

KEYWORD: Guideline I

DIGEST: At his hearing, Applicant testified “The most recent one, I came out of my building at the end of work day at [work site] and I saw the clouds starting to circle over the top of our main office building. I requested they move, and they did.” The Judge’s analysis failed to consider significant aspects of Applicant’s case. Although a Judge is not expected to discuss every piece of record evidence, which would be virtually impossible, he or she should address evidence that a reasonable person would expect to see discussed regarding a matter of national security such as a person’s access to classified information. Favorable decision reversed.

CASE NO: 18-02085.a1

DATE: 01/03/2020

DATE: January 3, 2020

In Re:)	
)	
-----)	ISCR Case No. 18-02085
)	
Applicant for Security Clearance)	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT

Kelly M. Folks, Esq., Department Counsel

FOR APPLICANT

Steven R. Freeman, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 29, 2018, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline I (Psychological Conditions) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 30, 2019, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Paul J. Mason granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge’s favorable decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge’s Findings of Fact

Applicant’s SOR alleges (1) that he was hospitalized for depression and suicidal thoughts from October to November 2014 and diagnosed with Bipolar Disorder; and (2) that he was evaluated at the request of the DoD in May 2018 and diagnosed with Bipolar Disorder, currently in full remission. However Applicant’s lack of candor during the evaluation led to the conclusion that he would not likely seek treatment should his symptoms return.

Applicant holds a bachelor’s degree and a professional credentialing license. He has held a clearance since 1969. Around 1984, Applicant started becoming depressed and suicidal. He sought treatment through a program offered by his then-employer, though in 1984 he did not follow advice to seek treatment, and, in 1993, he left his job rather than seek treatment. He worked on a family farm until 2004, when he began working for the predecessor of his current employer.

In October 2014, Applicant voluntarily entered in-patient treatment at a hospital. He was experiencing suicidal thoughts and depression. He told the medical staff that he had the power to affect storms, though he did not recall telling them that he was a prophet or had two contradictory personalities. After his discharge he received outpatient treatment but has had no treatment since mid-2015. He has not had a lapse in his condition since he left the hospital.

In addition to his hospitalization, Applicant sought mental health treatment, electroconvulsive therapy, and medication periodically over the years since 1985. These treatments worked temporarily, but when they stopped working, his symptoms returned, and he discontinued treatment. At the request of the CAF, Dr. D, a psychologist, evaluated Applicant on the question of whether his mental health issues impugned his judgment and reliability. Dr. D conducted the interview on line. Applicant felt uncomfortable, believing that he could not trust Dr. D. In addition, he did not want to undergo the emotional pain of speaking about his psychological history. Dr. D explained to Applicant that failure to talk about his history could have an adverse impact on his security clearance.

Dr. D prepared a written evaluation of Applicant, basing his opinions on his on-line clinical interview, a medical records review, and a personal assessment inventory (PAI). He also spoke with Applicant's wife. The evaluation stated that Applicant was not willing to discuss "triggers and causes of his depression" and would reply to questions "with statements instead of answers[.]" Decision at 4. The tests that Dr. D performed did not disclose current disqualifying psychological conditions. He diagnosed Applicant with Bipolar Disorder in full remission. He went on to state that Applicant's failure to be candid and forthright despite the implications for his security clearance showed a lack of judgment and suggests that, were Applicant's symptoms to recur, he would not seek treatment. Based on this resistance to treatment, Dr. D was not able to recommend that Applicant receive a clearance.

In December 2018, Applicant submitted to an evaluation by a psychiatrist, Dr. E, at the request of Applicant's attorney. Applicant was cooperative with Dr. E due to the face-to-face nature of his four-hour interview. Dr. E based his opinion on DoD records, inpatient medical records, and a seven-page statement that Applicant prepared describing his history of psychiatric treatment. Dr. E administered a PAI and interviewed Applicant's wife. Following his examination, Dr. E diagnosed Applicant with Recurrent Major Depression that had been in full remission for at least three years. Dr. E concluded that Applicant's condition did not impair his reliability, trustworthiness, or ability to abide by rules and regulations. "Because of the statistical likelihood of a recurrence of a major depressive episode in the future, Dr. E recommended a psychiatrist monitor Applicant regularly." Decision at 6.

