*The original of this document contains information which is subject to withholding from disclosure under 5 U.S. C. § 552. Such material has been deleted from this copy and replaced with XXXXXX's.

United States Department of Energy
Office of Hearings and Appeals

In the Matter of Personnel Security Hearing	)	
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Filing Date: June 14, 2013	)	Case No.: PSH-13-0074
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Issued: September 19, 2013

Hearing Officer Decision

Steven J. Goering, Hearing Officer:

This Decision concerns the eligibility of XXXXXXXX (hereinafter referred to as "the individual") for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."[1] For the reasons set forth below, I conclude that the DOE should restore the individual's access authorization.[2]

I. BACKGROUND

The individual is an employee of a DOE contractor and held an access authorization until it was recently suspended. On February 1, 2013, the individual was hospitalized for a psychological evaluation. Exhibit 9. After the individual reported this hospitalization, Exhibit 8, a Local Security Office (LSO) summoned the individual for an interview (PSI) with a personnel security specialist on February 19, 2013. Exhibit 10. After the PSI, the LSO referred the individual to a local psychologist (hereinafter referred to as "the DOE psychologist") for an agency-sponsored evaluation. The DOE psychologist prepared a written report, setting forth the results of that evaluation, and sent it to the LSO. Exhibit 6. Based on this report and the rest of the individual's personnel security file, the LSO determined that derogatory information existed that cast into doubt the individual's eligibility for access authorization. The LSO informed the individual of this

[1] An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as access authorization or a security clearance.

[2] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm.

determination in a letter that set forth the DOE's security concerns and the reasons for those concerns. See Exhibit 1 (summary of security concerns). I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for an access authorization.

The individual requested a hearing in this matter. The LSO forwarded this request to OHA, and I was appointed the Hearing Officer. The DOE introduced eleven exhibits into the record of this proceeding. The individual introduced five exhibits, and presented the testimony of nine witnesses, in addition to his own testimony.

II. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable and unfavorable, that has a bearing on the question of whether restoring the individual's security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting or restoring 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 regulations further instruct me to resolve any doubts concerning the individual's eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

III. NOTIFICATION LETTER AND ASSOCIATED SECURITY CONCERNS

The Notification Letter cited derogatory information within the purview of 10 C.F.R. § 710.8, subsection (h) (hereinafter referred to as Criterion H). Exhibit 1.[3] The Notification Letter also cited Section 1072 of the National Defense Authorization Act for Fiscal Year 2008, otherwise known as the Bond Amendment. *Id.*[4]

[3] Under Criterion H, information is derogatory if it indicates that the individual 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). The Notification Letter originally also cited 10 C.F.R. § 710.8, subsection (k), but the LSO subsequently issued an amended Summary of Security Concerns, removing the citation to that subsection of the regulations. Memorandum from LSO to Director, OHA (July 18, 2013).

[4] The Bond Amendment provides that "the head of a Federal agency may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance or an addict (as defined in section 802(1) of title

To support Criterion H, the LSO cited the report of the DOE psychologist, in which he concluded that the individual met criteria found in the Diagnostic and Statistical Manual of Mental Disorders IV-TR (DSM-IV-TR) for Opioid Dependence, and that this condition causes, or may cause, a significant defect in judgment and reliability. *Id.* Under the Bond Amendment, the LSO cited the same diagnosis. *Id.*

I find that the DOE psychologist's diagnosis, the fact of which is not in dispute, adequately justifies the DOE's invocation of the Bond Amendment and Criterion H, and raises significant security concerns. First, the diagnosis of Opioid Dependence raises a concern that the individual is an "addict" under the Bond Amendment. Further, certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness, in this case Opioid Dependence, a condition that the DOE psychologist found causes or may cause a significant defect in judgment or reliability, being of concern under Criterion H. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (*Adjudicative Guidelines*), The White House (December 19, 2005), Guideline I.

IV. FINDINGS OF FACT AND ANALYSIS

The individual is 55 years old, and has worked for DOE contractors since January 2004. Exhibit 7; Exhibit 11 at 20. In February 1979, when the individual was 20 years old, he attempted suicide by shooting himself in the stomach with a 38-caliber revolver. Exhibit 6 at 3. The individual testified that, at that time in his life, he had "no direction, no goals," and that the "catalyst" for the attempt was the departure of his girlfriend to another state with their son. *Id.;* Hearing Transcript (Tr.) at 18-20.

