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**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of: Personnel Security Hearing)
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Filing Date: October 8, 2015) Case No.: PSH-15-0078
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Issued: March 23, 2016

Administrative Judge Decision

William M. Schwartz, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXXXXXX (hereinafter referred to as “the individual”) to hold an access authorization¹ under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” As discussed below, after carefully considering the record before me in light of the relevant regulations and the Adjudicative Guidelines, I have determined that the individual’s access authorization should not be restored.

I. Background

The individual is a DOE employee who holds a position that requires him to maintain a DOE access authorization. During a neuropsychological evaluation in the fall of 2014, the evaluator found that the individual exhibited significant, persistent, and stable cognitive limitations that could impair performance of assigned duties. In early 2015, a DOE staff psychologist reported that the individual demonstrated a lack of reliable and specific reporting of medical information and alcohol use in an interview. Ex. 5. Finally, a DOE consultant psychiatrist (DOE psychiatrist) evaluated the individual in June 2015, and concluded that the individual met the criteria for Unspecified Neurocognitive Disorder, as set forth in the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5). The DOE psychiatrist further determined that the disorder was a mental condition that may cause a significant defect in his judgment or reliability. Ex. 6. In September 2015, the local security office (LSO) informed the individual that there existed derogatory information that raised

¹ Access authorization is defined as “an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

security concerns under 10 C.F.R. § 710.8(h) (Criterion H).² See Ex. 1 (Notification Letter, September 11, 2015). The Notification Letter also informed the individual that he was entitled to a hearing before an Administrative Judge in order to resolve the security concerns. *Id.*

The individual requested a hearing on this matter. Ex. 2. The LSO forwarded his request to the Office of Hearings and Appeals, and I was appointed the Administrative Judge. At the hearing, the individual's counsel presented the individual's testimony and that of a clinical psychologist and neuropsychologist (clinical psychologist) who had evaluated him shortly before the hearing, and the DOE counsel presented the testimony of the DOE psychiatrist who had evaluated the individual in June 2015. The DOE counsel introduced ten numbered exhibits into the record and the individual submitted two exhibits (Exhibits A and B). The exhibits will be cited in this Decision as "Ex." followed by the appropriate numeric or alphabetic designation. The hearing transcript in the case will be cited as "Tr." followed by the relevant page number.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

Once the DOE has demonstrated a national security concern, the individual must come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Administrative Judge's Decision

In personnel security cases arising under Part 710, it is my role as the Administrative Judge to issue a decision that reflects my comprehensive, common-sense judgment, made after

² Criterion H concerns information that a person has "an illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause a significant defect in judgment or reliability." 10 C.F.R. § 710.8(h).

consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As support for its security concerns under Criterion H, the LSO relies on the DOE psychiatrist's opinion that the individual met the DSM-5 criteria for Unspecified Neurocognitive Disorder, and that this disorder is a mental condition that may cause a significant defect in judgment or reliability.

I find that there is ample information in the Notification Letter to support the LSO's reliance on Criterion H. Certain emotional, mental and personality conditions can impair judgment, reliability, or trustworthiness. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House (Adjudicative Guidelines) at Guideline I. The DOE psychiatrist's conclusion in June 2015 that the individual's neurocognitive disorder is severe enough to cause a significant defect in judgment or reliability supports my finding in this regard. *Id.* at ¶ 28(b).

IV. Findings of Fact

The individual was diagnosed with Lyme disease in 2006, after having been bitten by a tick while training for work. Ex. 6 at 4. His symptoms at that time were fatigue, headaches, joint aches, and memory problems; some of these ailments continue into the present. *Id.* The individual had an accident while driving a work vehicle in May or June 2013 for which he received a five-day suspension. Ex. 9 at 14, 22; Ex. 6 at 4. He was arrested in December 2013 for public intoxication after consuming seven alcoholic drinks over the course of four to six hours. *Id.* at 3.

