

* 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 XXXXXXXX's.

January 7, 2003

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal
Date of Filing: October 22, 2002
Case No.: TIA-0010

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The DOE Office of Worker Advocacy determined that the applicant was not a DOE contractor employee and, therefore, that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the DOE Office of Worker Advocacy determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. Parts A and D of the Act provide benefits to certain workers.

Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. See 42 U.S.C. § 73841(1).

Part D of the Act provides for a DOE program to assist "Department of Energy contractor employee[s]" in filing for state workers' compensation benefits for illnesses caused by exposure to toxic

substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's published list also refers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 67 Fed. Reg. 79,069 (citing www.eh.doe.gov/advocacy).

This case concerns Part D of the Act, the portion of the Act that provides for DOE assistance to DOE contractor employees in filing for state workers' compensation benefits. Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. See 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant stated that he was an employee of the Bethlehem Steel plant in Lackawanna, New York, from approximately 1951 to 1956. The DOE Office of Worker Advocacy determined that the applicant was employed by an atomic weapons employer, not a DOE contractor. See September 9, 2002 Letter from DOE

1/
See www.eh.doe.gov/advocacy.

2/ See Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2002), and a revised list in June 2001.

Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. In his appeal, the applicant contests that determination.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from an application for such benefits. A DOE decision that an applicant is not eligible for DOE assistance does not affect (i) an applicant's right to file for state workers' compensation benefits without DOE assistance or (ii) whether the applicant is eligible for state workers' compensation benefits under applicable state law.

Similarly, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning DOE assistance in filing for state workers' compensation benefits does not affect any claims made under other statutory provisions.

We now turn to whether the applicant in this case is eligible for DOE assistance in filing for state workers' compensation benefits.

B. Whether the Applicant is Eligible for DOE Assistance in Filing for State Workers' Compensation Benefits

In order to be eligible for DOE assistance in filing for state workers' compensation benefits, the applicant must have been a "Department of Energy contractor employee." 42 U.S.C. § 7385o(b). In order to be a "Department of Energy contractor employee," a contractor employee must have worked at a "Department of Energy facility." 42 U.S.C. § 73841(11); 67 Fed. Reg. 52,854 (to be codified at 10 C.F.R. § 852.2). Under the Act and the implementing regulations, a DOE facility is a facility (i) where DOE conducted operations and (ii) where DOE had a proprietary interest or contracted with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. *Id.* § 7385o(1)(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2) (emphasis added).

The applicant is not a DOE contractor employee because he did not work at a DOE facility. The DOE's published list of facilities designates the Bethlehem Steel plant as "AWE," the code for "atomic weapons employer facility." 67 Fed. Reg. 79,072. The DOE Office of Worker Advocacy web site describes the Bethlehem Steel plant as an "atomic weapons employer facility" during the period 1949 to 1952. The web site states that in 1949 the plant developed rolling mill pass schedules to be used in the planned uranium milling operation at DOE's Fernald facility. The site also states that the Bethlehem Steel plant performed uranium rolling experiments to help design the Fernald rolling mill. 3/ This description indicates that DOE did not conduct operations at the facility, did not have a proprietary interest in the facility, and did not have a management, environmental remediation, construction, or maintenance contract with the firm. Accordingly, the Bethlehem Steel plant does not fall within the definition of a DOE facility, 42 U.S.C. § 7385o(1)(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2) (emphasis added). Finally, we have no reason to question the accuracy of the web site description of the facility.

As the foregoing indicates, the applicant was not a DOE contractor employee and, therefore, is not eligible for DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

3/ The Fernald rolling mill began operations in 1952. The DOE's web site contains a report describing DOE facility operations, including Fernald. See <http://www.eh.doe.gov/legacy/reports/reports.html>.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0010 be, and hereby is, denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 7, 2003

