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January 16, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal
Date of Filing: November 19, 2002
Case No.: TIA-0013

XXXXXXXXXXXX (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 had not provided reasonable evidence that his hearing loss was caused by exposure to a toxic substance 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 employees in filing for state workers' compensation benefits for illnesses caused by "exposure to a toxic substance" at a DOE facility. 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/ 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).

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. 42 U.S.C. § 7385o(d)(3). If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. 42 U.S.C. § 7385o(e)(3)(A). 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)(B) & (C). As stated above, the Physician Panel Rule implements the Part D assistance program, and 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 Rust Engineering Construction from 1982 to 1988 and worked as a painter at various sites at DOE's Oak Ridge, Tennessee facility. The applicant claimed hearing loss caused by exposure to toxic substances at those sites.

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, 66 Fed. Reg. 31218 (June 11, 2001).

In support of his claim, the applicant submitted a medical report prepared by a physician and dated October 22, 2001. The report discussed the results of an August 2001 medical examination, and the report states that the examination was conducted in order to determine whether the applicant had any health effects from his work at the DOE's Oak Ridge facilities.

The report discussed the results of a hearing test. The report stated:

Your hearing test showed a hearing loss. The pattern of hearing loss is not what we usually see from noise exposure. We recommend you see a hearing specialist for further testing. If you would like us to suggest a hearing specialist, please call our Nurse Coordinator

October 22, 2001 physician report at 2. Attached to the report was an "Audiometric Record," reporting the results of the hearing test. In addition to reporting the audiometric results, the report stated that the applicant had cerum plugs (earwax) in both ears, and that the applicant had played drums within 14 hours of the test.

In its September 19, 2002 determination, the DOE Office of Worker Advocacy found that the applicant was not eligible for physician panel review. The determination stated that hearing loss is not commonly associated with exposure to a toxic substance. The determination stated that if the applicant had additional information to support his claim that his hearing loss was caused by exposure to a toxic substance, he should submit that information to the DOE.

In response to the September 19, 2002 determination, the applicant filed the instant appeal. After reviewing the appeal and underlying documents, we wrote to the applicant to ask if he had any other evaluations of his hearing loss. The applicant replied that he had not, stating that the DOE had not sent him to a hearing specialist.

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, specifically whether the applicant is eligible for physician panel review.

B. Whether the Applicant is Eligible for Physician Panel Review

As an initial matter, we note that workers with hearing loss caused by noise exposure are not eligible for the DOE assistance program. The Act established the DOE assistance program for illnesses resulting from "exposure to a toxic substance" at a DOE facility. 42 U.S.C. § 7385o(d)(3). The Physician Panel Rule defines a "toxic substance" as "any material that has the potential to cause illness or death because of its radioactive, chemical, or biological nature." 67 Fed. Reg. 2854 (to be codified at 10 C.F.R. § 852.2). The preamble to the rule specifically rejected a proposal that noise be included in the definition of a toxic substance:

One commenter suggested that noise should be included as a toxic substance. DOE understands that noise can cause harm to workers in certain situations. However, the dictionary defines "toxic" as "of, relating to, or caused by poison or toxin." DOE does not believe that noise operates to poison people because it does not injure by chemical action. Hence, it does not fit comfortably within the ordinary

meaning of "toxic substance." Neither the text of Part D nor its legislative history suggests otherwise.

67 Fed. Reg. 52843. Accordingly, the Act's requirement that the illness be caused by exposure to a "toxic substance" excludes hearing loss caused by noise exposure.

As the foregoing indicates, if the applicant's hearing loss was caused by noise exposure, the applicant is not eligible for the DOE assistance program. We now turn to whether the applicant has submitted "reasonable evidence" that his hearing loss may be related to exposure to a toxic substance at DOE's Oak Ridge facilities.

The Act requires that, in order to be eligible for physician panel review, the applicant must provide "reasonable evidence" that the illness "may have been related" to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o(b)(2)(B) & (d)(3). In implementing the requirement of "reasonable evidence," the Physician Panel Rule requires that the applicant submit the following:

The name and address of any licensed physician who is the source of a diagnosis based upon documented medical information that the employee has or had an illness and that the illness may have resulted from exposure to a toxic substance while employed at a DOE facility and, to the extent practicable, a copy of the diagnosis and a summary of the information upon which the diagnosis is based.

67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.4(a)(2)). The applicant has not submitted "reasonable evidence" or any logical argument that his hearing loss, diagnosed in 2001, may have been related to exposure to a toxic substance during his employment at DOE's Oak Ridge facilities in the 1980's. The applicant attempts to rely on the October 22, 2001 physician's report, but the report merely states that "[t]he pattern of hearing loss is not what we usually see from noise exposure." Thus, the report does not provide a basis to believe that the applicant's hearing loss may have been related to exposure to a toxic substance. Given the report's failure to identify exposure to a toxic substance as a possible cause of the applicant's hearing loss, the DOE's Worker Advocacy Office correctly concluded that the applicant failed to present sufficient evidence to submit his case to a physician panel.

The applicant has suggested that, if the October 22, 2001 physician's report is insufficient, DOE is required to provide him with an examination by a hearing specialist. Our review indicates that neither the Act nor the implementing rule requires the DOE to provide such an examination. See also 67 Fed. Reg. 52844.

As the foregoing indicates, we have determined that the applicant is not eligible for 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.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0013 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 16, 2003