In October 2014, the individual participated in a neuropsychological evaluation, the report of which is not in the record. That report was summarized, however, in a report of an evaluation conducted by a psychologist in January 2015. Ex. 7. In the January 2015 report, the psychologist stated that neuropsychological evaluation report identified four impediments to the individual's functioning in his position: (1) observed and reported memory deficit; and variable performance on (2) attention, (3) spatial organization, and (4) speed of processing. According to the psychologist, the neuropsychologist also observed that he could identify no clear cause for the variations in these test results; he specifically ruled out both brain damage and Lyme disease. Finally, because he could not identify the cause of the individual's deficits, the neuropsychologist believed that there was no treatment that was likely to resolve those "difficulties." *Id.* at 12-13. The psychologist himself observed the individual's memory as being vague and unreliable. *Id.* at 13. On the basis of the neuropsychologist's identification of neurocognitive deficits that included "variable performance on tasks involving attention, spatial organization, and speed of processing, as well as unreliable memory," the psychologist found that the individual met the DMS-5 criteria for Unspecified Neurocognitive Disorder. *Id.* at 14.

The individual was then evaluated by the DOE psychiatrist in June 2015. The LSO asked the DOE psychiatrist to evaluate the individual's alcohol use and any illnesses or mental conditions related to, or unrelated to, his alcohol use, that cause or may cause a significant defect in judgment or reliability. Ex. 6 at 2. After considering the information contained in the individual's personnel security file, a substance abuse evaluation conducted by an alcohol and drug abuse counselor, and his interview with the individual, the DOE psychiatrist determined that the individual did not meet the criteria for alcohol abuse or alcohol dependence. *Id.* at 7. In addition, despite concerns that the individual was vague in reporting his alcohol use, laboratory studies of the individual's liver enzymes supported his finding that the individual was not suffering from an alcohol related disorder or drinking habitually to excess. *Id.* at 8. The DOE psychiatrist did, however, observe that the individual exhibited some of the neurocognitive symptoms during his evaluation that the neuropsychologist had reported in October 2014, and agreed with the diagnosis of Unspecified Neurocognitive Disorder, though he believed that it might be related to Lyme disease. *Id.* at 9. He characterized the disorder as mild but nevertheless concluded that it qualified as a mental condition that may cause a significant defect in judgment or reliability. *Id.*

At the request of the individual, a clinical psychologist conducted an independent evaluation of the individual in the fall of 2015. Over a period of seven weeks, the clinical psychologist spent portions of six days administering tests to the individual and compiled a report that the individual submitted into the record. Ex. A. In his report, the clinical psychologist concluded that the deficits other experts had observed in the individual were the results not of a neurocognitive disorder but rather of a learning disability that has negatively affected his reading ability due to visual and auditory processing deficits as well as fine motor limitations. *Id.* at 8-11. He disputed the findings of the other specialists, concluding that the observed deficits were evidence of "deficits in [the individual's] early development of hearing the sounds of language and/or from Lyme's disease" rather than evidence of memory and attention problems. *Id.* at 11. He concluded that the individual has good executive, learning, and cognitive skills. *Id.* at 13.

At the hearing, the individual testified that he still suffers from severe headaches, recounting that he had had one the day before the hearing. He acknowledged that he has had problems with memory and word finding (using the correct word while speaking). He could not recall any recent incidents of either nature, but stated that he is aware when they occur. Tr. at 21-23. He stated that he contracted Lyme disease in 2006, which left him feeling forgetful, groggy, tired, with headaches and joint pain, and maintained that he suffered from none of these effects before then. *Id.* at 26. Finally, he asserted that his headaches, memory deficits, word finding difficulties, and physical problems that he attributes to Lyme disease have never interfered with his ability to work. *Id.* at 21, 27.

In addition to the individual, both the clinical psychologist and the DOE psychiatrist testified at the hearing. The clinical psychologist noted that no one before him had administered comprehensive testing to the individual. *Id.* at 32. In his testimony, he pointed out that, due to lack of sufficient testing, the other experts had not had the opportunity to observe the subtleties that his comprehensive testing revealed, and therefore reached incorrect conclusions. *Id.* at 51-52. Because he attributed the individual's deficits to a learning disability and not a

neurocognitive disorder, the clinical psychologist believed that none of the individual's impairments demonstrated a defect in judgment or reliability, particularly since he had found no impairment in the individual's executive functioning. *Id.* at 47-48. His diagnosis for the individual was Learning Disorder, Not Otherwise Specified, Auditory and Visual Processing, as described in the DSM-IV, the preceding edition of the DSM-5. *Id.* at 58. He further stated that the symptoms of Unspecified Neurocognitive Disorder and Learning Disorder, Not Otherwise Specified, may appear similar; the distinction lies in the underlying cause of the disorder, and no expert in this case has been able to establish what caused the individual's problems. *Id.* at 59-60. Finally, the clinical psychologist testified that the individual has started receiving treatment for his learning disorder. *Id.* at 56.

