



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



In the matter of:)	
)	
[REDACTED])	ISCR Case No. 17-03297
)	
Applicant for Security Clearance)	

Appearances

For Government: Michelle Tilford, Esq., Department Counsel
For Applicant: *Pro se*

03/29/2018

Decision

MARINE, Gina L., Administrative Judge:

Guideline H (Drug Involvement and Substance Misuse), and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 25, 2015. On December 1, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines H and E. The DOD CAF acted under Executive Order (EO) 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 (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on December 12, 2017, and requested a decision on the record without a hearing. On January 29, 2018, the Government sent a complete copy of its written case, a file of relevant material (FORM) including documents identified as Items 1 through 6, to Applicant. He was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government's evidence. He received the FORM on February 1, 2018, and timely submitted his response, to which the Government did not object. Items

1 and 2 are the pleadings in the case. Items 3 through 6 are admitted into evidence. The case was assigned to me on March 27, 2018.

Findings of Fact¹

Applicant, age 34, has been married since 2005. They have two children, ages 11 and 8. He graduated high school in 2002. He honorably served in the U.S. Air Force from 2005 until January 2013. He earned a bachelor's degree in 2015. Since 2015, he has been employed as a software-development analyst by the same defense contractor (Company A) who previously employed him from January 2013 until September 2013. He was granted a security clearance in 2010.

The SOR alleged under Guideline H, and cross-alleged under Guideline E, that Applicant misused Percocet (SOR ¶¶ 1.a/2.a) and Vicodin (SOR ¶¶ 1.b/2.a) prescriptions in August 2013, and stole prescription painkillers from a co-worker on multiple occasions (SOR ¶¶ 1.c/2.a). In his SOR answer, Applicant denied SOR ¶ 1.a, without explanation, and SOR ¶ 1.c on that basis that it occurred only one time.

The SOR also alleged under Guideline E that Applicant falsified material facts about the incidents alleged in SOR ¶¶ 1.a through 1.c. on his 2015 SCA (SOR ¶ 2.e), during his 2016 (SOR ¶ 2.b) and 2017 (SOR ¶ 2.c) security clearance interviews, and in his 2017 response to interrogatories propounded by the Government (SOR ¶ 2.d). In his SOR answer, Applicant admitted each of these allegations and explained that they were caused by his fear of admitting the worst mistake of his life. He averred that they do not "show the type of person [that he is]."

In his SOR answer, Applicant explained that "fear" caused him not to tell investigators "what [he] did." He also stated that he was worried about "costing [himself] another job." In his FORM response, Applicant described himself as a "good and honest" person who made "one huge mistake." He acknowledged wrongdoing in stealing the prescriptions from his co-worker and then not being honest about it during his investigation. He averred that he is trying to be a better man and better person. He asserted that he is great at his job and has much to offer his employer. He expressed remorse for his actions in both his SOR answer and FORM response.

Prescription Use and Misuse History

Applicant's first encounter with prescription medication was in high school, in 2002 when he was approximately 18 years old. He had surgery on his foot and was prescribed Vicodin. In 2007, when he was approximately 24 years old, he was prescribed Vicodin after he tore his rotator cuff. Between the summer of 2007 and 2008, he had two separate surgeries to remove wisdom teeth. He was prescribed Percocet on both occasions. In 2008, he was prescribed Vicodin after he had a cyst removed from his wrist. In 2011, he was prescribed unspecified pain medication after he was involved

¹ Unless otherwise indicated by citation to another part of the record, I extracted these facts from Applicant's SOR answer (Item 2) and his SCA (Item 3).

in a motorcycle accident that required surgery on his shoulder. From 2009 through 2017, he had ten separate foot surgeries. He was prescribed unspecified pain medication on each occasion. During that same period, he was also prescribed unspecified pain medication on each occasion that he had kidney stones, which was approximately three to four times. Applicant recalled that the longest duration that he was “without any pain medication” was approximately eight to nine months, but he did not specify any dates.²

On two occasions in August 2013, during Applicant’s first job with Company A while working on an Air Force base, he stole prescription pain medication from his co-worker. On the first occasion, he stole approximately three or four Percocet pills, which had emptied the prescription bottle. Approximately two weeks later, he stole approximately five to six Vicodin pills, which had emptied the prescription bottle. After each theft, he ingested the pills, one at a time, during the course of 24 hours on the same day that he stole them, including at work and at home. He was caught after the co-worker reported the incidents and caused the Air Force Security Forces (AFSF) to initiate an investigation. When confronted by AFSF, Applicant admitted that he stole the medication on two occasions, but denied the amounts alleged and claimed that he only took two or three the first time and two the second time. He explained that he took the pills because of “physical pain and home problems.” After Company A took his access badge, Applicant resigned. During his security investigation, Applicant maintained that he was never fired, but in his response to the FORM, he acknowledged that the incidents caused him to lose his first job with Company A. He also maintained that he was never arrested, but the AFSF incident report reflects that he was fingerprinted and that booking photos were taken. The investigation was closed without any action taken by the Commander.³