During his testimony, Dr. E discussed statements that Applicant had made during hospitalization that he had hit himself with a hammer, that he was a prophet, and that he had the power to move storms. He characterized these as delusional beliefs that occur in manic phases of Bipolar Disorder. Had Applicant reported those symptoms to Dr. E, he might have changed his diagnosis to Schizoaffective Personality Disorder or Schizotypal Disorder, depending on the persistence of the delusions. He stated that a claimed power to move storms was not revealed in Applicant's medical records or during his examination. Dr. E concluded that Applicant's hospitalization evidenced an episode of agitated depression. He opined that a peculiar belief in the context of a normal mood may not require treatment. He stated that Applicant's wife will ensure that he pursues treatment should symptoms reappear.

The Judge's Analysis

The Judge cited to evidence that Applicant had received outpatient psychological treatment for over thirty years, discontinuing treatment when his symptoms returned. He noted Dr. E's opinion that Applicant's condition is treatable and that he would seek treatment when his condition warranted it. He stated that both Dr. D and E believed that Applicant had no psychological symptoms that would affect his ability to protect classified information. Dr. D's negative recommendation was based upon Applicant's refusal to discuss his psychiatric history, evidencing what Dr. D believed was a lack of judgment. The Judge concluded that Applicant's failure to cooperate was due to his discomfort with an evaluation conducted by means of a computer and cell phone. By contrast, Dr. E conducted his evaluation in person, and the Judge found his favorable

conclusions to be persuasive. The Judge stated that, based upon Applicant's candor with Dr. E and his credible testimony that he will seek treatment should his symptoms recur, Applicant had mitigated the concerns raised in the SOR.

Discussion

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. Directive ¶ E3.1.15. The standard applicable in security clearance decisions "is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." Directive, Encl. 2, App. A ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See* ISCR Case No. 14-02563 at 3-4 (App. Bd. Aug. 28, 2015).

Department Counsel argues that the Judge's favorable mitigation and whole-person analyses failed to address significant contrary record evidence. We find this argument to be persuasive. We note the following, drawn from the Judge's decision and the record evidence.

Applicant has suffered from depression for many years, seeking and then discontinuing treatment on his own with considerable frequency. Decision at 3; Tr. at 51, 60, 70, 74; Applicant Exhibit (AE) C.

He left a job in the early 1990s rather than seek recommended mental health treatment. Decision at 3.

In 2014, Applicant voluntarily underwent inpatient mental health treatment. He was experiencing depression and having thoughts of suicide. During the course of his hospitalization, he disclosed "grandiose delusions," stating that "the power of his anger was enormous. He literally was able to control storms and tornadoes and his anger could crush this building flat." He expressed a concern that he is both Dr. Jekyll and Mr. Hyde and that he was not able to suppress Mr. Hyde. He also advised that, on one occasion, he had become so frustrated with himself that he hit himself in the head with a hammer. Decision at 3; Tr. at 62; Government Exhibit (GE) 3 at 24, 57.

Applicant's providers diagnosed him with Bipolar Disorder. Upon discharge he was advised to continue treatment by a named provider. Applicant did so for a while but discontinued treatment in 2015. He has not received mental health treatment since then. Tr. at 70; GE 3 at 25.

In 2018, he spoke with a DoD recommended psychologist, Dr. D, who diagnosed Applicant with Bipolar Disorder in full remission. However, Dr. D noted Applicant's failure to answer questions about his medical history candidly, which impugned his judgment. Due to Applicant's failure of cooperation, Dr. D concluded that he would not likely seek treatment should his symptoms return. He recommended that Applicant not receive a clearance. Decision at 3-5; GE 4.

After receipt of the SOR, Applicant spoke with a psychiatrist, Dr. E, who diagnosed him with Recurrent Major Depression in Full Remission. Although he concluded that there was no reason to believe that Applicant was currently lacking in judgment and reliability, he also testified that, during a period of severe depression, judgment "can go out the window." Moreover, he stated that there is a statistical likelihood that Applicant's depression will return. He testified that Applicant had not made any delusional statements to him, although if he had then his diagnosis might have been different. He stated that, to determine the clinical significance of Applicant's stated belief in his power to control the weather, he "would have had to do . . . more specific questioning about it." Dr. E stated that Applicant should continue regular counseling sessions to prevent recurrence or to treat symptoms that are likely to recur. Decision at 5-6; Tr. at 87-96; AE C.

Despite his claim that his symptoms are under control, Applicant *testified at the hearing* that he had the power to move storms.

[DC]: Do you recall telling your treatment team that you had the power to control storms and tornadoes?

[Applicant]: Yes.

[DC]: Do you believe yourself to have the power to control - -

[Applicant]: May I explain?