In 1984, while working for a construction company, the individual suffered a serious injury to his right knee. Exhibit 6 at 4; Tr. at 29, 73. As a result, he received a $30,000 settlement payment from the construction company, which he used in part to buy drugs, including cocaine, to which he became addicted. Exhibit 6 at 4. He also consumed excessive amounts of alcohol, as much as a case of beer per day, during this period. *Id.* He sought treatment for his cocaine addiction, and stopped using the drug, but continued drinking until subsequently receiving treatment and stopping his use of alcohol, from which he has abstained since 1986. *Id.*

The individual tore the anterior cruciate ligament (ACL) in his left leg while playing basketball in the early 1990s, Tr. at 25, and again injured his left knee while playing basketball in 2004. *Id.* at 26; Exhibit 6 at 5. Beginning in approximately 2003, the individual used prescribed narcotic medications to treat the pain from his injuries to both legs. Exhibit 6 at 5. At first, he was prescribed short-acting opioid medications, but in 2009 or 2010 was switched to an extended-release opioid medication containing morphine sulfate. *Id.*; Exhibit 10 at 21. The individual testified that he much preferred the extended-release medication to the short-acting medication, stating that he did not like the way the short-acting medication made him feel and that "the pain would come back too quickly, ..." Tr. at 33. The individual's wife testified that the individual's doctor explained to her that "the morphine sulfate was . . . much better suited for somebody who doesn't want the high, who

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21)." 50 U.S.C. § 435c(b) (2011). Section 802(1) of title 21 defines "addict" as "any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." 21 U.S.C. § 802(1) (2011).

wants pain managed, you know. And so I felt good about that. . . . I wanted him to be clearheaded." *Id.* at 78-79. She expressed her concern that the short-acting medications gave "him a high. And he is a former drug addict, so I don't want him to have those in his body, you know. I just wanted him to be as clearheaded, clear thinking as he could be." *Id.* at 79.

In late January 2013, the individual was experiencing pain in his legs and wrist, which had been operated on several years ago, of a "9 or 10 on a scale of 10." Exhibit 6 at 5, 6. At this time, the individual was being prescribed 130 milligrams of morphine sulfate, 3 times a day, taken in two pills, one of 100 milligrams and another of 30 milligrams. Tr. at 37. By Monday, January 28, 2013, the individual ran short of his monthly supply of 30 milligram tablets, due to having taken more than the prescribed amount to treat his pain. *Id.* at 43-44, 86. The individual attempted to get an early refill of his 30 milligram tablets, but the doctor "couldn't fill the 30 milligram early, so she gave me some -- some of the fast-acting ones, to tide me over for those two days, is what she said." *Id.* at 44.

The individual's wife did not find out that the individual had been provided fast-acting medication until four days later. *Id.* at 86 ("I guess he got it filled on a Monday, and then on Friday night he brought the pill bottle to me."). She testified that she

> was very upset, because I didn't know about it, and, two, because I don't want him on short-acting. He said he did not ask for it, but I was upset that he even took the prescription from them. I mean, yes, you didn't ask for it, but – but taking it and getting them filled was what I was upset with.

Id. at 88. An argument ensued, during which the individual tried to get the pills back from his wife, ostensibly to flush them down the toilet. *Id.* at 91. The individual's wife testified that "earlier in the week I had . . . burned myself really, really bad, ... I had my arm down, it wasn't covered, and he reached to grab for the bottle of pills, and he ripped the skin off of it." *Id.* at 92. She stated that the individual "was very upset that he had hurt me, one, and he felt very bad that he had disappointed me, and that's when he said, you know, 'Just kill me. You ought to just kill me. Just get a knife.' And then he said, 'In fact, I'll get a knife.'" *Id.* at 92-93.

According to the individual's wife, he was going to leave the house, and she "just wanted to stop him from leaving. I mean, yeah, I was upset, and it was startling to hear him say that, but really I never took seriously that he was going to harm himself." She then called 911, not "because I thought that he was really going to harm himself. I didn't really think that. I was angry, and I was looking for help to stop him from leaving." *Id.* at 94. An incident report filed by a local police department states that "[d]ue to the statements by [the individual] to hurt himself we transported him to [a local hospital] for a psychological evaluation. [The individual] went voluntarily and at that time it was determined that there were no threats of violence nor further threats of violence between" the individual and his wife. Exhibit 9 at 3.