Applicant does not believe that he is addicted to pain medication, but acknowledged that he “could be.” He has never sought help nor has he ever been diagnosed as abusing drugs or being drug dependent. However, in 2011 or 2012, while on active duty, his first sergeant recommended that he attend an Alcohol and Drug Abuse Prevention and Treatment (ADAPT) program. Before that recommendation, Applicant had attended a meeting with the first sergeant, physician, and pharmacist due to a concern about the amount of pain medication that Applicant had been prescribed over a year and a half and that he had taken over the years. Applicant successfully completed the ADAPT program.⁴

Applicant’s most recent reported use of prescription pain medication was June 18, 2017. He did not specify whether that use was as prescribed. In his November 2017

² Item 6 at 2.

³ Items 5 and 6.

⁴ Item 6 at 2-3.

responses to interrogatories, he reported that he did not intend to illegally use Vicodin in the future (*albeit* alongside a falsification concerning his misuse of Vicodin in 2013).⁵

Security Clearance Investigation History

Applicant lied or was less than candid about the facts and circumstances surrounding his theft and misuse of prescription pain medication on five occasions during his security clearance investigation. First, he failed to report either the theft or misuse on his August 2015 SCA. Second, during his initial security clearance interview in August 2016, while he acknowledged being questioned by AFSF about the theft, he denied that he was arrested or that he had stolen the prescription pain medication.

Third, during a follow-up security clearance interview in June 2017, Applicant initially claimed that his co-worker gave him one prescription pain pill and provided false facts and circumstances to support that story. After the interviewer reminded Applicant that he had reviewed records and interviews about the incident, Applicant apologized and volunteered that he did take prescription pain pills from his co-worker. He claimed that he only stole two Vicodin pills on one occasion. He acknowledged that he should have reported it as a “charge[], conviction[], or sentence[] of a crime . . . within the past seven years” on his SCA. He also admitted that he has misused his own prescribed pain medication by taking more pills than were prescribed. He stated that he never told his wife about the 2013 incident because he was scared that she would be upset or worry. He also lied to her about why he lost his first job with Company A by claiming that he was laid off.

Applicant signed a sworn statement summarizing portions of his June 2017 interview. In that statement, he certified to its accuracy, including the following:

I didn't list or provide [the information about my theft and misuse of my co-worker's prescription pain medication (Incident)] on my [SCA] or discuss it with the [agent conducting the interview (Agent)] prior to [the date of the interview] because I was scared and unsure of what to do . . . I didn't think the Agent knew about the [Incident] because they didn't ask me anything about it. I took a chance by not bringing it up to the Agent and not listing the incident on my [SCA] and was hoping no one would find out. I didn't know if the Agent or agency that conducts my background investigation communicated with the [Air Force base on which the Incident occurred (Base)] or obtained the information from the [Base].

Fourth, in his November 2017 response to interrogatories, Applicant claimed that he misused only one Vicodin pill on only one occasion in September 2013, which he acknowledged that he stole from his co-worker. He also certified the accuracy of his June 2017 interview.

⁵ Item 6 at 4; Item 4 at 2.

Fifth, in his December 2017 SOR answer, Applicant averred that he stole prescription painkillers from his co-worker only one time, not twice.

Policies

“[N]o one has a ‘right’ to a security clearance.”⁶ As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.”⁷ The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”⁸

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”⁹ Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR.¹⁰ “Substantial evidence” is “more

⁶ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

⁷ *Egan* at 527.

⁸ EO 10865 § 2.

⁹ EO 10865 § 7.

¹⁰ See *Egan*, 484 U.S. at 531.

than a scintilla but less than a preponderance.”¹¹ The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability.¹² Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.¹³ An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government.¹⁴

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”¹⁵ “[S]ecurity clearance determinations should err, if they must, on the side of denials.”¹⁶

Analysis

The facts and circumstances of Applicant’s theft and misuse of prescription pain medication that are described in the Findings of Fact were summarized from the record. Because Applicant provided so many different versions of events, there remains a question of what is the whole truth.

Guideline H (Drug Involvement and Substance Misuse)

The concern under this guideline is set out in AG ¶ 24:

“The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any “controlled substance” as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.”

