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June 18, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal
Date of Filing: January 23, 2003
Case No.: TIA-0019

XXXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy 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, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the 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. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which 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 "facility owned, operated, or occupied by a beryllium vendor" (beryllium vendor facility) in the case of beryllium illness. See 42 U.S.C. § 7384l(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. See 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a DOE contractor employee has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). The DOE program is limited to DOE contractor employees performing work at DOE facilities because DOE and DOE contractors would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program 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). The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information about the program. 1/

Pursuant to an Executive Order, the DOE has published a state-by-state list of facilities covered by the DOL and DOE programs. The entry for each facility contains a code designating its status under the EEOICPA: (i) atomic weapons employer facility (designated by the code "AWE"), (ii) beryllium vendor facility (designated by the code "BE"), or (iii) DOE facility (designated by the code "DOE"). 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's facility list also refers readers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 67 Fed. Reg. 79,069.

This case involves the DOE program, i.e., the program through which a DOE contractor employee may obtain an independent physician panel determination that the employee's illness arose out of and in the

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, 2001), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility. The applicant states that from 1969 to 1970 she was employed by a firm called Physics International, Inc., located at 2700 Merced Street, San Leandro, California. The applicant further states that in 1995, she was diagnosed with multiple myeloma, which is now in remission. She believes that her illness was caused by exposure to radiation during her employment at Physics International.

The DOE Office of Worker Advocacy determined that the applicant was not employed at a DOE facility. In support of its determination, the DOE Office of Worker Advocacy stated that none of the employment listed on the application referred to a facility on the DOE facilities list. See December 20, 2002 letter from DOE Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for the physician panel process.

In her appeal, the applicant questions the determination that the Physics International plant was not a DOE facility. In addition to the information provided with her appeal, she referred to other material that she provided to the DOE. We obtained this information, which consists of a September 11, 2002 letter and attachments, from the DOE Office of Worker Advocacy. Accordingly, our consideration of her appeal includes a consideration of that material.

II. Analysis

As an initial matter, we emphasize that the DOE physician panel process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law. As explained below, we have determined that the applicant in this case is not eligible for the DOE physician panel process.

The issue in this case is whether the applicant worked at a DOE facility. As the DOE Office of Worker Advocacy correctly observed, the DOE facilities list does not include the Physics International

plant. As explained below, we do not believe that the Physics International plant was a DOE facility.

The applicant states that she worked for a department in Physics International that was responsible for nuclear research and experiments, including experiments on the impact of pulsed radiation on weapons. She indicates that she worked for lab technicians and physicists who worked with a variety of agencies, including DOE's Lawrence Livermore National Laboratory. She indicates that the corporate successor of Physics International - the Pulsed Sciences Division of Titan Corporation - now performs similar work for parts of the Defense Department and two DOE's laboratories - Lawrence Livermore and Sandia National Laboratory.

The applicant's description of the Physics International plant at the time of her employment is generally supported by the web site print-outs that she submitted concerning the firm's successor. Those print-outs state that Physics International was formed in 1960 and, as the result of a series of corporate changes, is now Titan's Pulsed Sciences Division. The print-outs further state that the firm pioneered the use of pulsed power to simulate nuclear weapons effects for military and industrial applications and that Titan's customers include the Defense Threat Reduction Agency and DOE's Lawrence Livermore and Sandia laboratories. Finally, the print-outs state that the firm houses and operates computers provided by the Defense Threat Reduction Agency.

The foregoing description indicates that the Physics International plant was not a DOE facility. Under the EEOICPA and the Physician Panel Rule, 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. 42 U.S.C. § 7385o(1)(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). Assuming arguendo that conducting experiments for DOE could qualify as conducting operations on behalf of DOE, the facility does not meet the second prong of the test. DOE did not have a proprietary interest in the plant, and contracts with DOE laboratories to perform experiments are not contracts for "management and operation, management and integration, environmental remediation services, construction, or maintenance." See 42 U.S.C. § 73841(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). Accordingly, the Physics International plant was not a DOE facility and its workers are not eligible for the DOE physician panel process. This makes sense

because DOE would not be involved in any state workers' compensation proceedings involving the facility and its workers.

As the foregoing indicates, the applicant was not employed at a DOE facility 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 state workers' compensation benefits.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Appeal, Case No. TIA-0019 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: June 18, 2003