Contemporaneous hospital records indicate that, based upon the information provided by the individual in the psychological evaluation and "no observed psychosis," the individual was to be discharged to his home with his wife, who reported that she felt safe with him at home. Exhibit 9 at 8. The individual's wife testified that the individual was at the hospital "maybe two hours. And I went and picked him up, and here we are. He went in to work Monday and reported it."

Tr. at 98; *see* Exhibit 8 (February 5, 2013, Personnel Security Information Report from individual's employer to DOE).

To address the primary cause of his chronic pain, the individual has scheduled double knee replacement surgery for October 31, 2013. *Id.* at 16. The individual explained that he had previously considered knee replacement surgery, but for several reasons "opted for the less aggressive approach of physical therapy and pain management . . . ." *Id.* at 15. First, he considered his age, as he was told by orthopeadic doctors that "new knees might not last more than 10 years. If that was the case, a second replacement might be needed. I was further told that a second replacement could be risky and potentially result in the loss of a leg." *Id.* The individual also testified that, "financially I would not have been able to manage the loss of income during the lengthy recovery period after the surgery." *Id.*

The individual testified that his former employer recently offered its former employees a one-time lump sum payout in lieu of a pension payment. *Id.* at 51-52. The individual chose to accept the one-time payment, which is scheduled to be released in September 2013. "We do get a penalty, but the fact that it gives me the opportunity to get new knees, that's what I would like to do." *Id.* at 52. Asked whether his decision was in reaction to DOE's concerns, he replied that "obviously, it's a security concern of DOE's, and . . . God, I think, put this money in my place. This was never there before. I've never had, you know, $25,000 coming my way ever like that, you know, during -- for this kind of thing." *Id.* at 50-51; *see id.* at 116 (confirmation by former co-employee of pension buyout offer).

Despite this fairly complex history of the individual, the concerns presented in the Notification Letter under Criterion H and the Bond Amendment, as noted above, are based solely on the conclusion of the DOE psychologist that the individual met criteria found in the DSM-IV-TR for Opioid Dependence, and that this condition causes, or may cause, a significant defect in judgment and reliability.

The Adjudicative Guidelines set forth the following conditions that "could mitigate security concerns" arising from psychological conditions:

> (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 a death, illness, or marital breakup), the situation has been resolved, and the individual no longer shows indications of emotional instability;

(e) there is no indication of a current problem.

Adjudicative Guidelines at ¶ 29 (Guideline I).

Regarding conditions (a) and (b) above, the DOE psychologist, who was present for the entire hearing and testified last, agreed that the typical treatment for substance addiction would not be appropriate here because the individual is taking opioid medications in response to pain. Tr. at 173. Thus, the DOE psychologist testified that he would not "expect him to [enter a treatment program], and he probably would do it and probably comply with it and go right through it. But would it be beneficial to him? I don't think so." *Id.*

The DOE psychologist testified that "[t]his is an unusual – for me, an unusual case. And my opinion has shifted. The issue is complex for me as a psychologist." *Id.* at 159. On one hand, he noted that he had "no question" that the individual was dependent on opiates. *Id.* On the other hand, the DOE psychologist remarked that the testimony of current and past coworkers of the individual indicated that the individual "doesn't do things that let me see . . . that he is an unstable character. I tend to believe that he is a pretty stable fellow. That was not very obvious to me [before] . . . ." *Id.* at 161. The DOE psychologist further stated that

> there's no evidence of an increasing instability -- of an increasing wish for more drug, even though you at one point said kind of off to the side to me you'd take more if you could, but they won't let you.
>
> Well, I don't know that you would take more if you could. The fact of the matter is -- is that you're not taking more because they won't let you, they being the pain management clinic, and you'd lose your access to that.
>
> You're doing the one thing that has the best chance of bringing -- of getting rid of that problem in that you're going to have surgery.

Id. at 163-64.