Applicant’s theft and misuse of prescription pain medication establish the following disqualifying conditions under this guideline:¹⁷

¹¹ See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

¹² See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

¹³ Directive ¶ E3.1.15.

¹⁴ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

¹⁵ ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

¹⁶ Egan, 484 U.S. at 531; See also AG ¶ 2(b).

¹⁷ The SOR allegations concerning Applicant’s drug treatment (SOR ¶¶ 1.i, 1.j, 1.m) do not establish any disqualifying conditions under Guideline H and E. If anything, they support mitigation.

AG ¶ 25(a): any substance misuse (see above definition);

AG ¶ 25(c): illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 26(f): any illegal drug use while granted access to classified information or holding a sensitive position.

None of the following potentially applicable mitigating conditions under this guideline are established:

AG ¶ 26(a): the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

AG ¶ 26(b): a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation; and

AG ¶ 26(c): abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended.

Applicant misused his own and stolen prescription pain medication over an extended period, including while in possession of a security clearance. During the 2013 incidents, he was 30 years old and married with children. Applicant has been prescribed, and potentially overprescribed, pain medication over the years for physical pain associated with approximately 15 surgeries (11 were foot surgeries) that took place between 2002 and 2017. While Applicant averred that he did not intend to misuse Vicodin again (*albeit* alongside a false statement about his Vicodin misuse), he did not provide a signed statement of that intent with automatic revocation of his clearance for any violation, nor state an intent not to misuse other types of pain medication. Applicant acknowledged that his misuse in 2013 was not solely to treat physical pain. Despite his history, Applicant has never admitted that he has an addiction to pain medication, but he did acknowledge that he “could be.” Applicant has never voluntarily sought help or treatment for his use and misuse of pain medication. As recent as July 2017, Applicant had still been using pain medication for his ongoing foot pain. I have substantial doubts about his current reliability, trustworthiness, and good judgment, and am unable to conclude unequivocally that Applicant’s misuse of prescription pain medication has ended and is not likely to recur.

Guideline E (Personal Conduct)

The concern under this guideline is set out in AG ¶ 15:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and
- (b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Applicant's theft and misuse of prescription pain medication establish the general concerns involving questionable judgment and unwillingness to comply with rules and regulations, and the following specific disqualifying condition under this guideline:

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 individual may not properly safeguard classified or sensitive information.

Based on the uncontroverted SOR allegations and Applicant's admissions, the following additional disqualifying conditions under this guideline are established:

AG ¶ 16(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 national security eligibility or trustworthiness, or award fiduciary responsibilities; and

AG ¶ 16(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

An applicant's completion of an SCA is the initial step in requesting a security clearance and the investigative process is contingent upon the honesty of the applicant. Beginning with an applicant's responses in the SCA,

The security clearance investigation is not a forum for an applicant to split hairs or parse the truth narrowly. The Federal Government has a compelling interest in protecting and safeguarding classified information. That compelling interest includes the government's legitimate interest in being able to make sound decisions (based on complete and accurate information) about who will be granted access to classified information. An applicant who deliberately fails to give full, frank, and candid answers to the government in connection with a security clearance investigation or adjudication interferes with the integrity of the industrial security program.¹⁸

Applicant's misuses of his own and stolen prescription pain medication over an extended period establish a pattern of questionable judgment that calls into question his ability or willingness to comply with laws, rules, and regulations. Even more egregious was his repeated failure to avail himself of numerous opportunities to be forthcoming and candid about the facts and circumstances surrounding his misconduct during various phases of the security clearance investigations process. Applicant has not demonstrated a sufficient pattern of modified behavior to demonstrate reform. I have serious doubts about Applicant's current reliability, trustworthiness, and good judgment. None of the potentially applicable mitigating conditions under this guideline applies.¹⁹

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the following guidelines, each of which is to be evaluated in the context of the whole person.

¹⁸ ISCR Case No. 01-03132 at 3 (App. Bd. Aug. 8, 2002).

¹⁹ AG ¶ 17(a) (the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts); 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 it 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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur).

An 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.

I have incorporated my comments under Guidelines H and E in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline H and E, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated the security concerns raised by his theft and misuse of prescription pain medication and his lack of candor about it during the security clearance investigations process. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

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

Paragraph 1, Guideline H (Drug Involvement and Substance Misuse): AGAINST APPLICANT

Subparagraphs 1.a – 1.c: Against Applicant

Paragraph 2, Guideline E (Personal Conduct): FOR APPLICANT

Subparagraphs 2.a – 2.e: Against Applicant

Conclusion

I conclude that it not is clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge