

* 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 XXXXXXX's.

October 1, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal
Date of Filing: August 8, 2003
Case No.: TIA-0029

XXXXXXXXXXXXX (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. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we are remanding the application to the OWA for further consideration.

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.

This case concerns Part D of the Act, which 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 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/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to

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

the employee, the DOE Office of Worker Advocacy accepts the determination and 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. 52841 (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.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the Program Office. 10 C.F.R. § 852.18(a)(2). See *Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In his application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that he worked at the DOE's Hanford facility in Richland, Washington from June 1994 to October 1996. During that time, he was an asbestos abatement worker and worked as an insulator, removing asbestos from machinery and pipes at the DOE's Hanford facility. He further indicated that his X-ray findings of February 2002 revealed scarring in his lung linings, pleural thickening, and pleural plaques. A medical examination of May 7, 2002 and addendum of June 13 noted the existence of bilateral pleural plaques resulting from asbestos exposure. This diagnosis was provided by an independent physician.

The Physician Panel issued a negative determination on this claim. The Panel found as follows: "[the applicant's] conditions did not arise out of and in the course of employment by a DOE employer and exposure to a toxic material at a DOE facility." In this regard the Panel stated that the applicant had some asbestos exposures during some of his work at Hanford facilities, but that he also had asbestos exposure in other jobs prior to working at Hanford facilities. Further, the panel noted that the mean latent period

for the formation of pleural plaques, from which the applicant suffers, is over 20 years. Since the applicant began to work at Hanford in 1994, the panel found this condition most likely resulted from exposures to asbestos prior to the employment at Hanford. Moreover, the panel found that in the absence of interstitial fibrosis on chest X-rays and pulmonary function tests abnormalities, pleural plaques alone are not a disease or cause of disability. The Panel's decision was adopted by the Office of Worker Advocacy. See June 27, 2003 Physician Panel Report. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. July 7, 2003 Letter from DOE to the applicant. In his appeal, the applicant contests the Physician Panel's determination that his lung-related conditions were not related to his work at the Hanford facility. 2/

II. Analysis

A. Standard of Review for Physician Panel

One issue on appeal is whether the Physician Panel applied the correct standard in making its determination in this case.

As noted above, the Physician Panel found that "[the applicant's] conditions did not arise out of and in the course of employment by a DOE employer and exposure to a toxic material at a DOE facility." While the "arise out of and in the course of employment" language adopted by the Panel tracks a part of the relevant regulation, it misses a key component. Section 852.8 provides that the panel's determination as to whether the illness or death "arose out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility" must be made on the basis of "whether it is at least as likely as not that exposure to a toxic substance at a DOE facility during the course of employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the illness or death of the worker." (Emphasis added.)

2/ The original application also indicated that the applicant suffered from prostate cancer. The applicant does not refer to the finding by the Panel that there is no evidence associating asbestos exposure and prostate cancer. Accordingly, no further consideration of that issue is warranted.

Thus, the Panel could find in favor of an applicant if it believed that the exposure to toxic material was a significant factor in aggravating or contributing to an applicant's illness or death. The Report's partial citation of the regulation suggests that the panel may not have applied the correct standard in this case. Indeed, no specific consideration was given to whether the exposure to asbestos at the Hanford facility was a significant factor in aggravating or contributing to the applicant's pleural plaques. The determination as set forth in the Report is incomplete in this regard.

B. Substantive Consideration of Applicant's Condition

The applicant also states that the Panel's review of his medical condition was incomplete. The OWA case summary indicated that the applicant claimed asbestosis as the covered illness in this claim. It is clear that at this time the applicant has not presented any evidence of asbestosis, and therefore the Panel properly rejected a claim based on that illness.

However, throughout the claims process the applicant presented evidence that he suffers from another condition related to exposure to asbestos: the formation of pleural plaques. The Panel also rejected a claim based on this condition. The Panel found (i) that formation of pleural plaques alone is not a disease or cause of disability, but rather a "bio-marker of exposure to asbestos;" and (ii) that since the mean latent period for the formation of pleural plaques is over 20 years, the pleural plaques suffered by the applicant are unlikely to represent the effects of asbestos exposures during work at the Hanford facilities, which began in 1994, but rather result from earlier asbestos exposures.

In his appeal, applicant points out that an independent physician specifically found that the pleural plaques was a disease. The applicant's medical records, which the Panel reviewed, included a June 13, 2002 addendum prepared by the independent physician. That addendum stated: "There are objective medical findings indicating [the applicant's] pleural disease is likely the result of asbestos exposure while employed at Hanford. . . . His diagnosed condition is due to his employment at Hanford." The Panel did not refer to this evidence in the report. In fact, the Panel specifically indicated that "there was no contrary evidence," to its own finding.

This matter is therefore remanded for a consideration by the Physician Panel of the following matters:

(a) The Panel should reconsider whether pleural plaques are an illness. In so doing, the Panel should consider the opinion of the independent physician that the individual's "pleural disease is likely the result of asbestos exposure while employed at Hanford." If the Panel uses medical literature to support a finding that pleural plaques are not an illness, it should place a copy of that material in the record to substantiate its finding and so that the applicant can review it.

(b) If it finds that pleural plaques are an illness, the Panel should consider evidence that the pleural plaques were caused by employment at Hanford. We note that the Panel stated that mean formation period for pleural plaques is over 20 years, and thus the pleural plaques are unlikely to represent the effects of asbestos exposures during the applicant's work at Hanford, which began in 1994. The panel should state the specific scientific evidence that it relied on in reaching a determination that formation takes "over a 20-year mean" period.

(c) Further, if pleural plaques are determined to be an illness, as discussed above, even if the pleural plaques were not caused by the applicant's employment at Hanford, the Panel should consider whether it is as least as likely as not that the more recent asbestos exposure at Hanford was a significant factor in aggravating or contributing to the formation of the pleural plaques.

We have provided the Office of Worker Advocacy with a copy of the applicant's Notice of Appeal, which we received on August 8, 2003.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0029 be, and hereby is, granted as set forth in Paragraph 2 below.
- (2) The application is remanded to the DOE Office of Worker Advocacy for further action in accordance with the above determination.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 1, 2003