The DOE psychiatrist agreed that the symptoms of the two disorders in question are similar, and that the difference is the etiology of the symptoms. *Id.* at 76. He stated that it was his hunch that Lyme disease had caused the impairments with which the individual now contends, as they comport with common symptoms of the disease. *Id.* at 78. On the other hand, he acknowledged that there is controversy as to whether Lyme disease actually causes neurocognitive disorders at all, and that, in this case, we do not know whether any of the symptoms were present before the individual contracted Lyme disease. *Id.* at 79. The DOE psychiatrist reiterated that he considered the individual's disorder to be mild and, from his observations of the individual at the hearing, found his symptoms to have improved since he evaluated him in June 2015. *Id.* at 76-77, 82. He also stated that he had never had any concerns about the individual's judgment; his concern at the time of evaluation was the individual's reliability. *Id.* at 80, 83. He concluded that, regardless of the diagnosis, his concern was that the individual's symptoms, in particular, his impairment in word finding, might cause a significant defect in reliability. Although the individual showed improvement at the hearing, the DOE psychiatrist could not be sure whether that concern had abated without additional evaluation. *Id.* at 83-84, 89.

V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c) and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's access authorization should not be restored. I cannot find that restoring the individual's DOE security clearance will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

I find that the individual presented well at the hearing, with the exception of some failure to find and use the correct word in a few contexts. This finding comports with the DOE psychiatrist's testimony that, in his opinion, the individual's mental status had improved since he evaluated him in June 2015.

The two mental health professionals who appeared at this hearing had divergent diagnoses for the individual. The DOE psychiatrist who evaluated the individual concluded that he suffers from Unspecified Neurocognitive Disorder, possibly as the result of, or exacerbated by, a bout of

Lyme disease in 2006. The individual's clinical psychologist reached a different diagnosis, Learning Disorder, Not Otherwise Specified, after subjecting the individual to an extensive battery of testing. At the hearing, both experts testified that the distinction between the discrepant diagnoses lay not in the observable symptoms, but in the underlying causes of those symptoms. Both experts further acknowledged that, in spite of at least four mental health experts' efforts, there is no evidence of any underlying causes. Consequently, I have determined that the individual has not met his burden of establishing that the DOE psychiatrist's opinion is so flawed that I may not rely on it in reaching a decision. I therefore find that the individual was properly diagnosed with Unspecified Neurocognitive Disorder, a mental condition that, in the opinion of the DOE psychiatrist, causes or may cause a significant defect in judgment or reliability. I also find that the individual has not yet received adequate treatment for this condition, as it is not clear that any treatment is available at this time. I do note, however, that the individual's condition, at least in the opinion of the DOE psychiatrist, has improved, whether through treatment he has begun for learning disabilities or as a result of the mere passage of time.

With respect to the security concerns cited in the Notification Letter under Criterion H, the Adjudicative Guidelines identify the following possible mitigating factors: "demonstrated ongoing and consistent compliance" with a treatment plan for a condition amenable to treatment; voluntary participation in counseling or a treatment program with a favorable prognosis by a duly qualified mental health professional; a recent opinion by a duly qualified mental health professional that the condition is under control "and has a low probability of recurrence or exacerbation;" emotional instability that was a temporary condition and has resolved itself; and no indication of a current problem. Adjudicative Guidelines at Guideline I, ¶ 29. In the opinion of the DOE psychiatrist, the individual's condition is not treatable, though it appears to be improving with time. At the hearing, the DOE psychiatrist stated that he was unable to predict the likeliness of a relapse of the disorder. Tr. at 82. Finally, the continuing headaches and occasional lapses of memory and word finding ability are ongoing symptoms of a condition that the DOE psychiatrist has identified as a disorder under Criterion H. Consequently, I cannot find that the individual has resolved the Criterion H concerns that his mental health condition has raised.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raised serious security concerns under Criterion H. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has not brought forth sufficient evidence to fully resolve the security concerns associated with this criterion. Therefore, I cannot conclude that restoring the individual's suspended DOE access authorization "will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.1(a). Accordingly, I find that the DOE should not restore the individual's access authorization.

The parties may seek review of this Decision by an Appeal Panel, under the regulation set forth at 10 C.F.R. § 710.28.

William M. Schwartz
Administrative Judge
Office of Hearings and Appeals

Date: March 23, 2016