psychological/psychiatric condition was temporary, 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.

Both AG ¶¶ 28(a) and 28(b) have some application. The initial evaluator and the medical professionals Applicant is currently seeing have each concluded that Applicant's bipolar disorder is readily controllable with treatment. Applicant has specifically been found to have a good prognosis with treatment, and a poor prognosis without treatment. AG ¶ 28(a) therefore partially applies. Similarly, Applicant appears to have "gotten the message" about the fact that he needs treatment, and he began pursuing treatment with an LCSW and a psychiatrist immediately after his September 2017 evaluation. That treatment is ongoing. AG ¶ 28(b) therefore also partially applies.

Applicant remains in active treatment. His participation is regular and ongoing. However, at the time of the hearing, he had been in regular treatment for only seven months. As Applicant's treating psychiatrist found, his current condition is not stable, and she is unable to provide a favorable prognosis, as his prognosis is unknown. As she also found, "my hope is that with continued close monitoring and consistent appointments, we will be able to control and manage his symptoms in the near future." Particularly given the fact that Applicant was initially diagnosed with bipolar disorder in 2012 and did not follow through with treatment and medication as directed, Applicant needs to develop a steady track record of compliance with treatment recommendations. Additionally, Applicant only pursued treatment after it became clear that his clearance was in jeopardy. Thus, less weight is afforded these recent actions. AG ¶¶ 28(a) and 28(b) do not fully apply.

For similar reasons, AG ¶ 28(c) also does not apply. Applicant's condition is ongoing and is not temporary. AG ¶¶ 29(d) and 29(e) do not apply.

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 the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (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(a), 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. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline I in my whole-person analysis.

Applicant is a valued employee, and is technically proficient at his job. Applicant testified about his need for a clearance and for his desire to work to manage his disorder. Having recently married and begun to raise a family, his life has stabilized. His testimony and presentation at hearing was credibly in line with the conclusions of the DOD evaluator, who observed that he has a desire to address his disorder by pursuing appropriate treatment and to do so consistently.

However, given his psychiatrist's conclusions that Applicant's bipolar condition remains unstable and his prognosis is unknown, it is difficult for me to override that conclusion and find that the Guideline I security concerns are fully resolved at this time. At some point in the future, once Applicant develops a stronger track record of regular participation in treatment and compliance with his medication regimen, he may well be an appropriate candidate for access to classified information. But at this time, the security concerns arising from his condition are not sufficiently mitigated to warrant granting him a clearance. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the Guideline I 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 I:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant

Conclusion

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

Braden M. Murphy
Administrative Judge