[DC]: Yes

* * *

[Applicant]: I don't understand why, but through my word, I have seen storms move. I don't understand that one. I seriously don't, but they have .

* * *

[DC]: So, do you believe that you have the power to move storms?

[Applicant]: No, I said I had, it's not - - it's not a science, it's not like science that's repeatable and predictable. No, it's on its own occasion. It happens and then you try it again, no, it does not work. It happened once, but you can't control it, and that part I'm grieved that I cannot better explain. It's like I can control it now, tomorrow I won't be able to, and I don't know why the difference.

[Judge]: Again, sir, controlling what?

[Applicant]: Move storms.

[Judge]: Storms?

[Applicant]: Storms, move them.

[Judge]: Like climate-type storms?

[Applicant]: Yes.

[Judge]: Okay, thank you.

[DC]: When, most recently, did you feel yourself to have moved a storm?

[Applicant]: The most recent one, I came out of my building at the end of work day at [work site] and I saw the clouds starting to circle over the top of our main office building. I requested they move, and they did. Tr. at 65-67.

In light of the above, we conclude that the Judge's analysis failed to consider significant aspects of Applicant's case. Although a Judge is not expected to discuss every piece of record evidence, which would be virtually impossible, he or she should address evidence that a reasonable person would expect to see discussed regarding a matter of national security such as a person's access to classified information. *See, e.g.,* ISCR Case No. 15-02903 at 3 (App. Bd. Mar. 9, 2017).

Most notably, the Judge did not discuss Applicant's hearing testimony about his belief in his power to control the weather, limiting his analysis to the statements Applicant made during his 2014 hospitalization. His failure explicitly to address evidence that Applicant was, on the day of the hearing, articulating apparently delusional beliefs that had been found symptomatic of a serious psychological impairment during the course of his hospitalization diminishes the force of his conclusion that Applicant's problems are mitigated under the *Egan* standard. Even Applicant's own witness, Dr. E, stated that if Applicant had made statements like that to him during his evaluation it would likely have resulted in a different diagnosis, albeit not one of Bipolar Disorder.

Regarding Dr. D, the Judge stated that his negative recommendation had been based upon Applicant's refusal to cooperate rather than upon his current psychological condition. The Judge accepted Applicant's explanation that he was not comfortable with an interview conducted by means

of electronic communications. Of course, Applicant stated that his reticence was also a result of his desire not to relive painful events from his past, which a reasonable person might find an unavoidable aspect of psychological counseling. Even so, the Judge did not explain why he discounted Dr. D's conclusion that Applicant's failure to cooperate, for whatever reason, seriously impugned his good judgment and whether his apparent cooperation with Dr. E, following receipt of his SOR, might have been in some measure self-serving.

Moreover, both Drs. D and E acknowledged that Applicant may well require further mental health treatment in the future. The Judge failed to address the substantial amount of record evidence that raises skepticism about Applicant's willingness to avail himself of such treatment should his condition so warrant, much less whether he would follow Dr. E's recommendation that he receive regular counseling during the course of his holding a clearance. This evidence includes, among other things, Applicant's many instances of stopping treatment on his own when his symptoms grew worse, an occurrence that a reasonable person would likely find to be a cause to continue and even increase treatment rather than abandon it.

In summary, Applicant has experienced depressive episodes for over thirty years. He has repeatedly withdrawn from treatment, and he left a job rather than seek recommended psychological counseling. He was hospitalized for severe depression and suicidal thoughts, expressing delusional ideas such as his ability to control storms and flatten buildings. He also admitted to having hit himself in the head with a hammer in frustration over his emotional difficulties. During his hearing testimony, he reiterated his belief that he could control storms, which appears inconsistent with a conclusion that, whatever his diagnosis, his condition is in full remission. A DoD appointed psychologist recommended that he not receive a clearance due to lack of cooperation during his evaluation. A psychiatrist of Applicant's own choosing stated that his problems are statistically likely to recur and believed that he should continue regular counseling. However, the record suggests Applicant may well decline to do so.

As noted above, a favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information. *See, e.g.*, ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014). In the case before us, the record discloses many reasons to doubt Applicant's current judgment and reliability and to conclude that Applicant has failed to meet his burden of persuasion regarding mitigation. The Judge's analysis failed to address important record evidence and ran contrary to the weight of the evidence. The decision is not sustainable.

Order

The Decision is **REVERSED**.

Signed: Michael Ra'anan

Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy

James F. Duffy
Administrative Judge
Member, Appeal Board