I find that this testimony is relevant to the application of condition (c) above, as evidence that the individual's condition is "under control . . . and has a low probability of recurrence or exacerbation; . . ." Further, the DOE psychologist testified that switching to an extended-release opioid medication is "another thing that he's kind of over time taken more control of. He may have enjoyed the high earlier, but he's put himself -- he's gotten himself in a position where he's taken a medicine that doesn't produce that, although he's still addictive. But it doesn't produce that high." *Id.* at 166.

Pertinent to both conditions (c) and (e) (no indication of a current problem), the DOE psychologist testified that, while the individual's condition caused significant defects in judgment and reliability in the past, he did not expect it to do so in the future, and that there was a low likelihood of manifestation of such defects going forward. *Id.* at 170-71. He further testified that he was "very confident" that the individual will take the steps necessary to address his pain in a way that might lessen his need for narcotic drugs in the future. *Id.* at 173.

Finally, at the hearing, I read to the DOE psychologist the definition of addict used in application of the Bond Amendment, "any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." The DOE psychologist testified that he did not think the individual meets that definition. Tr. at 172.

As noted above, the Part 710 regulations require me to make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). This is a forward-looking determination as to whether restoring the individual's security clearance would not endanger the common defense and would be clearly consistent with the national interest. In this case, given that the source of the concern is the individual's opioid dependence, I must consider, under Criterion H, the risk that this condition will, in the future, cause significant defects in the individual's judgment or reliability. Similarly, under the Bond Amendment, I must consider the risk that the individual's use of opioid medications will, in the future, "endanger the public morals, health, safety, or welfare," or cause the individual to "los[e] the power of self-control with reference to his addiction."

In accord with the opinion of the DOE psychologist, I find that these risks are low. First, I note that the individual has been using prescribed opioid medications for approximately 10 years, and that this use resulted in an incident of concern only once over that period of time. Thus, though relatively recent, I find this to be an isolated occurrence. *See* 10 C.F.R. § 710.7(c) (requiring consideration of frequency and recency of the conduct).

Second, while I find that the individual's use of more than the prescribed amount of medication in response to his severe pain in January 2013 represents a lapse in judgment and reliability, I also find that the individual exercised good judgment by following the proper protocol when he ran short on his prescribed dosage, by notifying his medical provider of that fact, who prescribed him enough medication to tide him over during the remaining days of his regular prescription.

Though the individual's wife was clearly very upset when she learned that the individual had been prescribed a short-acting medication for those few days, that fact and the argument that resulted from it is more attributable to the decision of the medical provider than to a lapse in the individual's judgment and reliability. Moreover, I am convinced, as was the individual's wife and the DOE psychologist, that the statements made by the individual during that argument did not represent a genuine threat of suicide. *See* Tr. at 161 (testimony of DOE psychologist that he "trust[s] the evaluation" of the individual's wife); 10 C.F.R. § 710.7(c) (requiring consideration of "the nature, extent, and seriousness of the individual's conduct" and "the circumstances surrounding the conduct").

Clearly, even an isolated lapse of judgment and reliability can raise the risk of a similar lapse in the future. Considering the totality of the circumstances here, however, I find that not only is the risk of a repeat of such an incident low, but that the consequences of such a lapse, if it should occur, would not be severe, if the individual's past behavior is any guide. Reducing that risk even further is the fact that the individual is scheduled for double knee replacement surgery within the next two months, which the DOE psychologist described as the "best chance" of ridding him of his dependence on narcotic drugs. Even assuming that this surgery is delayed, cannot take place, or has limited success, I find that the individual's continued use of prescribed opioid medications does not present more than minimal risk to the national security, given the individual's decade-long track

record of successfully taking these medications with only one isolated and relatively minor instance of use of more than the prescribed amount of medication.

For these reasons, I find that the individual has resolved the concerns under Criterion H and the Bond Amendment raised by his dependence on legally prescribed opioid pain medication.

V. CONCLUSION

For the reasons set forth above, I conclude that the individual has resolved the DOE's security concerns under Criterion H and the Bond Amendment. Therefore, the individual has demonstrated that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the DOE should restore the individual's security clearance. Review of this decision by an Appeal Panel is available under the procedures set forth at 10 C.F.R. § 710.28.

Steven J. Goering
Hearing Officer
Office of Hearings and Appeals

Date: September 19, 2013